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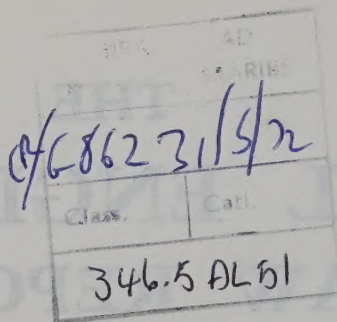
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These reports contain references, which follow after the headnotes, to the following major works of legal reference described in the manner indicated below—

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The reference 2 Halsbury's Laws (3rd Edn) 20, para 48, refers to paragraph 48 on page 20 of volume 2 of the third edition of Halsbury's Laws of England, of which Viscount Simonds is Editor-in-Chief.

Halsbury's Statutes of England

The reference 26 Halsbury's Statutes (2nd Edn) 138, refers to page 138 of volume 26 of the second edition, and the reference 5 Halsbury's Statutes (3rd Edn) 302, refers to page 302 of volume 5 of the third edition, of Halsbury's Statutes of England.

English and Empire Digest

References are to the replacement volumes (including reissue volumes) of the Digest, and to the continuation volumes of the replacement volumes.

The reference 31 Digest (Repl) 244, 3794, refers to case number 3794 on page 244 of Digest Replacement Volume 31.

The reference Digest (Cont Vol B) 287, 7540b, refers to case number 7540b on page 287 of Digest Continuation Volume B.

The reference 28 (1) Digest (Reissue) 167, 507, refers to case number 507 on page 167 of Digest Replacement Volume 28 (1) 1971 Reissue.

Halsbury's Statutory Instruments

The reference 12 Halsbury's Statutory Instruments (2nd Reissue) 124, refers to page 124 of the second reissue of volume 12 of Halsbury's Statutory Instruments; references to subsequent reissues are similar.

Encyclopaedia of Forms and Precedents

The reference 7 Ency Forms & Precedents (4th Edn) 247, Form 12, refers to Form 12 on page 247 of volume 7 of the fourth edition, of the Encyclopaedia of Forms and Precedents.

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Corrigenda

- [1969] 3 All ER
p 1309. **Tremain v Pike**. Footnote (13): for '[1964] 1 Q.B. 158' read '[1964] 1 QB 518'.
- [1971] 3 All ER
p 1165. **Government of the State of Penang v Beng Hong Oon**. Line d 2: for '[1848] 10 Divl (Ct of Session) 446' read '(1848) 10 Durl (Ct of Session) 446'.
- p 1318. **Cyril Leonard & Co v Simo Securities Trust Ltd**. Counsel for the defendants: add 'and *J Gibson-Watt*'.
- [1972] 1 All ER
p 147. **Jones v Secretary of State for Social Services**. Lines e 1 and 2: for '(Lord Denning MR, Edmund Davies and Fenton Atkinson LJ) dated 13th November 1970, read '(Lord Denning MR and Fenton Atkinson LJ, Edmund Davies LJ dissenting) dated 13th November 1969'. Page 165, line c 5: read 'Mr Ryde, for the respondent, put it, correctly I think, in saying . . .' instead of as printed. Page 184, line e 1: for 'claims' read 'chains'. Page 195, lines a 5 and 6: for '"Chest pain", "Myocardial infarct"' read '"chest pain", myocardial infarct'.
- p 206. **Willingale v Islington Green Investment Co**. Counsel for the taxpayer company: for '*Bruce Holroyd Pearce QC*' read '*James Holroyd Pearce*'.
- p 221. **R v Clarke**. Line c 4: for 'the evidence was wholly inconsistent' read 'the evidence was wholly consistent'.
- p 541. **Jemison v Priddle**. Counsel for the respondent: read *J B S Edwards*.
- p 774. **British Railways Board v Herrington**. Line b 2: for 'for Dixon CJ is a master of language;' read 'for the former Chief Justice is a master of language;'. Line h 4: for 'This the appellants rejected' read 'This the Board rejected.'
- p 806. **Cassell & Co Ltd v Broome**. Counsel for Captain Broome: read *David Hirst QC, A J Bateson QC* and *Michael Tugendhat* instead of as printed. Page 864, line h 3: for 'in argument by counsel for Captain Broome' read 'in argument by counsel for the respondent'.
- p 1205. **Crawford v A E A Prowting Ltd**. Solicitors: read '*Vincent & Vincent* (for the claimants); *Milners, Curry & Gaskell* (for the builders)' instead of as printed. *Messrs Vincent & Vincent* commenced to act for the claimants in January 1971.
- p 1207. **Inland Revenue Commissioners v Helical Bar Ltd**. Line d 4: for '£78,798,' read '£78,650. The figure appearing in the case stated is £78,798, but this relates to a higher assessment (£114,099) than that now contended for (£113,951).' Page 1208, lines e 3 and 4: delete 'by the Commissioners of Inland Revenue'.

Bugden and another v Ministry of Defence and others

COURT OF APPEAL, CIVIL DIVISION

c LORD DENNING MR, EDMUND DAVIES AND STEPHENSON LJJ
8th OCTOBER 1971

d Writ – Extension of validity – Application – Order for renewal made in absence of application – Validity of order – Application for leave to serve concurrent writ out of jurisdiction – Good and sufficient cause for renewal but no application made – Whether master having power to make order for renewal – RSC Ord 6, r 8 (2).

e The plaintiffs were injured in a motor accident which occurred on 9th October 1966 when the car in which they were passengers came into collision with an army vehicle. They claimed damages against the Ministry of Defence and the army driver, and against their own driver, B. Negotiations went ahead for a settlement of the claim but took some time because there were difficult medical questions to be solved. Accordingly a writ was not issued until 23rd September 1969, i.e. just before the expiry of the three year limitation period. Thereafter the writ was not served as the medical position remained uncertain. However, on 7th September 1970 the plaintiffs' solicitors decided to serve the writ before it expired. B was then in Scotland and accordingly they applied to the master for leave to issue a concurrent writ against **f** B for service on him in Scotland. The master gave leave and, in view of the time factor but without any application being made to him, also added: 'liberty to renew for three months'. The solicitors accordingly drew up the order containing the liberty to renew for three months and eventually served the writ on B in December 1970. B's solicitors, on behalf of his insurers, thereupon applied to set aside the service of the writ contending that the master had no jurisdiction to make the order for renewal since no application for extension had been made as required by RSC **g** Ord 6, r 8 (2)^a.

h **Held** (Edmund Davies LJ dissenting) – Had an application been duly made to the master there would have been good cause for renewing the writ; the lack of an application was a mere irregularity which did not render the order for renewal a nullity and accordingly the order should stand (see p 3 h, p 4 b and p 5 c and f, post).

Notes For time for service and renewal of writ, see 30 Halsbury's Laws (3rd Edn) 303, para 558, and for cases on the subject, see 50 Digest (Repl) 291-293, 328-346.

i Cases referred to in judgments

Jones v Jones [1970] 3 All ER 47, [1970] 2 QB 576, [1970] 3 WLR 20, Digest (Cont Vol C) 1080, 331A.
Stevens v Services Window & General Cleaning Co Ltd [1967] 1 All ER 984, [1967] 1 QB 359, [1967] 2 WLR 939, Digest (Cont Vol C) 1080, 337A.

^a RSC Ord 6, r 8 (2), is set out at p 4 d, post

Interlocutory appeal

This was an interlocutory appeal by the plaintiffs, Jacqueline Ann Bugden and Kevin Bugden (an infant suing by his mother and next friend), against the order of Caulfield J, made on 10th June 1971, that the service on the third defendant, Roy Ambrose Bugden, of the writ of summons in an action by the plaintiffs against the Ministry of Defence, the first defendants, Joseph Patterson, the second defendant, and the third defendant, be set aside and that the appeal against the order of Master Bickford Smith made on 3rd February 1971 be allowed. By his decision Master Bickford Smith refused to order that the writ of summons be set aside or that the order of Master Elton made on 10th September 1970 giving leave to the plaintiffs to issue a concurrent writ against the third defendant, and to have liberty to renew for three months, be set aside. The facts are set out in the judgment of Lord Denning MR.

R N Titheridge for the plaintiffs.

M J Turner for the third defendant.

Philip Otton for the first and second defendants.

LORD DENNING MR. On 9th October 1966 there was an accident on a road in the North Riding. Mr and Mrs Bugden, with their eight month old child, were in a car driven by Mr Bugden, who is in the army; it came into collision with a personnel carrier of the Ministry of Defence, driven by a service driver. There was a collision in the middle of the road. Mrs Bugden and the baby were injured. They made a claim against the Ministry of Defence and their driver, and also against Mr Bugden himself. We all know that the passengers in a car have an unanswerable claim for damages against one or other, or both, drivers. The Ministry of Defence appointed their claims commission to act for them. Mr Bugden was represented by his insurance company. These two have a sharing agreement between themselves, whereby they arrange to apportion responsibility between one another. In this case they arranged that negotiations for both should be conducted by the claims commission. On 13th December 1967 the solicitors for the plaintiffs wrote to the insurance company:

‘... Will you please confirm therefore that the passenger claims may be dealt with under the terms of the third party sharing agreement which we believe operates between yourselves and the Ministry of Defence.’

The insurers wrote back on 2nd January 1968:

‘We confirm that any claim made will be dealt with under the terms of our Third Party Sharing agreement with the Claims Commission who we understand from recent correspondence are dealing with the matter...’

Negotiations went ahead. They took some time because there were some difficult medical questions to be solved. It appears that the child developed hydrocephalus—that is, his head got much bigger than normal. He also suffered from some drying up beneath the skin. It was suggested that these troubles might be due to the accident. It was wise to defer a settlement until the medical situation could be resolved. On this account a writ was not issued until 23rd September 1969. That is just before the three years expired. No one can be blamed for that. It was not served at that time. That was fair enough. The medical position was still uncertain. Nearly another year went by. On 7th September 1970 the plaintiffs’ solicitors thought to themselves, very properly: ‘We will have to serve this writ in the next fortnight; otherwise it will lose its validity at the end of a year’. They found out that Mr Bugden, a serving soldier, was in Scotland. The writ would have to be served on him out of the jurisdiction. So they applied to Master Elton for leave to issue a concurrent writ against Mr Bugden for service on him in Scotland—in Edinburgh. They made this application for the writ on 7th September. The year would expire on 23rd

a September 1970. Master Elton not only gave leave to issue the concurrent writ, but, out of the goodness of his heart, thinking it would help, he also added (without any application made to him) 'liberty to renew for three months'. The solicitors for the plaintiffs thought that Master Elton must know the practice. He would not have added those words unless it could be done. So they drew up the order containing the liberty to renew for three months. They accepted the benefit which
b the master gave them. They did not rush round so as to serve the writ within the year. They waited for the best part of the three months. They then served the writ in December 1970.

The Ministry of Defence and their driver took no exception to the renewal of the writ. They entered an unconditional appearance. That was the fair thing to do. It was what we should expect the Treasury Solicitor to do. But not so the insurers.
c They entered a conditional appearance. They said this writ ought not to have been renewed. They applied to set aside the renewal so that the action would not proceed. (Outwardly they were acting for Mr Bugden, but in truth they were acting on their own account. Mr Bugden would not mind the action going on; but the insurers did.) The application came before Master Bickford Smith on 3rd February 1971. Master Bickford Smith asked himself what he would have done in
d Master Elton's place if an application had been made at that time to him. He answered it in this way:

'I do not feel very much doubt about it. The claims are passenger claims, there is no issue on liability, there is a difficult medical position and negotiations were proceeding. I would have renewed the writ.'

e Having formed that view, he held that there was good cause for the renewal, and he refused to set it aside. The insurers appealed to Caulfield J. He took an equally strong view the other way. He said:

'Master Elton of his own motion renewed the writ for a three-months period. There was no material before him to enable him to do so.'

f The judge held that the writ ought not to have been renewed. He set it aside. If he is right, the insurers escape altogether. The plaintiffs appeal to this court. RSC Ord 6, r 8 (2) provides:

'Where a writ has not been served on a defendant, the Court may by order
g extend the validity of the writ from time to time for such period, not exceeding twelve months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the Court before that day or such later day (if any) as the Court may allow.'

h That rule does not say anything about good cause. But the courts have said from time to time—and the latest case is *Jones v Jones*¹—that in the ordinary way a writ should not be renewed unless good cause is shown.

The first question I ask myself is this: suppose that an application has been duly made to Master Elton for renewal—I know it was not—was there good cause for renewing the writ? That I would answer in the same way as Master Bickford Smith. There were only 12 days to go before the writ was due to expire. There might be difficulty in serving it on Mr Bugden in that time. He might have been sent on
j service overseas. He might be somewhere where it was difficult to get hold of him. An extension for three months would not prejudice the defendants at all, especially as it was a difficult case where there were difficult medical questions to be solved, and there were negotiations for a settlement. I would have thought that there was good cause for renewal.

But then it is said that Master Elton acted on his own initiative. There was no application before him for renewal—there was no affidavit before him to support it—he ought not to have granted leave without being asked. It is suggested that that makes his order bad—that it was a nullity, that the plaintiffs' solicitors should have known this, and that they should not have accepted the gift he offered them. I cannot accept this suggestion in the least. The lack of an application was a mere irregularity. It does not render the order a nullity. It would, indeed, be a sorry thing if the plaintiffs were to suffer because of a helpful step taken by the master.

I am afraid I cannot agree with Caulfield J. I would allow the appeal and let the renewal stand.

EDMUND DAVIES LJ. If personal preference were permitted to prevail in performing one's judicial duties, I should gladly have agreed with the judgment just delivered by Lord Denning MR, but regretfully I do not find myself able to do that. The provision in relation to the renewal of writs is to be found in RSC Ord 6, r 8 (2), and I quote the relevant part:

'Where a writ has not been served on a defendant, the Court may by order extend the validity of the writ from time to time for such period . . . as may be specified in the order, if an application for extension is made to the Court before that day or such later day (if any) as the Court may allow.'

That rule varies in its wording from previous provisions dealing with the renewal of writs, but the fact remains that the court requires good and sufficient cause for renewal to be shown. Furthermore, the settled practice is that such an application, being made *ex parte*, and I quote from *The Supreme Court Practice 1970*²:

' . . . must be supported by an affidavit showing all the circumstances relied upon, including the date of issue of the original writ, and if it has already been renewed, the date of the last renewal, and a full explanation of why the writ has not already been served.'

In the present case it is quite clear that this settled practice was not observed.

As I see it, the test is not whether Master Elton could have made an order had good cause been shown, for no application was made. Therefore no good cause for making the order which he in fact made was ever shown. In those circumstances, I do not for my part think that Master Elton had power of his own volition to make the order extending the time which no one had asked him to make, and certainly no one had proceeded to attempt to show a good cause for it being made at all. At one stage it was submitted by counsel for the plaintiffs that, even if at the time of the limited application to Master Elton no good cause existed, nevertheless this court is entitled to have regard to the fact that Master Elton (although uninvited) made the order, and accordingly to say that Master Bickford Smith was in consequence justified in holding that good cause for granting an extension had thereby been created. I do not think that counsel for the plaintiffs persisted in that original submission, and in any event he must allow me to say that I do not regard it as well founded.

If I am right in thinking that Master Elton in the circumstances which prevailed when he heard the plaintiffs' application had, on the material before him and in the absence of any application, no power to make the order he in fact made, it seems to me to follow that it was immaterial that Master Bickford Smith expressed the view that the various topics referred to in his short but helpful note of judgment amounted to 'good cause' within the meaning of the reported cases. For my part I think, though with some diffidence, that the test must be whether Master Elton had any

a power to make the order he made. My regret in differing from Lord Denning MR naturally springs not only from my reluctance so to do, but also from the fact that I accept that, had the various points which Master Bickford Smith dwelt on been the subject-matter of an application for the renewal to Master Elton, they might well be regarded as amounting to 'good cause'. But that, for the reasons I have stated, does not appear to me to be the relevant test in the circumstances of this case. I accordingly would be for upholding the decision of the learned judge and dismissing this appeal.

c **STEPHENSON LJ.** I feel the force of counsel for the third defendant's submission that Master Elton's order was made without good cause or sufficient reason and cannot therefore be supported, particularly as his submission was based on the decision of Chapman J in *Stevens v Services Window & General Cleaning Co Ltd*³ and has been accepted by the judge and by Edmund Davies LJ. But there were in existence at the time when Master Elton made his order grounds which I regard as good and sufficient for renewing the writ. Those are the grounds which commended themselves to Master Bickford Smith reinforced by the further ground relied on by counsel for the plaintiffs, which it is safe to assume was relied on by Master Elton, that the third defendant was in Scotland and there were about 12 days in which to serve him.

d In my judgment, the plaintiffs' solicitors would have been acting reasonably if they had applied to Master Elton to renew the writ when he renewed it and they cannot be said to have acted unreasonably in accepting his gratuitous benevolence in renewing it without their asking for it. The first and second defendants regarded it as a reasonable order to make, and I am by no means satisfied that the third defendant's solicitors, acting for his insurers in the circumstances of which we have been told, would have taken a different view if they had been asked in advance to concur in the making of it.

e For the reasons given by Lord Denning MR, I am glad to be able to allow this appeal in the very special circumstances of this case, and without, as I think, any injustice to the third defendant or his insurers, to remove the risk that the plaintiffs will fail altogether if they fail to prove any liability on the part of the first and second defendants.

f *Appeal allowed.*

g Solicitors: *Amery-Parkes & Co* (for the plaintiffs); *Rowe & Maw*, agents for *Westhorpe, Ward & Catchpole*, Ipswich (for the third defendant); *Treasury Solicitor*.

L J Kovats Esq Barrister.

R v Chief Immigration Officer of Manchester airport, ex parte Insah Begum a

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, BRIDGE AND SHAW JJ

8th OCTOBER 1971

Commonwealth immigrant – Admission – Refusal of admission – Notice of refusal – Delivery of notice to immigrant – Notice delivered by immigration officer to immigrant's legal adviser at airport – Immigrant illiterate and having no knowledge of English – Immigrant in another part of airport at time notice delivered – Whether necessary that notice should be delivered by hand to immigrant personally – Commonwealth Immigrants Act 1962, Sch 1, para 2 (1). b

B, a Pakistani citizen who was illiterate and had no knowledge of English, arrived at Manchester airport on 14th September 1971. She alleged that she was going to join her husband who was resident in England. She was seen by an immigration officer at 14.15 hours on that day. She handed him a passport which had what purported to be an entry certificate to the UK granted to her by the authorities in Lahore. The certificate appeared to the officer to be a forgery. While enquiries were being made the immigration officer served B with a notice under para 1 (2) of Sch 1^a to the Commonwealth Immigrants Act 1962 requiring her to submit to a further examination. The interview was suspended at 14.30 hours. Thereafter the immigration officer, through an interpreter, examined B from 18.00 hours to 19.15 hours, and again for a third time from 20.30 hours to 21.00 hours. The investigation was suspended until the following day, 15th September, to enable the immigration authorities to get some Telex information from Lahore. When received this information confirmed the immigration officer's suspicions that the certificate was a forgery and, at 13.30 hours on 15th September, it was decided to refuse B entry into the UK. At that time she was in another part of the airport and in her absence the appropriate notice of refusal under para 2 (1) of Sch 1^b to the 1962 Act was served on her solicitor who raised no objection. B applied for an order of certiorari to quash the decision of the immigration authorities contending (i) that the requirements of para 2 (1) of Sch 1 had not been complied with, in that the notice of refusal had not been handed to her in person; (ii) that as the investigations involved a series of interviews, the initial notice under para 1 (2) of Sch 1^a should have been renewed at the close of each interview; and (iii) that as there was an interval of more than 12 hours between the end of the third interview at 21.00 hours on 14th September and the notification of refusal at 13.30 hours on 15th September the notice of refusal was invalid as given out of time under para 2 (3) of Sch 1^c. c
d
e
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Held – The application would be refused for the following reasons—

(i) although the purpose of para 2 of Sch 1 was to ensure that the notice should be delivered to the immigrant by hand and not sent through the post or in any other form of communication, since B was illiterate and quite incapable of dealing with her affairs at all, there was nothing wrong in handing the notice to someone authorised by her to receive it; it was an inevitable inference that the legal adviser who was representing her and handling the whole affair on her behalf should be regarded as a person having authority to receive the notice (see p 8 j to p 9 b and p 10 a, post). h

(ii) although the investigation took place in a series of interviews it was not necessary that the notice under Sch 1, para 1 (2), requiring the immigrant to submit to further examination should be renewed in a further notice of that kind at the close of each j

^a Schedule 1, para 1 (2), is set out at p 7 j, post

^b Schedule 1, para 2 (1), is set out at p 8 g, post

^c Schedule 1, para 2 (3), is set out at p 9 f, post

- a section of the interview; the only function of the notice under Sch 1, para 1 (2), was to provide for the contingency that the examination could not be completed within the time specified in that paragraph; since the examination had in any event been completed within that time no situation ever arose in which the notices under para 1 (2) would have had any relevance to all (see p 9 d and e and p 10 a, post);
- b (iii) as the examination of the applicant continued right up to and including the time when refusal was given at 13.30 hours on 15th September the refusal was not given out of time under the terms of para 2 (3) of Sch 1 (see p 9 h and j and p 10 a, post).

Notes

For examination of Commonwealth immigrants, see Supplement to 5 Halsbury's Laws (3rd Edn) para 1514.

- c For the Commonwealth Immigrants Act 1962, Sch 1, paras 1, 2, see 4 Halsbury's Statutes (3rd Edn) 47, 48.

Motion for certiorari

- d This was an application by way of motion on behalf of Insah Begum for an order of certiorari to bring up and quash a decision made on 15th September 1971 by an immigration officer at Manchester airport whereby he refused her admission to the United Kingdom. Her grounds for the application were, inter alia, (i) that the notice of refusal made under para 2 of Sch 1 to the Commonwealth Immigrants Act 1962 was invalid because the immigration officer handed the notice to the applicant's solicitor and not to the applicant herself; (ii) that the initial notice under para 1 (2) of Sch 1 to the 1962 Act for her to submit to a further examination should have been renewed at the close of each section of the interview, and (iii) that the notice of refusal
- e was invalid as given out of time under para 2 (3) of Sch 1 to the 1962 Act. The facts are set out in the judgment of Lord Widgery CJ.

G S Khan for the applicant.

Gordon Slynn for the chief immigration officer.

- f **LORD WIDGERY CJ.** In these proceedings counsel moves on behalf of the applicant, Insah Begum, for an order of certiorari to bring up and quash a decision made by Her Majesty's immigration officer at Manchester airport on 15th September 1971 whereby admission to this country was refused to the applicant. The notice of motion asks for other relief, which request is not pursued before us, and it also raises a number of grounds which counsel for the applicant has found it impossible
- g to proceed on. The matter therefore lies before us in a relatively small compass.

- h The applicant arrived at Manchester airport from Pakistan on 14th September 1971. She held herself out as a married woman, the wife of a person already resident in this country, one Arif Hussain, using a passport which had in effect what purported to be an entry certificate into this country granted to her by the authorities in Lahore. She was seen by an immigration officer at 14.15 hours on 14th September and, to the eye of the immigration officer, the entry certificate appeared to be a forgery. He appreciated that this would involve considerable enquiries, and might involve the expenditure of some time, and he immediately served her with a notice under para 1 (2) of Sch 1 to the Commonwealth Immigrants Act 1962, which in its original form provided:

- i 'A person shall not be required to submit to examination under this paragraph after the expiration of the period of twenty-four hours from the time when he lands in the United Kingdom unless, upon being examined within that period, he is required in writing by an immigration officer to submit to further examination.'

The period of 24 hours has since been amended to 28 days¹, and the purpose of the

¹ See s 4 of the Commonwealth Immigrants Act 1968

provision both in its original and amended form, quite evidently is that unless proceedings can be completed within that limit of time, the onus is thrown on the immigration officer of serving a notice requiring the would-be immigrant to submit to further examination. a

In perhaps an excess of caution, such a notice was served really as soon as the difficulties in this case became apparent. The interview beginning at 14.15 hours was suspended at 14.30 hours, but later in the same day further enquiries took place between the immigration officer and the applicant through an interpreter. b The period of that examination was from 18.00 hours until 19.15 hours. I might have said that the applicant is illiterate and had no knowledge of the English language, and at an early stage her solicitor and later her counsel were brought to the airport to assist her and the enquiry.

The second interview, if that is the right word, having finished at 19.15 hours, there was a further interview between 20.30 and 21.00 hours, and the circumstances in which that interview terminated are described by Mr David Ian Fuller, one of the immigration officers concerned, in his affidavit at para 34. Speaking of this last interview he states: c

‘At the conclusion of this interview which was finished at about 21.00 hours I told Mr. Anwar Salamat Ali and the applicant through Mr. Kumar that I considered that the entry certificate was a forgery. I also told them that I was not satisfied as to the authenticity of the marriage. I further told them that I was expecting a reply to a Telex that had been sent to the Entry Certificate Officer at Lahore about the entry certificate and that no decision would be taken to admit or to refuse to admit the applicant until this had been received.’ d

Accordingly, at 21.00 hours on 14th September the investigation was suspended until the following day when the Telex from Lahore was received, and since the terms of the Telex confirmed the suspicions of the immigration officer that the entry certificate was a forgery, they decided to refuse entry to the applicant at 13.30 hours on 15th September. Thereupon the appropriate notice under para 2 of Sch 1 of the 1962 Act was prepared, and it was handed by the officers to Mr Bookin, who was the applicant's solicitor, and who was present at the time. Just to complete the picture at this point the applicant herself was not present, although somewhere within the airport confines. Present at the moment when the certificate of refusal was issued were the immigration officers, the solicitor to the applicant and her counsel. e

Schedule 1, para 2 (1), is in these terms: f

‘The power of an immigration officer under section two of this Act to refuse admission into the United Kingdom or to admit into the United Kingdom subject to conditions shall be exercised by notice in writing; and subject to sub-paragraph (2) of this paragraph, any such notice shall be given by being delivered by the immigration officer to the person to whom it relates.’ g

In fact, as I have already recounted, the notice was handed not to the applicant but to her solicitor, who raised no objection at the time, and indeed on some aspects of the evidence may have appeared to welcome it being given to him rather than anybody else. h

Counsel for the applicant having as I have said abandoned a number of matters which were to be ventilated, according to the terms of the notice of motion, has really taken three points. He says first of all that the certificate of refusal was of no effect because it was handed to the solicitor and not delivered to the applicant, that is to say to the person to whom it relates. To my mind it is quite clear that the draftsman of these regulations wished to emphasise that the notice was to be delivered and not sent through the post, or in any other form of communication, and no doubt it is right to apply the paragraph strictly to this extent, that in normal circumstances where the applicant is in a position to receive the notice and capable of understanding i

a what it means, a wise immigration officer will follow the literal letter of Sch 1, and deliver it by hand to the applicant. But it seems to me impossible to hold that in these not uncommon cases, where the applicant is illiterate and quite incapable of dealing with her affairs at all, that there should be anything wrong in handing the certificate over to someone authorised by her to receive it. It seems to me an inevitable inference in such a case as the present that the legal adviser, who was
b representing the applicant and who was handling the whole affair on her behalf, should be regarded as a person having authority to receive the notice. Accordingly in my judgment there is nothing in the first point.

The second point is that the investigation having taken place in a series of interviews, in the manner which I have described, it is said that the initial notice under Sch 1, para 1 (2), of a requirement for the applicant to submit for further examination
c should have been renewed in the form of a new notice of that kind at the close of each section of the interview. Accordingly it is argued that when the initial interview finished at 14.30 hours, a notice should have been served, as indeed it was, and that a later notice should have been served at the end of the second and third interviews. For my part I find no foundation whatever in this argument. There seems to me to be no function in the notice referred to in para 1 (2) of Sch 1 except to provide for
d the contingency where the examination is not to be completed within the time specified in that paragraph, that is to say the initial 24 hours, now 28 days. If in fact the investigation is concluded and a decision to admit or refuse is made within that period, it seems to me that such a notice has no function, and it is a matter of total irrelevance whether it was ever given at all, or once or more than once. In any event I do not subscribe to the suggestion that new notices are required as the enquiry itself
e goes on, but the short answer in the present case is that no situation ever arose in which the notices under para 1 (2) would have any relevance at all.

The third and the last point made by counsel for the applicant is under para 2 (3) of Sch 1 which, still dealing with a notice of refusal, provides:

f 'Subject to the following provisions of this Schedule, a notice under this paragraph [i.e. a notice of refusal] shall not be given to any person unless he has been examined in pursuance of paragraph 1 of this Schedule, and shall not be given to any person later than twelve hours after the conclusion of his examination (including any further examination) in pursuance of that paragraph.'

The argument here is that the examination under para 1 which undoubtedly took place in respect of the applicant was concluded at 21.00 hours on 14th September
g at the end of the third interview to which I have referred. Counsel for the applicant points out that between that hour and 13.30 hours on the following day, when refusal was in fact notified, there was an interval of more than 12 hours, indeed an interval of 16½ hours, and so he says that the notice of refusal was invalid in that it was given out of time under the terms of para 2 (3).

This argument depends entirely on the validity of counsel for the applicant's
h submission that the examination was concluded at 21.00 hours on the evening of 14th September. Counsel for the respondent's argument is that when regard is had to Mr Fuller's explanation of the deferment until the following day and of the desire to receive information by Telex from Lahore, the irresistible conclusion is that the examination had not been concluded on the previous evening, and for my part I find that conclusion entirely acceptable. I do not think the examination was concluded on the previous evening at 21.00 hours, any more than it had been at the end
j of either of the earlier interviews. I think that the examination was still in force right up to and including the time when notice of refusal was given at 13.30 hours on 15th September.

In my judgment the three points which have been clearly and economically made by counsel for the applicant are each and severally without foundation, and I would find it necessary to refuse this application.

BRIDGE J. I entirely agree. a

SHAW J. I also agree.

Motion dismissed.

Solicitors: *Simpson, Silvertown & Co*, agents for *Amelan & Roth*, Manchester (for the applicant); *Treasury Solicitor*. b

N P Metcalfe Esq Barrister.

Re Thurlow (deceased) Riddick and another v Kennard and others c

CHANCERY DIVISION

PENNYCUICK V-C

1st, 7th JULY 1971 d

Will – Construction – ‘Descendants’ – Whether ‘descendants’ apt to include collateral relations.

By her will the testatrix bequeathed part of her residuary estate ‘to be divided equally between [such of] the descendants on the one hand of my late Mother and [such of] the descendants on the other hand of my late Father’ as her trustees should think fit. At the date of the will the testatrix’s parents were both dead and, as they had been married only to one another, it was impossible that any person could be a descendant of one but not the other. Further, the testatrix had never married and her four brothers and sisters had predeceased her without issue. On a summons to determine the true meaning of the will it was contended on behalf of the collateral relations of the testatrix who were not statutory next-of-kin that, since there could be no lineal descendants of the testatrix’s parents, the word ‘descendants’ should be construed as meaning collateral relations, being descendants of the testatrix’s grandparents. e

Held – It was impossible to say that, either in the ordinary use of English language or in legal language, the word ‘descendants’ was apt to include collateral relations (see p 12 b and p 13 d, post). f

Craik v Lamb (1844) 1 Coll 489 and *Best v Stonehewer* (1864) 34 Beav 66, (1865) 2 De GJ & Sm 537 distinguished. g

Notes

For the meaning of ‘descendants’ in a will, see 39 Halsbury’s Laws (3rd Edn) 1062, para 1587, and for cases on the subject, see 49 Digest (Repl) 760, 761, 7119-7130. h

Cases referred to in judgment

Best v Stonehewer (1864) 34 Beav 66, 34 LJCh 26, 11 LT 468, 55 ER 557; *affd* (1865) 2 De GJ & Sm 537, 34 LJCh 349, 12 LT 195, 46 ER 484, 49 Digest (Repl) 760, 7124.

Craik v Lamb (1844) 1 Coll 489, 14 LJCh 84, 4 LTOS 152, 63 ER 512, 49 Digest (Repl) 760, 7123. i

Whitrick (dec’d), *Re, Sutcliffe v Sutcliffe* [1957] 2 All ER 467, [1957] 1 WLR 884, 48 Digest (Repl) 461, 4160.

Adjourned summons

By a summons dated 28th January 1971 the plaintiffs, Hubert Arthur Riddick and

a William Arthur Espley, executors under the will of the testatrix, Cecilia Anne Thurlow, sought the court's determination of the true meaning and construction of the will. There were joined as defendants Kathleen Rose Kennard and Daphne Elisabeth Ann Clegg, being members of classes who might have an interest under the will, and Helen Mary Bennett and Ronald Phillip Kennings Howell who claimed to be entitled on intestacy. The facts are set out in the judgment.

b *J H Weeks* for the plaintiffs.

H A P Picarda for the first defendants.

D J Nicholls for the second defendant.

T L Dewhurst for the third and fourth defendants.

c *Cur adv vult*

July 7th. **PENNYCUICK V-C.** I now turn to the next question which has arisen under the will of the testatrix, on which I reserved my judgment. It will be remembered that the testatrix directed that her residuary estate was to be held on trust as to one-tenth for certain charitable purposes, as to one-tenth for certain persons or institutions as the trustees should decide, and then:

d 'As to the remainder of my Estate to be divided equally between the descendants on the one hand of my late Mother and the descendants on the other hand of my late Father my Trustees in this respect in their entire and sole discretion being empowered to make such enquiries and investigations as they think fit (but no more) and to divide the respective halves of the remainder of my Estate between such of the said respective descendants living at my death as they shall think fit having regard particularly to any who may appear to be in need of help.'

One then turns to the family tree which has been exhibited to the affidavit on the summons and one finds that at the date of her death the state of the testatrix's family was as follows. Her parents were Robert Youngman Thurlow and Clara Thurlow.

f They were first cousins, but nothing turns on that fact. There were five children of Robert Youngman and Clara, two daughters who predeceased the testatrix and two sons who likewise predeceased the testatrix. None of those four brothers and sisters had any issue. The testatrix was never married. Turning to the collaterals, the testatrix's mother had a sister, Mary Ann Jackson, who had a daughter Mrs Helen Bennett, who is still living. Mrs Bennett in turn has three children and two of them have children. The testatrix's mother also had a brother William who had a daughter, Jane Maria Howell, who predeceased the testatrix. She had five children who are still living. The brother William also had a daughter Dorothy, who is still living, and she has a daughter Daphne Elisabeth Ann Clegg.

g On the present summons Mrs Clegg has been joined to represent those collateral relations of the testatrix who are not statutory next-of-kin, she not being one of the next-of-kin because her mother is still living. Mrs Bennett was originally joined to represent the statutory next-of-kin. She, however, has taken no part in the proceedings and one of the sons of Mrs Howell, namely Ronald, has been joined to represent the statutory next-of-kin.

h It is clear that when the testatrix refers firstly to the descendants of her mother and secondly to the descendants of her father she cannot possibly have intended the word 'descendants' to mean issue. There are two reasons for this. In the first place, her father and mother were married only to one another and, therefore, they being both dead at the date of her will, it was impossible that any person could be a descendant of one but not of the other, and yet the testatrix contemplated two different classes of descendants taking equal shares. In the second place, all of the descendants of the testatrix's parents except herself having died, there could never

in fact be any descendant of either of them. That being the position, counsel for Mrs Clegg has contended that in that clause in the will the word 'descendants' should be construed as meaning collateral relations, being descendants of the testatrix's grandparents; that limits it to the three stirpes to which I have referred. a

Apart from authority it seems to me that the word 'descendants' is totally incapable of referring to collateral relations. The word 'descendants' in its ordinary meaning in the English language means 'issue' and nothing else. Counsel, however, has cited two cases decided in the last century, the latter of which, he says, supports his contention. b

The earlier case is that of *Craik v Lamb*¹ where the headnote states:

"Testator gave all the residue of his real and personal estate unto and equally between and amongst all his relations who might claim and prove their relationship to him by *lineal descent*. He had no wife or issue at the time of making his will, nor afterwards. He died, leaving several first cousins his next of kin. Held, that the first cousins were entitled to the residuary estate, both real and personal'. c

The reason given is that the testator could not have intended as beneficiaries those who were lineally descended from himself and, that being so, the particular words used by him, i.e. 'relationship to him by *lineal descent*', could clearly be construed as denoting lineal descent from a common progenitor. That case, admittedly, is of very little assistance. d

The other case on which counsel relied is that of *Best v Stonehewer*² before the Master of the Rolls and the Court of Appeal. The headnote in the former report states³:

"A testator directed an estate to be sold on the decease of his sister and three others, and the produce paid to such persons as should then "be nearest in blood to him as descendants from his great-grandfather, J. S". The testator and his sister, both advanced in years, were the only lineal descendants of J.S. Held, that the collateral descendants of J.S. were entitled.' e

The headnote omits the critical words 'and whose kindred with me originates with him'. After reading the words, Sir John Romilly MR said⁴: f

"Mr. Joshua Stonehewer had no lineal descendants except the testator and his sister, and, at the time when the testator made his will, it was highly improbable that either of them would leave any issue surviving either of them. By the words of the will, the property of the testator was to go to the descendants of Joshua Stonehewer alive at the decease of the survivor of four persons, of whom his sister was one. The words therefore could not mean lineal descendants, because on the death of the sister after the testator, and without leaving any issue, there could be no lineal descendants. The Court has, therefore, to consider whether it is possible to put a fair intelligible meaning on the words, for if it is not, then there must be an intestacy and the Plaintiff would be entitled. I think it is not only possible to put an intelligible meaning on these words, but that, in truth, the meaning of the testator is very obvious. It is usual, not merely in legal language, but even in popular parlance, to speak of two classes of descendant, the lineal descendants and the collateral descendants. In fact, if this were not so, the word lineal would be wholly superfluous as applied to descendants, but it is usual to call the transfer of an estate occasioned by the death of the holder of it as "the descent of the estate", and in like manner it is usual to call the person on whom it descends the descendant. The definition of "descendant" g
h
i

1 (1844) 1 Coll 489

2 (1864) 34 Beav 66, on appeal, (1865) 2 De GJ & Sm 537

3 (1864) 34 Beav at 66

4 (1864) 34 Beav at 69-71

a in Lord Coke, in Sir William Blackstone, and indeed in all the law books, bear out this view. This is also confirmed by the definition to be found in the best dictionaries. Johnson gives us one of the meanings of the word “descent”—the transmission of any thing by succession and inheritance. In truth, unless the issue of the brother of a man who died intestate be called “the descendants” of that intestate, there is no word which would express the class; and unless we adopt this view, the words “collateral descendants”, so frequently to be found in law books, are mere jargon without any meaning.

b ‘Suppose the testator here had used these words “collateral descendants”, could anyone have doubted his meaning? He says “descendants”, he had no lineal descendants, then he meant mere collateral descendants. It is impossible for this Court to limit the words of a testator by a hypercritical and somewhat pedantic refinement to a narrow and unusual meaning, merely because it is not perhaps quite exact as familiarly used, and to do all this for the purpose of creating an intestacy. The words on which I hesitated on Saturday, viz., “whose kindred with me originates from him”, do not, on reflection, offer, to my mind, any difficulty. He, Joshua Stonehewer, is the link or point of union up to which both arrived, the testator directly and lineally, and the Defendants directly up to Thomas the brother, and thence collaterally to Joshua.’

c If that decision stood alone it would certainly provide powerful support for the argument advanced by counsel, but I must say that, for myself, I would find it impossible to say that either in the ordinary use of the English language or in legal language, the word ‘descendants’ was apt to include collateral relations. Apparently when that judgment was given it was apt, not merely in legal language but even in popular parlance, so to describe a collateral relation but that was a century ago and I do not think it is so today. Words sometimes change their nuance over the years both in popular and in legal language.

e However, I do not need to pursue that point, because the case went to the Court of Appeal where the decision of Sir John Romilly MR was upheld because the two lords justices were equally divided. Turner LJ, who supported the decision, did so on entirely different grounds from those relied on by Sir John Romilly MR. He said⁵:

f ‘The will is certainly difficult of construction, but upon the whole my opinion upon it agrees in substance with that of the Master of the Rolls. The will, as I read it, gives the estates, or rather the proceeds of them, to the persons or person of a specified class or classes who at the specified time shall be nearest in blood to the testator; the words “as descendants from my great-grandfather Joshua Stonehewer, and whose kindred with me originates from him”, describing the class or classes from which the devisees or legatees are to be taken, and the words “nearest in blood to me” describing what members of the class or classes are to be taken. Looking at the case in this point of view, the true question seems to me to be, whether the words descriptive of the class or classes from which the devisees or legatees are to be taken are to be construed as referring to one set of persons only, the descendants from the great-grandfather, or to two sets of persons, those descendants and also the persons whose kindred with the testator originated from the great-grandfather . . . It was argued, for the Appellant, that these latter words do not admit of being construed otherwise than as applying to descendants of the great-grandfather—that they are, in fact, no more than an emphatic declaration by the testator that those descendants (and those descendants only) were the persons who were intended to be the objects of the testator’s bounty; but I cannot assent to that argument. I think these words were intended to apply to persons whose kindred with the testator resulted from his (the testator’s) descent from the great-grandfather.’

Then he dealt with the word 'originate', and said⁶:

'... according to the true construction of the will, the Plaintiff is a trustee of the estates in question, or of the proceeds of the sale thereof, for such persons or person as at the time of the decease of the testator's wife were or was nearest in blood to the testator of a class composed of the descendants of the testator's great-grandfather Joshua Stonehewer, and of the persons whose kindred with the testator originated from their being related to his said great-grandfather . . .'

So Turner LJ there is not saying, as Sir John Romilly MR was saying, that the word 'descendants' includes collateral relations; what he is saying is that on the true construction of the will two separate classes of objects are denoted, namely a class consisting of descendants from the great grandfather, and also another class consisting of those whose kindred with the testator originated from the great-grandfather. On that construction the case is of no assistance to the argument on behalf of Mrs Clegg. Knight Bruce LJ disagreed with both constructions. No other authority has been cited which would support the argument put forward on behalf of Mrs Clegg, which I am free to reject, and which I do reject.

I would like only to mention one further matter. As I have said, it is clear beyond argument that the testatrix when she used the word 'descendants' did not intend that word to mean 'issue'. In other words, it is perfectly clear that something has gone wrong with the expression of her intention in this provision. I have been somewhat exercised whether this might be a case in which the court would be justified in striking out the word 'descendants' and substituting some other word, the obvious other word being 'relations'. The principle on which the court acts in this context is set out in *Re Whitrick (decd)*, *Sutcliffe v Sutcliffe*⁷, in which the Court of Appeal approved a passage in Jarman on Wills⁸ in these terms:

'Where it is clear on the face of a will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted, those words may be supplied in order to effectuate the intention, as collected from the context.'

Undoubtedly the first of those conditions is satisfied here. It might, perhaps, be arguable that the second is also satisfied. Counsel for Mrs Clegg has, however, disclaimed any contention on those lines. He found it impossible to contend that it is clear what word the testatrix did intend to use where in fact she used the word 'descendants'. There is no doubt difficulty in substituting the word 'relations' and I must leave it there.

I propose, accordingly, to answer question 2 in the negative; that is to say, the remainder of the testatrix's estate is undisposed of and devolves as on the intestacy of the testatrix.

Judgment accordingly.

Solicitors: *Cripps, Harries, Willis & Carter*, agents for *Mayo & Perkins*, Eastbourne (for the plaintiffs); *Bower, Cotton & Bower* (for the first defendant); *Thompson & Cooke* (for the second defendant); *Peter Steggle & Co*, Basildon (for the third and fourth defendants).

Richard J Soper Esq Barrister.

⁶ (1865) 2 De GJ & Sm at 543

⁷ [1957] 2 All ER 467 at 470, [1957] 1 WLR 884 at 887

⁸ 7th Edn, vol 1, p 556

a **Hodgson and others v National and Local Government Officers Association and others**

VACATION COURT, CHANCERY DIVISION

GOULDING J

b 2nd, 3rd SEPTEMBER 1971

Trade union – Action – Action for wrong done to union – Proper plaintiff – Unregistered trade union not entitled to sue in own name – Executive council of union acting contrary to policy declared by union conference – Action by individual members of union – Rule in Foss v Harbottle not applicable to unregistered trade union – Individual members entitled to injunction requiring executive council to act in accordance with union policy.

c *Trade union – Action – Action for wrong done to union – Proper plaintiff – Remedy within power of union itself – Application of rule in Foss v Harbottle – Applicability of rule in cases of urgency – Right of action by individual members – Executive council of union acting contrary to union policy – Power of union conference to approve or disapprove actions of executive council – Urgency precluding union from taking effective action in time – Individual members entitled to injunction requiring executive council to act in accordance with union policy.*

At their annual conference in June 1971 the National and Local Government Officers Association ('NALGO'), an unregistered trade union, passed the following resolution:

e 'That this Conference is opposed to the entry of Britain into the European Economic Community (the Common Market) unless it can be shown to be in the long-term interests of both Britain and the Community.' Subsequently the National Executive Council of NALGO requested its Service Conditions Committee to consider the government's white paper on the Common Market and to report the committee's views on this subject to a meeting of the council to be held on 7th August 1971. On 6th August

f the committee passed a resolution which stated that in their view the white paper did not in itself enable any firm declaration to be made that it could be shown to be in the interests of Britain and the community that Britain should enter into the community but nevertheless 'in the light of the public debate which has taken place over the past few months' the committee favoured Britain's accession. The committee duly minuted their resolution to the council. On the following day the council

g approved the committee's minute and adopted it as being the view of the council. The council then instructed the NALGO delegates to the Trade Union Congress to be held on 6th September 1971 to oppose a motion on the agenda against entry into the Common Market and to support another motion favouring entry. The plaintiffs by their motion sought (i) a declaration that the instructions to the NALGO delegates were ultra vires the union's rules and consequently invalid, (ii) mandatory injunctions

h cancelling the existing instructions and requiring the council to instruct the delegates to vote on the Common Market issue in accordance with the union's general policy as laid down at its last conference. The defendants contended, inter alia, that even if the instructions given by the council to the delegates were ultra vires the union's rules, the court was precluded from intervening by virtue of the rule in *Foss v Harbottle*^a.

j **Held** – The plaintiffs were entitled to the declaration and mandatory injunctions sought for the following reasons—

(i) the conference resolution could not be construed as delegating power to the National Executive Council to reverse the policy of the union on the Common Market;

^a (1843) 2 Hare 461

the words 'unless it can be shown to be in the long-term interests of both Britain and the Community' in the resolution meant 'shown to a future conference of NALGO' (see p 21 a and b, post); even if the National Executive Council had been authorised to reverse the policy of the union on being satisfied that entry into the Common Market was in the long-term interests of Britain and the community, the resolution failed to record that the council were so satisfied and hence, in their instructions to delegates, the council acted inconsistently with the union policy as laid down at the conference (see p 21 g, post); accordingly the council were not entitled to give these instructions for to do so was to arrogate to themselves a power to determine the policy of the union and further to alter the policy actually declared by the conference (see p 21 c, d and j to p 22 a, post);

(ii) the rule in *Foss v Harbottle*^a did not apply to the case of an unregistered trade union which was incapable of suing in its own name (see p 24 a, post); dicta of Mellish LJ in *MacDougall v Gardiner* (1875) 1 Ch D at 25, of Romer J in *Cotter v National Union of Seamen* [1929] 2 Ch at 71, and of Jenkins LJ in *Edwards v Halliwell* [1950] 2 All ER at 1066 applied;

(iii) alternatively, even if the rule in *Foss v Harbottle*^a did apply to an unregistered trade union, the rule should not be applied in the present case since it was impossible in the time available to summon a special conference of NALGO and the result of applying the rule would therefore be to deprive the majority of an opportunity of carrying out their will (see p 24 e and f, post).

Notes

For the circumstances in which the court will interfere in the internal affairs of a trade union, see 38 Halsbury's Laws (3rd Edn) 378, 379, para 651, and for cases on the subject, see 45 Digest (Repl) 545, 546, 1230-1232.

Cases referred to in judgment

Bloxham v Amalgamated Marine Workers' Union, unreported.

Cotter v National Union of Seamen [1929] 2 Ch 58, [1929] All ER Rep 342, 98 LJCh 323, 141 LT 178, 45 Digest (Repl) 549, 1273.

Edwards v Halliwell [1950] 2 All ER 1064, 45 Digest (Repl) 545, 1231.

Foss v Harbottle (1843) 2 Hare 461, 67 ER 189, 9 Digest (Repl) 662, 4832.

MacDougall v Gardiner (1875) 1 Ch D 13, 45 LJCh 27, 33 LT 521, 9 Digest (Repl) 619, 4130.

McNamee v Cooper (1966) *The Times*, 7th September.

Motion

This was a motion whereby the plaintiffs, Geoffrey Roberts Hodgson, Jack Tinsdale and John Hall Fraser, members of the Leeds branch of the National and Local Government Officers Association ('NALGO'), applied for a declaration and mandatory injunctions against NALGO. In the course of the hearing Goulding J gave leave for the addition as defendants to the motion, Frederick John Williams and William Whalley, sued on their own behalf and on behalf of all members of the National Executive Council of NALGO except the plaintiff Fraser, and Glyn John Phillips and Norman Wilson Bingham, sued on their own behalf and on behalf of all members of NALGO's delegation to the Trade Union Congress except the plaintiff Fraser, and as members of NALGO. The facts are set out in the judgment.

C M Smith for the plaintiffs.

I M Rankin QC and A G Steinfeld for the defendants.

GOULDING J. The facts which form the background to the present motion are not in dispute for the most part between the parties and indeed many of the facts must be of common knowledge to those who read the newspapers or listen to

^a (1843) 2 Hare 461

a the wireless. However, it will be necessary for me to go into some detail as to the development of the controversy.

b One starts off with this. That it is expected that at an early date proposals will be made to Parliament regarding the possible accession of the United Kingdom to the organisation of six European states connected by certain treaties and commonly known as the Common Market. But before any reassembling of Parliament, and in fact, as I understand, next week, there will occur a meeting of the Trade Union Congress. No evidence has been adduced before me as to the constitution or procedure of the TUC. I understand, however, that it is an association whose members consist of trade unions in the United Kingdom and that it holds an annual meeting at which delegates of the member unions attend and in that capacity debate and pass resolutions on matters of common interest. It appears that one or more motions will come before the TUC next week concerning the advantages or disadvantages c to the United Kingdom of accession to the Common Market. It also appears that the view taken by the TUC on such a matter may be of some general political influence.

The purpose of the present motion is to determine how the delegates of one trade union will deal with that union's votes at the TUC in relation to two motions concerning the Common Market. The union in question is the National and Local Government Officers Association, usually called, as I shall call it, 'NALGO'. The d plaintiffs in the action are three members of NALGO. They are, in fact, members and officers of the Leeds branch of the union. As the action was first constituted the only defendant was NALGO itself. NALGO was sued in the belief and on the footing that it was duly registered as a trade union under the Trade Union Acts. That belief was ill-founded. NALGO has never been registered. Its status as a trade union within the statutory definition is not in doubt because it holds a certificate e under the Trade Union Act 1913¹, which while it stands is conclusive. It is not, however, a registered trade union and accordingly in my view of the Act it has no power to sue or to be sued in its own name. Those representing NALGO said they were willing to waive any irregularity in the constitution of the action. It is not necessary to consider how far the irregularity could be cured in that way because f I have given leave for the addition as defendants of two representative members of the union's National Executive Council and two representative members of its delegation to the TUC so that there is no doubt that there are defendants effectively before the court.

NALGO is thus an unincorporated association and it is governed by a number of rules. It is happily unnecessary for me to examine the rules at any great length, but some of them are of critical importance. The definitions rule, r 2, includes among g others the following definitions:

h "Officer" means a person whose duties are wholly or mainly administrative, professional, technical, clerical or supervisory and whose employment is not by way of manual labour, who is employed whole-time or part-time by or under or who is paid either wholly or to a substantial degree directly or indirectly by any public authority in Great Britain, the Isle of Man or Northern Ireland, and includes an articulated pupil.

And the word 'Service' is defined as follows:

i "Service" means one of the following in Great Britain, the Isle of Man and Northern Ireland: the local government service, the electricity supply industry, the gas industry, the national health service, the transport industry, the water supply industry, or the service of any public authority as defined by these rules.

I do not think it is necessary that I should read the definition of public authority. It

includes all statutory local authorities and a number of other statutory authorities. Then the objects of NALGO are defined by r 3. a

'The objects for which the Association is established are: (a) To organize the whole of the officers in all departments of each and every service. (b) To improve the conditions and protect the interests of the Association's members by collective bargaining, agreement, withdrawal of labour or otherwise. (c) To regulate the relations between such members and between them and their employers.' b

And then there follow a number of more detailed objects. I should read r 3 (f) and (g):

'(f) To give to the legislature, government departments and others, facilities for conferring with, and ascertaining the views of, persons engaged or interested in each and every service, and to confer or co-operate with government departments and employing authorities in regard to each and every service and officers. (g) To consider all Bills presented to, and all questions raised in Parliament affecting the interests of officers.' c

And after a number of other particular objects the rule ends up in r 3 (r): d

'To do all such other lawful things as are incidental or conducive to the attainment of the above objects, or any of them.'

In my judgment it is within the objects of the union as so expressed to state a collective view with regard to major political questions like that of the Common Market and to represent that view either directly to Her Majesty's government or through the TUC or otherwise as may be thought fit. Thus, in my judgment, the formulation and propagation of collective opinion about the Common Market proposals is in no sense *ultra vires* the union, even within the limited range in which such a concept can be applied to an unincorporated association. e

I pass now to r 35:

'Conferences: The general policy of the Association shall be directed by Conference. An annual Conference shall be held on such dates and at such place as the Council may from time to time determine, and a special Conference may be held in the circumstances referred to in rule 38. Subject to the provisions of rule 37 each session of a Conference shall be a public session.' f

The following rules contain very elaborate provisions as to the constitution of a conference, the mode of summoning it and the taking of votes. I do not think it is necessary that I should go into those. I may mention perhaps that the requisition of a special conference, otherwise than by the National Executive Council, requires the concurrence of the chairmen and secretaries of at least fifty branches authorised by resolutions of their branches. The essential provision for conference is that it meets annually and special conferences are subject to an unusual and not very speedy machinery of convening. g

I pass now to rr 64 and 65, which are the first of a number of rules dealing with the National Executive Council. h

'64. *The Council*: The affairs of the Association shall be managed by the National Executive Council, the members of which shall be elected annually. Subject to the provisions of rules 55 and 70, the members of the Council shall hold office from the conclusion of the annual conference at which they are declared elected until the conclusion of the next succeeding annual Conference. i

'65. *Powers*: The Council shall be vested with and shall exercise complete executive powers, provided that in the exercise of those powers it shall do nothing

a inconsistent with these rules or the general policy of the Association as laid down from time to time by Conference. It may appoint a committee for any such general or special purpose as in the opinion of the Council would be better regulated and managed by means of a committee, and may delegate to a committee so appointed, with or without restrictions or conditions, as it thinks fit, any functions exercisable by the Council.'

b And the rules then go into the composition of the council and the rules governing its procedure. I interpret rr 64 and 65 as conferring on the National Executive Council the fullest authority to manage the current affairs of the union and in the words of r 65 'complete executive powers', which I interpret as meaning complete powers to carry out the functions and policy of the union. But reading rr 64 and 65 with r 35, in my judgment, the council has no power of itself to decide general policy.

c The last annual conference of NALGO was held in the latter part of June 1971, at Douglas in the Isle of Man. That conference had before it certain proposals relating to the Common Market. One of those proposals was a notice of motion by the Leeds branch. That was number 112 on the agenda, and it read:

d 'That this Conference is opposed to the entry of Britain into the European Economic Community (the Common Market).'

The next item on the agenda, number 113, was an amendment proposed to item 112. The amendment was proposed by the North Western and North Wales District Council of the union and read:

e 'Add "unless it can be shown to be in the long-term interests of both Britain and the Community".'

f The National Executive Council requested the conference to refer both those items to itself, the council, for consideration. And indeed, on the agenda where an indication of the council's attitude I think is given, the words 'Ask for reference' appear against both items 112 and 113. The conference declined that invitation. The amendment was carried and the motion as amended was (in the terms of an affidavit filed on behalf of the plaintiffs) overwhelmingly carried so that the effective resolution of conference was in the end in this form:

g 'That this Conference is opposed to the entry of Britain into the European Economic Community (the Common Market) unless it can be shown to be in the long-term interests of both Britain and the Community.'

h At about the same time or as I was informed somewhat before the date of the conference at Douglas, the government published the well-known white paper entitled 'The United Kingdom and the European Communities'. At a meeting of the National Executive Council on 10th July 1971, it was resolved that the Service Conditions Committee, one of the union's committees, should be requested to consider the white paper in order that the committee would be in a position to give its views on that subject to the National Executive Council at its meeting on 7th August. The Service Conditions Committee accordingly held a special meeting on 6th August, and passed a resolution consisting of two numbered paragraphs:

i '(1) That this Committee take the view, recognising that individual judgments vary in this matter, that the White Paper "The United Kingdom and the European Communities" does not in itself enable any firm declaration to be made in the terms of the Conference motion that "it can be shown to be in the long term interests of both Britain and the community".

(2) That nevertheless in the light of the public debate which has taken place over the past few months this Committee is in favour of Britain's accession to the European Economic Community.'

Next day, 7th August, there was as expected a meeting of the National Executive Council. One of the items on the agenda related to this matter of the Common Market and the first business done under that item of the agenda was that the chairman of the Service Conditions Committee moved that the National Executive Council approve that committee's minute, being in the two numbered paragraphs which I have just read. Before any vote was taken, an amendment was moved, namely that para (2) of the minute be not approved, (that was the paragraph recording the view of the Service Conditions Committee that it was in favour of Britain's accession to the community). The amendment was voted on first when 26 members of the National Executive Council voted for the amendment, 29 against. The amendment was accordingly lost. Then before the original substantive motion was voted on a Mr Rumney moved and he was duly seconded that:

'This Council is not able to make a firm declaration that entry to the Common Market is in the long term interests of both Britain and the community, and accordingly reaffirms that the association's policy is one of opposition to the entry.'

That motion was voted on and was lost by the same division of votes, 26 to 29, as the amendment. The original motion, approving the Service Conditions Committee's minute was then put to the meeting and was carried by 29 votes to 26. Accordingly the two paragraphs which I have read were adopted as the view of the National Executive Council. The National Executive Council proceeded to give instructions to the delegates of NALGO who were going, in due course, to the TUC and those instructions directed the delegates to oppose one motion that appeared on the TUC agenda against entry into the Common Market and to support another motion on the same agenda which was in favour of entry. Thus, in effect, the instructions given to delegates by the National Executive Council are, unlike the resolution of the conference at Douglas, in favour of accession to the Common Market. The instructions are not absolute. They are expressed as being subject to the delegation examining these decisions in the light of composite motions and amendments appearing on the final agenda (that is the final agenda of the TUC); however, as I read the instructions, that is a mere qualification to meet the practical difficulties that arise when at the TUC a number of separate motions are combined into one composite motion; it does not, in my view, affect the general force of the National Executive Council's instructions. It is also said in an affidavit by the general secretary of NALGO that in the last resort the delegates are entitled to consult their own consciences as to what is in the best interests or in accordance with the policy of NALGO and are not completely bound by the instructions of the National Executive Council. He does not give any authority for that view, and there does not appear to be any such qualification in the instructions themselves.

It is now necessary to look again at the resolutions passed by the annual conference of NALGO and subsequently by the National Executive Council to see how far the National Executive Council was acting in accordance with the constitution of the union. When conference resolved that it was opposed to the entry of Britain into the Common Market unless it can be shown to be in the long term interests of both Britain and the community it necessarily raised the question, 'shown to whom?' It is contended here, for the plaintiffs, that the true reading of the resolution was that conference was opposed to the entry of Britain into the Common Market, unless it could be shown to a future conference to be in the long term interests of both Britain and the community. The defendants would have me read, 'unless it can be shown to the National Executive Council to be in the long term interests of both Britain and the community', on the footing that, as it were, conference was declaring a policy against the Common Market, but was giving authority to the National Executive Council to reverse that policy if it should be satisfied that the advantages of the market had been sufficiently demonstrated. I strongly suspect that those

a who passed the resolution had no very clear idea of what body of persons they had in mind when they used the phrase, 'unless it can be shown'. I cannot for myself read the resolution as delegating a power to the National Executive Council to reverse the policy of the union on this matter. Even if it was within the competence of conference to make such a delegation, as to which I will express no opinion, I do not think that the language used was sufficiently clear to amount to that. If I have to decide b on the interpretation of the amended resolution, I prefer the plaintiffs' view that what was contemplated was a change of mind by a future meeting of conference because of proof in the interval that accession to the Common Market was in the long term interests of both Britain and the community. It is, of course, true that such a saving was strictly unnecessary, because one conference can, as I understand the rules, always rescind the directions or policy expressed by its predecessor. Now if c I am right in preferring the plaintiffs' construction of that resolution, then in my judgment, the National Executive Council have done wrong in their instructions to delegates. For two reasons. One is, that they have arrogated to themselves a power to determine the policy of the union instead of merely managing the affairs of the union and acting in an executive capacity to carry out policy. The other reason is that, contrary to the direction in r 65², they have done something inconsistent with the general policy of the association as laid down from time to time by conference.

d If, however, the defendants' construction of the amended resolution 112³ is correct and the National Executive Council was authorised to reverse the policy of the union on being satisfied that entry to the Common Market was in the long term interests of both Britain and the community, the question arises whether the National Executive Council in fact has been so satisfied. It is quite clear from para (1) of the two e paragraph resolution that the National Executive Council took over from the Service Conditions Committee, that the committee did not consider that the White Paper satisfied the requirements of conference. Then they went on that nevertheless, in the light of the public debate which had taken place over the last few months, this committee is in favour of Britain's accession to the European Economic Community. Two of the 29 members who voted in favour of adopting those resolutions have sworn f affidavits and they, for themselves, appear to have taken the view that what was called the public debate had demonstrated that the long term interests of both Britain and the community would be advanced by joining the Common Market but they are only two of a large number and it would be contrary to principle for me to construe the written resolution in the light of what two of those who voted for it afterwards say was their understanding. Construing the resolution in itself, in g my judgment, para (2) does not, any more than para (1), record that the National Executive Council was satisfied on the point reserved by conference. Therefore, even on the defendants' construction of resolution 112, as amended and passed, I am of opinion that the National Executive Council acted inconsistently with the policy as laid down by conference when they gave the instructions which I have mentioned to the delegation.

h The evidence filed on behalf of the defendants draws attention to the difficulties inherent in NALGO's constitution. It is pointed out that conference is a large somewhat unwieldy body prone, although it is put more politely than this, to adopt rather woolly resolutions representing a degree of compromise between opposing opinions which are not a satisfactory basis for practical executive action and it is clear that in the ordinary way the National Executive Council do take it on themselves to j determine, with a good deal more precision than conference can normally provide, the policy of the union on various matters. One, of course, quite understands that sort of situation, it is a very common one, and as long as no acute differences arise, bodies often get along very well with constitutions that give rise to practical difficulties if strictly construed. Nonetheless, it appears to me, that once the question is raised,

2 See pp 18, 19, ante

3 See p 19, ante

it is apparent that the National Executive Council have no power to determine the general policy of the union, still less have they power to alter the policy actually declared by conference. a

Now it is said next that if the National Executive Council have given instructions to delegates which represent a departure on their part from their duty under the rules, the court is unable to interfere in the matter because of the well-known rule, primarily a rule of company law, known as the rule in *Foss v Harbottle*⁴. The general rule is that: b

‘First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is *prima facie* the company or the association of persons itself.’

That broad statement occurs in the judgment of Jenkins LJ in *Edwards v Halliwell*⁵. c

The basis of the rule is that where a company or other body has provision in its constitution for a majority of the members to determine what acts within the company's powers shall be done, it is for the members in general meeting, or whatever is the proper machinery, to decide whether they approve of what their officers are doing in their name or not. If one member points out that the officers are transgressing the limits of their powers in some way, it is idle for the court to interfere, if immediately afterwards a general meeting is called and the majority of members ratify what has been done. It is pointed out that there is no evidence in the present case that any large body of NALGO's membership is incensed at the change of front on the part of the National Executive Council. The plaintiffs all come from the same branch, the branch that originally proposed the resolution directed against the Common Market. They have not put in evidence any suggestion that they have the support of a large body of their fellow members. On the other hand, the National Executive Council itself was very nearly evenly divided on the decisive matters of voting to which I refer. d

Now the rule in *Foss v Harbottle*⁴ is an exception to the general principle *pacta servanda sunt*. It represents a case in which, although something has been a matter of express or implied agreement between the parties the court, nevertheless, will not intervene at the suit of an individual party to hold the other to the bargain. The basis of the exception was put long ago by Mellish LJ, on two alternative grounds. That was in *MacDougall v Gardiner*⁶. One ground was that the rule restrains what he called cantankerous litigation. If every member of a company or association is allowed as an individual plaintiff to complain against a thing that is done in the course of the company or association's business life would really become intolerable, because in a large body there are often a number of difficult members who would take every opportunity to involve the company and its officers in litigation. Therefore, the rule has its value as restraining vexatious litigation and, secondly, said Mellish LJ— e

‘if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes.’ f

This case does not fall within any of the well-known exceptions to the rule in *Foss v Harbottle*⁴. It was urged at one time, on behalf of the plaintiffs, that what was being g

⁴ (1843) 2 Hare 461

⁵ [1950] 2 All ER 1064 at 1066

⁶ (1875) 1 Ch D 13 at 25 h

a done was an ultra vires act, but, in my judgment, that does not hold water at all. As I said when I referred to the objects of the union, it is plain that giving instructions of any kind to delegates to the TUC to vote this way or that or to abstain from voting on the Common Market questions, is entirely within the powers of the union as such. Further, this is not one of the cases in which the individual plaintiffs can say that something in the nature of a proprietary right of theirs is being infringed, as where b subscriptions are being altered, or qualifications for office are being altered, or benefits are being altered. Nothing of that kind is in question. Indeed, it is hard to imagine a matter further removed from an individual proprietary interest than the attitude of the union to proposals about the Common Market. Nor again is the case one of those in which an exception has been made from the rule on the ground that otherwise the majority might do by some informal machinery what under the rules can only be done with some special formality. Nothing of that sort arises c here.

However, two other points were made on behalf of the plaintiffs, which require somewhat more substantial consideration. First of all, NALGO as I have said, is not an incorporated body, it is not a registered trade union, it cannot in my view, sue in its own name. That being so, it is contended, the basis for the application of the rule in *Foss v Harbottle*⁷ is wanting. Going back to Jenkins LJ's formulation⁸:

d '... the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is *prima facie* the company or the association of persons itself.'

That seems to assume that the company or the association as such can be a plaintiff. If the best that can be done is for one or more individuals plaintiffs to sue on behalf e of themselves and all other members who are of the same mind that is not quite the same thing as a suit by the association itself. The best one could do I suppose in applying the *Foss v Harbottle*⁷ principle to an unincorporated association not entitled to sue in its own name would be to say that the suit will not be entertained in normal circumstances unless the plaintiffs can show that they have been duly authorised by f the proper meeting or other procedure, to sue for the benefit of the association as such. But the matter is not put that way in the well-known formulations of the rule and I have not been referred to any authority where the rule has been applied to an unregistered trade union or other body not capable of suing in its own name. In *Cotter v National Union of Seamen*⁹ Romer J had to consider whether the rule applied to a registered trade union, and after referring to *MacDougall v Gardiner*¹⁰, and the well-known judgment of Mellish LJ, he said⁹:

g 'It is said, however, by the plaintiffs in the present action that this principle has no application to a trade union, inasmuch as a trade union differs in material respects from an incorporated company. There are no doubt many and important differences between the two bodies, but in the case of a registered trade union are those differences material to the present question? In my opinion h they are not. The principle, as I understand it, does not depend upon the existence of a corporation. The reasoning of it surely applies to any legal entity which is capable of suing in its own name and which is composed of individuals bound together by rules which give the majority of them the power to bind the minority. There does not appear to be in the books any actual decision to the effect of showing that the principle applies to such a body as a registered trade union. There is, however, a dictum of Russell J. to that effect in *Bloxham v. Amalgamated Marine Workers' Union*¹¹.'

7 (1843) 2 Hare 461

8 In *Edwards v Halliwell* [1950] 2 All ER at 1066

9 [1929] 2 Ch 58 at 71

10 (1875) 1 Ch D 13

11 Unreported

So that the learned judge there apparently thought that there were two requirements for an application of the rule in *Foss v Harbottle*¹². One that there was a legal entity capable of suing in its own name, and two that the individual members should be bound by rules giving the majority the power to bind the minority. I therefore conclude that I ought not to extend the principle to the case of an unregistered trade union.

Now there was a second and an alternative ground on which it was said that the plaintiffs could escape from the difficulty raised by *Foss v Harbottle*¹², and that was the urgency of the matter. It is conceded that it would have been impossible after the date of the decisive meeting of the National Executive Council, namely 7th August, to go through the necessary procedure for summoning a special conference of the union. However large might have been the body of members who objected to the National Executive Council's action it would have been impossible to summon such a conference in time to ascertain its will before the meeting of the TUC. Therefore, the practical reasoning that the court should leave matters of internal decision to the proper constitutional machinery of the association really does not apply. If the directions given to delegates are left uncorrected and if the votes of the delegates should prove to be of great importance at the meeting of the TUC, it would be cold comfort to the majority of the next NALGO conference to pass a resolution saying, 'We really meant what we said last June and we did not intend to authorise the National Executive Council to alter it.' If that was their conclusion the horse would long since have left the stable and the view of the majority when expressed would be without practical effect. It is submitted, therefore, that the court ought not to allow the rule in *Foss v Harbottle*¹² to become the possible instrument of an injustice to the majority that the majority could not afterwards correct. There does not appear to be—so far as the researches of counsel have gone—any authority on that aspect of the matter. In my view, *Foss v Harbottle*¹² should not be applied if the result may be to deprive the majority of an opportunity of carrying out their will. In other words, if the constitutional machinery of the body cannot operate in time to be of practical effect, the court, in my view, should entertain the suit of a member or members not supported by the association itself. That, therefore, is an alternative ground on which I would decide in the plaintiffs' favour, if I am wrong in thinking that the rule in *Foss v Harbottle*¹² does not apply to an unregistered trade union. I am conscious that in deciding in favour of the plaintiffs I am differing from a reported decision of Goff J on facts which bear a striking similarity to those of the present case. It was the case of *McNamee v Cooper*¹³. It does not appear whether the union there in question was registered or not and it does not appear whether the other considerations on which I am relying were ever argued before the learned judge. Accordingly, I do not think that I ought to treat that decision where his Lordship rejected the claim on motion, as precluding the granting of the plaintiffs' application in the present case.

Order accordingly.

Solicitors: *Montague Kelvin* (for the plaintiffs); *J G Haley* (for the defendants).

Gordon H Scott Esq Barrister

¹² (1843) 2 Hare 461

¹³ (1966) The Times, 7th September

Daish (an infant by his next friend Albert Edward Daish) v Wauton

COURT OF APPEAL, CIVIL DIVISION

SALMON, KARMINSKI AND STEPHENSON LJJ

13th, 14th, 15th, 16th JULY, 15th OCTOBER 1971

Damages – Measure of damages – Loss of future earnings – Deduction – Future living expenses – Plaintiff aged five years at time of accident – Severe brain injury – Evidence that plaintiff would be supported in state institutions free of cost for remainder of life – Plaintiff thereby saving on expenditure on future housing and maintenance which would have had to be met out of earnings – Whether future living expenses properly deductible in assessing figure for loss of earnings.

The plaintiff suffered very severe brain injury in a collision with a motor car driven by the defendant who agreed to pay 55 per cent of the sum which could properly be awarded to the plaintiff for the resulting damage and loss. The medical evidence established that the plaintiff, who was under five years old at the time of the accident, was unlikely to live beyond 40 to 50 years and that the life left to him was not a thing of much value; he was too crippled in mind and body to be able to work for a living and feelings of distress over what he had lost would play little part in his life. The trial judge quantified the plaintiff's loss in a single sum of £16,000 and so gave judgment for £8,800. In arriving at the figure of £16,000, the judge did not dissect it into its several parts, but he did state that he had 'made only a modest allowance' for lost future earnings because most of them would have been spent on housing and maintenance whereas, because of the accident, the plaintiff would be supported entirely in a state institution free of cost and 'such pleasure as he is capable of appreciating will be similarly provided'. The plaintiff appealed on the ground that the amount of damages awarded was inadequate.

Held – (i) Such national health service benefits as the plaintiff would receive were not deductible in assessing damages; although it would be proper to take into account expenditure which would have been incurred in earning future wages it did not follow that general living expenses were deductible. It was established that maintenance of an injured plaintiff free of cost by a friendly relative was not to be set off against the award of damages and, if the national health benefits were to be regarded as a form of public benevolence, there were no grounds for distinguishing between private and public benevolence. Alternatively the benefits were to be regarded as akin to the fruits of an insurance claim, which would not be deductible, in that they were financed by compulsory contributions from members of the public; the fact that the plaintiff had been injured so young and so badly that he could never pay his contributions was no reason for considering the nature of the benefits to be different in his case and deductible from his prospective earnings (see p 29 g, p 30 a, b, e and f and p 34 a to c, post).

Bradburn v Great Western Ry Co [1874-80] All ER Rep 195, *Liffen v Watson* [1940] 2 All ER 213, *Redpath v Belfast & County Down Ry* [1947] NI 167, *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569, dicta of Lord Denning MR and Diplock LJ in *Fletcher v Autocar & Transporters Ltd* [1968] 1 All ER at 734, 738, and *Parry v Cleaver* [1969] 1 All ER 555 applied.

British Transport Commission v Gourley [1955] 3 All ER 796 explained.

Oliver v Ashman [1961] 3 All ER 323 not followed.

(ii) If the benefit of free maintenance in a state hospital or institution was not taken into account the allowance for loss of earnings must be substantial. Further, in arriving at the sum to be awarded for pain and suffering and loss of amenities, there must be

excluded from consideration the fact that little if any of the sum awarded was likely to be spent on the plaintiff in any way that could diminish his plight or affect his loss. The total sum of £16,000 fixed by the trial judge was far too low. The figure for pain and suffering and loss of amenities should be £20,000, and for loss of earnings £6,000; accordingly judgment would be given for 55 per cent of £26,000, i.e. £14,300 (see p 34 d to f and p 35 b, post). }

Notes

For the recovery of damages in respect of lost future earnings, see 11 Halsbury's Laws (3rd Edn) 258, 259, para 430, and for a case on the subject, see 17 Digest (Repl) 200, 1053.

Cases referred to in judgment

Alexander v Dispatch Motor Co (1971) The Times, 13th February.

Bradburn v Great Western Ry Co (1874) LR 10 Exch 1, [1874-80] All ER Rep 195, 44 LJEx 9, 31 LT 464, 36 Digest (Repl) 205, 1071.

British Transport Commission v Gourley [1955] 3 All ER 796, [1956] AC 185, [1956] 2 WLR 41, Digest (Cont Vol A) 462, 28a.

*Dougan v British Steel Corp*n (14th July 1971) unreported.

Fletcher v Autocar & Transporters Ltd [1968] 1 All ER 726, [1968] 2 QB 322, [1968] 2 WLR 743, Digest (Cont Vol C) 748, 1051bb.

Jefford v Gee [1970] 1 All ER 1202, [1970] 2 QB 130, [1970] 2 WLR 702, Digest (Cont Vol C) 709, 182a.

Liffen v Watson [1940] 2 All ER 213, [1940] 1 KB 556, 109 LJKB 367, 162 LT 398, 36 Digest (Repl) 201, 1067.

National Insurance Co of New Zealand Ltd v Espagne (1961) 105 CLR 569, Digest (Cont Vol A) 1197, *1902.

Oliver v Ashman [1960] 3 All ER 677, [1961] 1 QB 337, [1960] 3 WLR 924; *affd* CA [1961] 3 All ER 323, [1962] 2 QB 210, [1961] 3 WLR 669, Digest (Cont Vol A) 1191, 1053a.

Parry v Cleaver [1969] 1 All ER 555, [1970] AC 1, [1969] 2 WLR 821, Digest (Cont Vol C) 750, 1061e.

Redpath v Belfast & County Down Ry [1947] NI 167, 18 Digest (Repl) 177, *902.

Rose v Ford [1937] 3 All ER 359, [1937] AC 826, 106 LJKB 576, 157 LT 174, 36 Digest (Repl) 229, 1210.

Shearman v Folland [1950] 1 All ER 976, [1950] 2 KB 43, 36 Digest (Repl) 205, 1072.

Smith v Central Asbestos Co [1971] 3 All ER 204, [1971] 3 WLR 206.

Watson v Powles [1967] 3 All ER 721, [1968] 1 QB 596, [1967] 3 WLR 1364, Digest (Cont Vol C) 286, 165e.

West (H) & Son Ltd v Shephard [1963] 2 All ER 625, [1964] AC 326, [1963] 2 WLR 1359, Digest (Cont Vol A) 1191, 1053c.

Appeal

The plaintiff, Timothy Nicholas Sean Daish (an infant suing by his grandfather and next friend, Albert Edward Daish), appealed against an order of Lyell J, dated 19th February 1971, awarding the plaintiff £8,800 damages for personal injuries against the defendant, Edward Winthrop Brenton Wauton. The facts are set out in the judgment of the court.

Sir Joseph Molony QC and *D C Gordon* for the plaintiff.

Roy Beldam QC and *W L M Davies* for the defendant.

Cur adv vult

15th October. **STEPHENSON LJ** read the judgment of the court at the invitation of Salmon LJ. The plaintiff has suffered a very severe injury to his brain in a collision with a motor car driven by the defendant. The defendant has agreed to

a pay him 55 per cent of the sum of money which can properly be awarded him for the resulting damage and loss. Lyell J considered four elements in the plaintiff's damage and loss and quantified them in a single sum of £16,000. He thereupon gave judgment for the plaintiff for £8,800. The plaintiff appeals on the ground that the sum is inadequate.

b 1. There was a loss of expectation of life. The plaintiff, under five years old when injured, is unlikely to live beyond the age of 40 to 50 years, particularly because he cannot walk many steps without falling or appreciate the dangers peculiar to his crippled condition and obvious to persons of ordinary intelligence. But the life left to him is not a thing of much value. So the award for this loss was rightly minimal.

c 2. The plaintiff 'has been almost wholly deprived of the chance of leading a normal life', as the judge correctly summarised the medical evidence. His intellect is retarded, he has difficulty in communicating or learning, his eyes are unco-ordinated, his speech is slow, he cannot easily put words together, the movements of his legs and arms are clumsy, he is too crippled in mind and body to be able to work for a living. He has had one epileptic fit and he may have more.

d 3. Into his pitiful condition he has and will have, as the judge put it, 'some, though probably little, and only transient, insight'. This seems to us a fair summary again of the medical evidence. What the plaintiff has left to him is not quite an awareness of what he has lost because he has never known it and could not recollect it, if he had. But just as he gets some pleasure from small successes, so he feels frustrated at his inability to overcome his many handicaps and with his approaching adolescence may become aggressive as he becomes increasingly aware of his difference from others. He is in this respect like a child blinded before growing old enough to remember how the world looked to eyes that could see but frustrated by being unable to see or to do without difficulty what comes easily to others. The judge quoted Mr Gordon Walker's description of the picture of the plaintiff's life as one of permanent suffering, but we consider that he rightly interpreted the view of the doctors to be that 'feelings of distress over what he has lost will play little part in his life' and that no complaint can justly be made of his accepting their view. He rightly appreciated that this boy will have more insight into his condition and a longer life to bear it than the plaintiff in the earlier case of *Oliver v Ashman*¹ which he considered very closely. There the expectation of life was (as appears from the report of the case in the Court of Appeal², but not at first instance³) reduced (at 20 months) from 60 years to 30 years and the boy's appreciation of his condition was so momentary as not really to cause him mental suffering, although it did produce some feeling of frustration.

g We consider, however, that the judge's assessment of these last two heads of damage, whether considered together as different aspects of loss of enjoyment of life or separately as loss of amenities coupled with mental suffering, cannot have been adequate, however great the care that should be taken to avoid overlapping in the awards of damages under these two heads and the next head for loss of enjoyment of life and for pecuniary loss: *Smith v Central Asbestos Co*⁴, per Lord Denning MR.

h 4. The judge has not told us what he has awarded for loss of future earnings. Indeed he has said that in arriving at the total figure he has not even in his mind dissected it into its several parts, thereby preferring *Watson v Powles*⁵ to *Jefford v Gee*⁶.

i 1 [1961] 3 All ER 323, [1962] 2 QB 210

2 [1961] 3 All ER at 323, [1962] 2 QB at 212

3 [1960] 3 All ER 677, [1961] 1 QB 337

4 [1971] 3 All ER 204 at 214, [1971] 3 WLR 206 at 218

5 [1967] 3 All ER 721, [1968] 1 QB 596

6 [1970] 1 All ER 1202, [1970] 2 QB 130

But what he has told us is that he has 'made only a modest allowance' for lost future earnings because most of them would have been spent on housing and maintenance whereas now the plaintiff will be supported entirely in a state institution free of cost, and 'such pleasure as he is capable of appreciating will be similarly provided'. In deducting from his estimated gross earnings the unspecified figure which he attributes to housing and maintenance expenses the judge was clearly following the decision of this court in *Oliver v Ashman*⁷ as expressed in the judgments of Willmer and Pearson LJ. Their view is, in our judgment, correctly stated in the headnote. Willmer LJ expressed his view in this way⁸:

'He [the plaintiff Oliver] will never have the expense of maintaining a home, whether for himself alone or for himself and dependants. He will never have to bear the cost of food and clothing, light, heat, and so forth. Throughout the greater part of his life there will be no cause for expenditure. In those circumstances it would seem *prima facie* quite wrong to have regard to any probable future loss of earnings without also having regard on the other side of the account, to the probable saving of what would ordinarily be the expenses of life. Oddly enough this is not a matter on which there seems to be any great wealth of authority. Reference was made to *Liffen v. Watson*⁹, but I do not think that that is at all a parallel case. There, the victim was fortunate enough to find a relative who was prepared to house her free of cost, and the court held, in my judgment properly, that that was not a matter to be taken into consideration for the purpose of reducing the award of damages. That seems to me to be a wholly different case from that of this plaintiff, who, so far as can be foreseen, will be detained for the rest of his life in a National Health institution. The point was touched on by LORD ATKIN in *Rose v. Ford*¹⁰ in the passage of his speech to which HOLROYD PEARCE, L.J., has already made reference. LORD ATKIN left the question unsolved; but at least what he said does give ground for thinking that he saw a distinction between earnings which would have been saved and earnings which would not. Possibly more help is to be derived from what was said by LORD REID in *British Transport Commission v. Gourley*¹¹: [He] said: "... No one would suggest that it is improper to take into account expenditure genuinely and reasonably incurred, or that the plaintiff's damages should be assessed on the fees which he would have continued to receive without regard to the outgoings which he would have continued to incur". *Gourley's case*¹² is, of course, a very different case from this, but so far as it goes that expression of view is in accord with what I should myself have conceived to be the right principle. In those circumstances, it seems to me that [Lord Parker CJ] was quite right when, in taking into account the possible future loss of earnings of this child, he expressed the view that the saving of the normal expenses of life should be set off against such loss bearing in mind that for most of this unfortunate child's life there will in fact be nothing on which to spend the money. What the future earnings of the child would have been had he not met with this accident must remain completely speculative; so also must the question how far such earnings would have exceeded what he would have been likely to spend on living and providing a home for himself and any dependants he might have.'

Pearson LJ put his view in this sentence¹³:

7 [1961] 3 All ER 323, [1962] 2 QB 210
 8 [1961] 3 All ER at 334, 335, [1962] 2 QB at 234-236
 9 [1940] 2 All ER 213, [1940] 1 KB 556
 10 [1937] 3 All ER 359 at 363, [1937] AC 826 at 835
 11 [1955] 3 All ER 796 at 808, [1956] AC 185 at 213
 12 [1955] 3 All ER 796, [1956] AC 185
 13 [1961] 3 All ER at 339, [1962] 2 QB at 242

'Secondly, there is the probable expectation that, after being kept at home for a few years and after having probably a rather short stay in a private institution, the infant plaintiff will go to a state institution and be kept there free of charge for the rest of his life. That greatly diminishes the probable maintenance liability and provides an important offset to the loss of earning capacity, which in any case has to be discounted because the earnings would not have begun for many years.'

Holroyd Pearce LJ expressed no view on this point, but his questions when defendant's counsel submitted that¹⁴ 'Expenses such as food, rent, liability to tax, etc., must be taken into account and set off against earnings' show that he had it in his mind and would not necessarily have accepted the view the other lords justices took of it.

*Oliver v Ashman*¹⁵ has attracted judicial notice and the notice of textbook writers but not, we think, on this point. We make these comments on the views of Willmer LJ¹⁶ which appear to bind the judge and this court if they are still good law.

(1) We cannot find that Lord Parker CJ in his judgment¹⁷ expressed the view attributed to him by Willmer LJ in the passage just quoted. It must be spelt out of his observation¹⁸ that:

'In addition, there are questions of taxation and other matters, but whatever view one takes as to eventual earnings, the figure must in the case of such a young child be heavily discounted.'

Defendant's counsel had submitted that¹⁹:

'In regard to his loss of opportunity of earning it must be borne in mind that he will be kept at the expense of the State and will not have to support a wife and family.'

We cannot infer from this submission—or from the way in which plaintiff's counsel in reply disputed the relevance of the child going into a state institution—that living expenses were one of the matters which Lord Parker CJ was taking into account in discounting his eventual earnings. Nor can we find any support for the ascription of this view to the Lord Chief Justice in the concessions made by leading and junior counsel for the plaintiff²⁰. They were claiming for the plaintiff his loss of future earnings in full and conceding not that living expenses, but only that expenses in earning wages, must be set off against them.

(2) Willmer LJ is founding his opinion to some extent on *Gourley's* case¹ and in particular Lord Reid's view² that account should be taken of 'expenditure genuinely and reasonably incurred'; but by those words in their context Lord Reid clearly meant outgoings incurred on fees earned such as rent and rates for an office, clerks' salaries, expenses of running a car: hence the concession of plaintiff's junior counsel. They are 'incurred in the process of earning the profits': expenses which Lord Tucker³ classed with 'expenditure which—although not actually a charge on earnings—is imposed by law as a necessary consequence of their receipt' as 'relevant to the ascertainment of the loss suffered by the party injured'. As Lord Tucker pointed out³, the problem is 'what items of expenditure following the earning of profits are

¹⁴ [1962] 2 QB at 216

¹⁵ [1961] 3 All ER 323, [1962] 2 QB 210

¹⁶ [1961] 3 All ER at 334, 335, [1962] 2 QB at 234-236

¹⁷ [1960] 3 All ER at 678, [1961] 1 QB at 341

¹⁸ [1960] 3 All ER at 680, [1961] 1 QB at 344

¹⁹ [1961] 1 QB at 340

²⁰ [1962] 2 QB at 214, 215

¹ [1955] 3 All ER 796, [1956] AC 185

² [1955] 3 All ER at 808, [1956] AC at 213

³ [1955] 3 All ER at 810, [1956] AC at 215

to be taken into consideration and which are to be ignored' in ascertaining that loss; and none of their Lordships suggested that living expenses, as distinct from office expenses, should be taken into consideration. Indeed, Lord Goddard's suggested direction to a jury in his speech⁴, with which Lord Radcliffe and Lord Somervell of Harrow agreed, we take to imply that they should not; for the jury are to consider the plaintiff's 'spendable income', which Lord Goddard seems to equate with⁴ 'what he had left to support himself and his family after tax was paid'; not what he had left after supporting himself and his family and paying tax.

(3) The passage in Lord Atkin's speech in *Rose v Ford*⁵ referred to by Willmer LJ⁶ does perhaps suggest that earnings which would have been saved must be recoverable for the benefit of the estate of the deceased person, but that earnings spent may not be because they would not have been saved to increase his estate. However, in *Rose v Ford*⁷ their Lordships were not considering the problem which troubled Lord Tucker and others in *Gourley's* case⁸ nor the (as we think) different problem which confronts this court in the instant case, but a specific question raised by the Law Reform (Miscellaneous Provisions) Act 1934. Lord Atkin is only asking: 'If [or, possibly, "as"] a living plaintiff can recover more for loss of earnings than he would have saved out of them, could the personal representatives of a dead person do the same?'

(4) Willmer LJ seems to distinguish the case from *Liffen v Watson*⁹ on the ground that maintenance by a friendly relation free of cost is⁶ 'wholly different' from maintenance by the state in a National Health institution free of cost. But *Liffen's* case⁹ was distinguished by defendant's counsel¹⁰ only on the ground that a right to be maintained by the state is not too remote, whereas purely charitable maintenance may be. If that was the only ground for distinguishing private benevolence from support by the state—and Willmer LJ gives no other—it may no longer be good since, as we hope to show, remoteness is no longer the test.

(5) The lords justices thought that they were applying the *Gourley*⁸ principle of real loss in deducting not tax but living expenses. They never considered, because they were not asked to consider, whether free maintenance at the public expense (in a sense on which we comment later) was a benefit which was not deductible like private charity: *Redpath v Belfast & County Down Ry*¹¹; or the fruits of insurance: *Bradburn v Great Western Ry Co*¹²; or a contributory police pension: *Parry v Cleaver*¹³.

We can find in *Gourley's* case⁸ only two references to benefits received by a plaintiff after his injury for which he seeks compensation, Earl Jowitt's reference to cases of insurance¹⁴ and Lord Reid's¹⁵ to 'a compensatory gain' in the following sentence:

'A loss which the plaintiff has suffered, or will suffer, or a compensatory gain which has come or will come to him, following on the accident may be of a kind which the law regards as too remote to be taken into account.'

When he came to reconsider such compensatory gains as the proceeds of insurance and benevolence in *Parry's* case¹⁶ Lord Reid discarded remoteness, whether in the

4 [1955] 3 All ER at 806, [1956] AC at 209

5 [1937] 3 All ER at 363, [1937] AC at 835

6 [1961] 3 All ER at 335, [1962] 2 QB at 235

7 [1937] 3 All ER 359, [1937] AC 826

8 [1955] 3 All ER 796, [1956] AC 185

9 [1940] 2 All ER 213, [1940] 1 KB 556

10 [1962] 2 QB at 217

11 [1947] NI 167

12 (1874) LR 10 Exch 1, [1874-80] All ER Rep 195

13 [1969] 1 All ER 555, [1970] AC 1

14 [1955] 3 All ER at 799, [1956] AC at 198

15 [1955] 3 All ER at 808, [1956] AC at 212

16 [1969] 1 All ER at 558, 559, [1970] AC at 14, 15

a sense that the gains were too remote to have been foreseeable by the defendant or in the sense that the relationship between the plaintiff's source of loss and source of gain was too remote, in favour of their intrinsic nature as the reason for their not being brought into account.

b The House of Lords has now by a majority declared in *Parry's case*¹⁷ that the question to be asked is whether free maintenance at the public expense is a deductible benefit, that it is to be answered by considering not remoteness, as Lord Pearson¹⁸, dissenting, still thought, but the intrinsic nature of the benefit in the light of justice and public policy and that the decision in *Gourley's case*¹⁹ gives no help in answering it, although decisions on other benefits such as the fruits of insurance or benevolence may: see per Lord Reid²⁰ and Lord Pearce¹. (Lord Wilberforce² agreed that *Gourley's case*¹⁹ had no bearing on the matter, but he got little help from intuitive feelings of justice or from other types of benefit³ and he did not rely on public policy.) Applying Lord Pearce's words in *Parry's case*⁴:

d 'The most that the respondent can get from *Gourley's case*¹⁹ in the present case is that in claiming that he has lost something a plaintiff must prove a genuine factual loss not a technical unreal loss of something of which he would never in fact have had an actual benefit, since the court is looking for *restitutio in integrum*. And this, it can be argued, may have some indirect bearing on the things which he brings into account on the other side of the ledger.'

e Is the plaintiff to be treated as not having the actual benefit of his full wages merely because he would have spent them on his own or his family's maintenance? It cannot even be argued that the answer may be 'Yes' unless there is a corresponding benefit such as free maintenance to be brought into account on the other side of the ledger, as in this case. In this case it has been argued for the plaintiff that his free maintenance has not to be brought into account or alternatively if any sum is to be deducted because of it from the plaintiff's lost earnings it should be minimal, or at least not more than one-third of his lost earnings.

f We have to consider *Gourley's case*¹⁹ in first computing the plaintiff's actual net loss of earnings and *Parry's case*¹⁷ in then considering whether any particular gain or benefit is to be deducted against net loss. That two-fold operation was never performed in *Oliver's case*⁵. *Bradburn's case*⁶ was not cited to the court, nor *Redpath's*⁷. The court carried out the first stage only.

g We must, in our view, carry out both stages. And we understand counsel for the defendant to concede that if the benefit of state maintenance is not deductible at stage two, neither are the living expenses at stage one. This concession is clearly right. The plaintiff's real loss of earnings can only be ascertained by comparing what he would have earned but for his injury with what he is earning or not earning as a result of it. In most cases an injured man will have living expenses after he is injured which are roughly equivalent to those he would have had to pay if he had not been injured. The expenses therefore cancel each other out. Only if a plaintiff without h dependants to support is in hospital for a long period, and is not a fee-paying patient,

17 [1969] 1 All ER 555, [1970] AC 1

18 [1969] 1 All ER at 582, [1970] AC at 43

19 [1955] 3 All ER 796, [1956] AC 185

20 [1969] 1 All ER at 557-560, [1970] AC at 13-16

j 1 [1969] 1 All ER at 575, 577, [1970] AC at 34, 37

2 [1969] 1 All ER at 580, [1970] AC at 40

3 [1969] 1 All ER at 581, [1970] AC at 42

4 [1969] 1 All ER at 575, [1970] AC at 34

5 [1961] 3 All ER 323, [1962] 2 QB 210

6 (1874) LR 10 Exch 1, [1874-80] All ER Rep 195

7 [1947] NI 167

is there any reason for a defendant to bring into account the living expenses which the plaintiff is saving by the misfortune he suffers from the defendant's tort. a

Compare the observations of Asquith LJ in giving the judgment of this court in *Shearman v Folland*⁸. In that case, on which both counsel in this case rely, the court was concerned with the special damage of 'a migratory hotel-dweller'. And it was concerned with what the defendant should pay towards the expenses of the hotel-dweller's temporary maintenance in a nursing home after being injured and before her action was tried. It was not concerned with her general damages, or with a potential wage-earner, or with a plaintiff who makes no claim against a defendant for the expenses which both plaintiff and defendant have been saved by his 'taking advantage of facilities available under the National Health Service Act, 1946' to be maintained permanently free of charge. Those words come from s 2 (4) of the Law Reform (Personal Injuries) Act 1948, which deters a defendant faced with a claim for medical expenses from resisting it on the ground that the plaintiff should reasonably have been saved them by taking advantage of those facilities. That subsection throws no light on the problem we have to solve; nor, with all respect to the argument of counsel for the defendant, does s 212 of the Road Traffic Act 1960, which provides for the payment of expenses reasonably incurred by a hospital in treating traffic casualties. b

The irrelevance in most cases of a plaintiff's expenditure on keeping himself and his dependants is, we think, illustrated and confirmed by this court (or a majority of it) in drawing the contrast between the good husband with a wife to support and the self-indulgent bachelor (a bird perhaps as rare among plaintiffs as the migratory hotel-dweller) in *Fletcher v Autocar & Transporters Ltd*⁹. The married man is to be compensated 'for his loss of future earnings to the extent that he would have used them for supporting his wife' per Lord Denning MR¹⁰, or for 'the additional deprivation of being unable to support his wife and family . . . under the head of loss of earnings' per Diplock LJ¹¹. Salmon LJ dissented¹² from what the majority of the court said about deducting from the plaintiff's earnings, whether married or single, extravagant expenditure from which the defendant's negligence had saved him. He considered that if a plaintiff is likely to be prevented by the defendant's negligence from earning £X per year for Y years, he is entitled to be compensated for the whole amount of that financial loss, and that whatever he might have done with the money was irrelevant so far as damages are concerned. It follows that Salmon LJ agreed with the majority in making no deduction for the married man's expense of keeping a wife and family and we assume that all three lords justices would not have deducted the single man's expenditure in maintaining any dependants he might have. c

Are we then bound, as Lyell J thought he was, by the decision of this court in *Oliver's case*¹³ to deduct something for expenses which the plaintiff would have paid out of his earnings in support of himself or his family if he had not been disabled by the defendant's negligence from ever doing so? Or is it open to us, or indeed incumbent on us, to consider whether the benefit of free maintenance in a state hospital is deductible, and if we think that, like the benefit of free maintenance in a private house, it is not, to disallow any deduction for such expenses? d

We ought, as we have said, to consider the question in the light of *Parry's case*¹⁴. In that case Lord Pearce and Lord Wilberforce¹⁵ considered that a benefit would not be deductible if it was not necessarily intended as a substitute for earning capacity e

8 [1950] 1 All ER 976 at 979, 980, [1950] 2 KB 43 at 48, 49

9 [1968] 1 All ER 726, [1968] 2 QB 322

10 [1968] 1 All ER at 734, [1968] 2 QB at 337

11 [1968] 1 All ER at 738, [1968] 2 QB at 343

12 [1968] 1 All ER at 747-749, [1968] 2 QB at 359-361

13 [1961] 3 All ER 323, [1962] 2 QB 210

14 [1969] 1 All ER 555, [1970] AC 1

15 [1969] 1 All ER at 575, 582, [1970] AC at 34, 42 f

a or its payment was not dependent on loss of earning capacity; and Lord Reid indicated how he might answer the question which we have to decide in this sentence¹⁶:

‘We do not have to decide in this case whether these considerations also apply to public benevolence in the shape of various uncovenanted benefits from the welfare state, but it may be thought that Parliament did not intend them to be for the benefit of the wrongdoer.’

b We have now to decide that very question with reference to national health service benefits without deciding the question in relation to other public benefits such as unemployment benefit or national assistance, which have already been the subject of decision in other courts and of comment in *Parry's case*¹⁷ by Lord Reid and Lord Wilberforce.

c We have also to decide it without having heard from counsel any analysis of the nature of national health service benefits or any consideration of the National Health Service Contributions Acts 1957 to 1965. A cursory investigation shows that national health service facilities were first financed by national insurance contributions paid by insured persons whether employed, self-employed or non-employed, by employers and out of moneys provided by Parliament; but since 1957 separate national health service contributions have been paid by these classes of persons and collected with their national insurance contributions.

d We think that we can gain more assistance from the views expressed by Sir Owen Dixon CJ and Windeyer J in *National Insurance Co of New Zealand Ltd v Espagne*¹⁸, which were considered in *Parry's case*¹⁹, as to the characteristics of benefits not to be regarded as mitigating loss, whether as a result of legislation or contract or benevolence; namely, that they were ‘conferred . . . independently . . . of a right of redress against others but so that they may be enjoyed by him [the plaintiff] although he enforce that right (*Espagne case*²⁰ per Sir Owen Dixon CJ); or that they were either—

e (a) received as a result of a contract he had made before the loss occurred and by the terms of that contract express or implied to be provided notwithstanding any rights of action he might have [or] (b) given or promised to him by way of bounty to the extent that he should enjoy them in addition to and not in diminution of any claim for damages.’

f (See the *Espagne case*¹ per Windeyer J who gave as illustrations of the latter alternative ‘public charitable aid and some forms of relief given by the State as well as private benevolence’.) Windeyer J was able to find that the pension for the blind awarded to the plaintiff *Espagne* was not a deductible benefit because the manifest policy of the Act brought it within the second category.

g We find it hard to say what the intention of Parliament was in relation to such circumstances as those of the present case when it conferred on contributors, and some who are not contributors, the right to national health service benefits. But it does seem clear that the effect, if not the intention, of this legislation was that these benefits should be conferred independently both of any loss of earning capacity and of any legal liability in another person to compensate the victim. A person injured entirely by his own fault or in an inevitable accident would be entitled to such benefits and so he would be in the perhaps unlikely event of his suffering no loss of earning capacity.

j

16 [1969] 1 All ER at 558, [1970] AC at 14

17 [1969] 1 All ER at 562, 579, [1970] AC at 19, 39

18 (1961) 105 CLR 569

19 [1969] 1 All ER 555, [1970] AC 1

20 (1961) 105 CLR at 573

1 (1961) 105 CLR at 599

In our judgment, such national health service benefits as this plaintiff will receive are not deductible. Either they constitute public benevolence, and there is no sensible reason for distinguishing between public and private benevolence, or they are akin to insurance. They are financed in part at least out of compulsory contributions paid by all, or most, members of the public of whom in many if not most cases an injured party will be one. In that sense only are these benefits provided at the public expense—and ‘uncovenanted’. The fact that this plaintiff has been injured so young and so badly that he can never hope to attain the privilege of paying his contributions seems to us no reason for considering the nature of the benefits to be different in his case and deductible from his prospective earnings. There is no principle—and, if we except *Oliver v Ashman*², no authority—which requires that such benefits should be deductible. Nor do we consider that public policy does so. It is unlikely that there will be many cases in which the question arises; and we see no reason to add to the difficulties of estimating pecuniary loss by requiring an assessment of a saving of hypothetical expenses out of kindness to the wrongdoer in those few cases where he has already benefited by not having to pay the plaintiff he has injured a substantial sum for future medical expenses.

If the benefit of free maintenance in a state hospital or institution is not to be taken into account, it cannot be and is not disputed that the allowance for loss of earnings should not be ‘modest’ but must be substantial. It is impossible to say what the plaintiff would have done or earned if he had reached normal manhood. Assuming that he had become a labourer earning £20 a week net at about 20 years of age—and that assumption may be too favourable to the defendant—the multiplier to be applied to the resulting annual loss of about £1,000 cannot be less than 12. The uncontradicted medical evidence is that he is likely to live into his forties. Give him £12,000 on that basis and halve it because the sum he is awarded for lost earnings will double in the decade before he would have earned it, and you get what we think is a fair figure of £6,000.

What sum should be added to that for the loss of the amenities of life and such mental pain as his limited awareness of it and his dreadful disabilities cause him? We have no doubt that the total sum of £16,000 fixed by the judge is far too low for these alone and they demand a figure much greater than £10,000. We must do what the judge tried to do following *H West & Son Ltd v Shephard*³: ‘Exclude from consideration the fact that little if any of the sum awarded is likely to be spent on him in any way that could diminish his plight or affect his loss’; and even if we take, as he did, the undissected total of £11,000 awarded to the plaintiff Oliver ten years ago as a yardstick (though a very short one) we must, with him, make some allowance for the fall in the value of money in the last decade.

Dr Henson was of the opinion, helpful though not conclusive, that the plaintiff’s condition was worse than a paraplegic’s and less bad than a quadriplegic’s. On 14th July this court affirmed an award by Forbes J of over £36,000, including £20,000 for pain and suffering and loss of amenities, to a paraplegic with unusual and serious elements in his condition, including physical pain: *Dougan v British Steel Corp*⁴. We were asked by counsel for the plaintiff to look at a judgment of Ackner J in *Alexander v Dispatch Motor Co*⁵, between the date of the hearing of this case before Lyell J and the date when he gave the judgment under appeal. Ackner J, on medical evidence which included that of the same Dr Henson, awarded a girl of 17, with brain damage which had produced a condition in some ways worse and in some ways better than the plaintiff’s, a total sum of £35,000, divided into £24,000 for loss of amenities and £11,000 for loss of earnings. (It is worth noting that counsel for the

2 [1961] 3 All ER 323, [1962] 2 QB 210

3 [1963] 2 All ER 625, [1964] AC 326

4 (14th July 1971) unreported

5 (1971) The Times, 13th February

a defendants conceded that the fact that she would be receiving from the state free board and lodging in the institution where she was likely to spend her life should *not* be reflected in the quantum of damages. There is accordingly no trace of that judge's scaling down her earnings by deducting living expenses.) We were told that there is an appeal from that judgment, but on liability only.

b We do not think that a detailed comparison of the facts of this case with that case, or indeed any other case, would give any real help in arriving at a fair measure of this plaintiff's damages. We would assess his enjoyment of life in all its aspects, what he has lost and what he feels about it, at £20,000; and when we include the nominal award for loss of expectation of life in that £20,000 or in the £6,000 for loss of earnings, we are not conscious of any overlap or duplication or of any need to reduce the total sum of £26,000.

c We allow this appeal and give the plaintiff judgment for 55 per cent of £26,000, i.e. £14,300.

Appeal allowed. Leave to appeal to the House of Lords.

Solicitors: *Druces & Attlee*, agents for *Damant & Sons*, Cowes, Isle of Wight (for the plaintiff); *J E Baring & Co* (for the defendant).

d Harold J Hughes Esq Barrister.

e Nippon Yusen Kaisha v Acme Shipping Corporation

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, CAIRNS AND ROSKILL LJ

11th OCTOBER 1971

f *Shipping – Charterparty – Construction – Baltime charterparty – Exemption clause – Damage – Second sentence of clause exempting owners from liability for ‘damage . . . whatsoever and howsoever caused’ – ‘Damage’ in this part of clause to be widely construed – Not limited to physical loss but covering financial loss – Claims by charterers for loss of time and for expenses resulting from master’s wrongful refusal to enter a port – ‘Damage’ wide enough to cover both heads of claim – Owners exempt from liability.*

g *Arbitration – Error on face of award – Application to set aside – Construction of clause in charterparty – Relevant clause not set out in award – Whether court entitled to look at charterparty – Proper course to raise point of construction by way of special case stated and not on motion to set aside award.*

h A dispute between the charterers and the shipowners was referred to arbitration. The umpire’s award showed that by a charterparty in the Baltime form the shipowners let the vessel *Charalambos N Pateras* on a time charter to the charterers. During the time charter the master of the vessel wrongfully refused to take the vessel into the port of Ampala to discharge a part cargo. On that account the charterers claimed damages under two heads. First, they claimed £5,037 1s 2d for loss of time, and deducted that sum from the hire payable by them, contending that because of the master’s refusal to enter the port they had been deprived of the use of the vessel for a number of days. Secondly, the charterers claimed £4,319 11s 1d as expenses to which they had been put because of the master’s refusal to enter the port. The shipowners sought to justify the master’s refusal, and in the alternative relied on an exemption in the charterparty to defeat the charterers’ claims. The umpire

awarded and adjudged that although the shipowners had failed to justify the master's refusal to enter the port, they had established that they were fully protected by 'the exemption clause in the charterparty' and that therefore the charterers' claims failed. The parties did not ask for a case stated, but the charterers applied by a motion to set aside the award on the ground that it was bad in law on the face of it. The exemption clause (cl 13) was not set out in the award but it was accepted that for the purposes of the motion the court could look at the clause. The first sentence of cl 13 made the owners responsible for certain specified types of delay and 'loss or damage to goods on board' when due to the default of the shipowners. The second sentence provided (in effect) that the shipowners were not to be responsible for those certain specified types of delay or loss or damage when not due to the owners' default, and then continued, in the second part of the sentence, '... nor for damage or delay whatsoever and howsoever caused even if caused by the neglect or default of their servants'. On the charterers' appeal from the dismissal of their motion for an order to set aside the award for error of law on its face,

Held—The appeal would be dismissed since the shipowners were exempt from liability for both the charterers' claims by virtue of the exemption in the second part of the second sentence of cl 13 for the following reasons—

(i) the word 'damage' there, being linked with the words 'whatsoever and howsoever caused', should not be limited to physical damage, but should be widely construed to include financial loss, 'damage' in this part of cl 13 being used in a wider sense than in the first sentence of the clause, where it was limited to physical damage to goods (see p 39 a, b, e and f and p 40 g, post);

(ii) (per Roskill LJ) the word 'damage' in the second sentence of cl 13 should be given a wide construction to include financial loss since the object of cl 13 was to establish a mutual code of shipowners' and charterers' responsibilities for loss or damage whether physical or financial, and to protect shipowners as far as possible from claims other than claims which fell specifically within the first sentence of the clause (see p 40 d to f, post);

(iii) accordingly 'damage' in the second sentence of cl 13 was wide enough to cover both the heads of claim made by the charterers (see p 39 c, d and g, post).

Louis Dreyfus et Cie v Parnaso Cia Naviera SA [1959] 1 All ER 502 considered.

Per Roskill LJ. Having regard to the form of the award it is extremely doubtful whether it was proper to look at either the charterparty or cl 13. If the charterers wished to raise a point on the construction of cl 13, it should have been raised by way of a special case stated for the decision of the court and not *ex post facto* on a motion to set aside the award for alleged error of law (see p 39 h to p 40 b, post).

Notes

For the construction of exceptions in a charterparty, see 35 Halsbury's Laws (3rd Edn) 256, para 393.

For setting aside an award for error in law on the face of the award, see 2 Halsbury's Laws (3rd Edn) 60, 61, para 127.

Cases referred to in judgments

Absalom (F R) Ltd v Great Western (London) Garden Village Society Ltd [1933] AC 592, [1933] All ER Rep 616, 102 LJKB 648, 149 LT 193, 2 Digest (Repl) 650, 1718.

Blaiber (D S) & Co Ltd v Leopold Newborne (London) Ltd [1953] 2 Lloyds Rep 427.

Champsey Bhara & Co v Jivraj Balloo Spinning and Weaving Co Ltd [1923] AC 480, [1923] All ER Rep 235, 92 LJ PC 163, 129 LT 166, 2 Digest (Repl) 649, 1710.

Dreyfus (Louis) et Cie v Parnaso Cia Naviera SA [1959] 1 All ER 502, [1959] 1 QB 498, [1959] 2 WLR 405; *rvsd* CA [1960] 1 All ER 759, [1960] 2 QB 49, [1960] 2 WLR 637, 41 Digest (Repl) 201, 324.

- a Istros (Steamship) (owner) v F W Dahlstroem & Co* [1931] 1 KB 247, 100 LJKB 141, 144 LT 124, 41 Digest (Repl) 219, 469.

Case also cited

Elderslie Steamship Co v Borthwick [1905] AC 93; *affg sub nom Borthwick v Elderslie Steamship Co* [1904] 1 KB 319.

b Appeal

- This was an appeal by the charterers, Nippon Yusen Kaisha, from the order of Mocatta J, dated 1st April 1971, dismissing the charterers' application by notice of motion dated 21st December 1970, for an order that the award of an umpire, Sydney Fowler Esq, dated 25th November 1970, in favour of the shipowners, Acme Shipping Corpn, be set aside on the ground that the award contained an error of law on its face. The award, so far as material, stated that by a charterparty in the Baltime form dated 10th March 1969 the shipowners let their vessel *Charalambos N Pateras* to the charterers on the terms therein defined. A dispute arose thereunder, the charterers alleging that during the charterparty period the master had wrongfully refused to take his ship into the port of Ampala and there discharge a part cargo as ordered by them. The charterers therefore claimed (a) a declaration that they were justified in having retained from hire due from them a sum equal to £5,037 1s 2d representing loss of time (or, alternatively, damages in the same amount); and (b) damages of £4,319 11s 1d representing the additional expenses which they had to meet as a result. The shipowners sought to justify the master's refusal and, in the alternative relied on an exemption clause in the charterparty to defeat these claims. Moreover they sought the return of £5,037 1s 2d that had been retained from the hire by the charterers. The umpire, having accepted the reference of the dispute and having heard the respective arbitrators and duly considered their submissions and the evidence in support of them, awarded and adjudged that, although the shipowners had failed to justify the refusal of the master to enter the port of Ampala, they had established that they were fully protected by 'the exemption clause in the charter-party' and that therefore the charterers failed in toto.

R A MacCrindle QC and *A G S Pollock* for the charterers.
Anthony Evans QC and *A D Colman* for the shipowners.

- LORD DENNING MR.** This is a motion to set aside an umpire's award on the ground that it is bad in law on the face of it. The award shows that on 10th March 1969 the shipowners let the vessel named *Charalambos N Pateras* on a time charter for three to five months to the charterers, Nippon Yusen Kaisha. It was in the Baltime form. During the time charter she approached the port of Ampala, which is in Nicaragua, Central America. The master wrongfully refused to take his ship into the port of Ampala. On that account the charterers claimed damages under two heads. First, £5,037 1s 2d. This was a claim for loss of time. The charterers said that, by reason of the master's refusal, they were deprived of the use of the vessel for a number of days and deducted that sum from the hire payable by them. Second, £4,319 11s 1d. These were expenses to which the charterers were put because of the master's refusal. I expect the vessel had to go to some other port, or to unload into lighters.
- The shipowners relied on an exemption clause in answer to the claim. The umpire made his award in these words:

'I award and adjudge (a) that, although the [shipowners] have failed to justify the refusal of the Master to enter the port of Ampala, they have established that they are fully protected by the exemption clause in the charterparty and that therefore the [charterers] fail in toto ...'

The parties did not ask for a case stated. The charterers now say that the award is bad in law on the face of it. The exemption clause is not set out in the award, but for the present purposes it is accepted that we can look at it. The exemption clause is cl 13. It goes back a very long time. The only case where it has been considered before is *Owner of Steamship Istros v F W Dahlstroem & Co*¹. It can be divided into four sentences:

First

'The Owners only to be responsible for delay in delivery of the Vessel or for delay during the currency of the Charter and for loss or damage to goods on board if such delay or loss has been caused by want of due diligence on the part of the Owners or their Manager in making the Vessel seaworthy and fitted for the voyage or any other personal act or omission or default of the Owners or their Manager.'

Second

'The Owners not to be responsible in any other case nor for damage or delay whatsoever and howsoever caused even if caused by the neglect or default of their servants.'

Third

'The Owners not to be liable for loss or damage arising or resulting from strikes, lock-outs or stoppage or restraint of labour (including the Master, Officers or Crew) whether partial or general.'

Fourth

'The Charterers to be responsible for loss or damage caused to the Vessel or to the Owners by goods being loaded contrary to the terms of the Charter or by improper or careless bunkering or loading, stowing or discharging of goods or any other improper or negligent act on their part or that of their servants.'

The first sentence makes the owners responsible for certain specified types of delay or loss or damage when it is due to the personal default of the owners or their manager. The first part of the second sentence says that the owners are not to be responsible for those specified types 'in any other case', i.e. when it is not due to the personal default of the owners or their manager. Seeing that the delay or loss or damage here does not come within those specified types, those parts of the clause do not come into question here.

The second part of the second sentence states: '... nor for damage or delay whatsoever and howsoever caused even if caused by the neglect or default of their servants.' This is the part here in question. The shipowners say that they were exempt from liability for both heads of claim here. The principal contest is as to the word 'damage'. Counsel for the charterers has urged that that refers only to physical damage. It takes its colour, he says, from the words in the first sentence 'damage to goods on board'. Counsel for the shipowners says that 'damage' refers not only to physical damage but also to financial loss or damage. He points out that in the third and fourth sentences 'damage' clearly includes financial loss and damage.

The Gencon charter contains words which are somewhat similar. It says: '... the owners are responsible for no loss or damage or delay arising from any other cause whatsoever.' These words were construed by Diplock J in *Louis Dreyfus et Cie v Parnaso Cia Naviera SA*². He held that they relate to loss of, or damage to the goods, or delay in delivery of the goods. But he based his judgment on the context in which those words occurred, especially the first paragraph of that clause in the Gencon

¹ [1931] 1 KB 247

² [1959] 1 All ER 502 at 507, [1959] 1 QB 498 at 514

a charter. It is interesting to notice that Diplock J³ indicates that it might have been different if the words had been 'no loss or damage or delay whatsoever'.

In the present clause in the Baltime charter, it seems to me that the second part of the sentence goes beyond the specified types which have been previously mentioned. The words 'damage or delay whatsoever and howsoever caused' mean damage of any kind whatsoever, including therein not only physical damage but also financial loss. The learned judge took this view, and I agree with him. The word 'damage'

b exempts the shipowners from the whole of the claim, both the loss of time and also the expenses.

It is unnecessary, therefore, to go into the meaning of the word 'delay' which follows 'damage'. Counsel for the charterers used it in his argument to show that 'damage' was not as comprehensive as I have mentioned; but one knows that in documents of this kind there is a good deal of repetition or overlapping; and that is

c so here. If it had been necessary to tell whether this claim was a claim for 'delay' or whether it was a claim for refusal to obey the charterers' orders, there might be quite a nice argument. But, from my point of view, I think the word 'damage' is wide enough to cover both the heads of claim in this case. At any rate, I do not see any grounds for saying that the umpire erred in law in so construing it.

d I, therefore, would dismiss the appeal.

CAIRNS LJ. I agree.

The construction of this clause is made difficult for two main reasons: first, that on any construction there is a certain amount of surplusage in words; and, secondly, that while the word 'damage' is certainly used in the first sentence of the clause as

e meaning physical damage to goods, it is certainly used in a wider sense in the fourth sentence, and it is probably used in a wider sense in the third sentence. The issue here is what it means in the second part of the second sentence. The striking feature, however, of the second part of the second sentence is that the word 'damage' is there linked with the words 'whatsoever and howsoever caused'; and, taking those words

f into account, I reach the same conclusion as Lord Denning MR, that 'damage' is to be construed widely in this second half of the second sentence, not limited to physical damage to goods; and accordingly in my opinion the learned judge reached a right decision on the construction and the appeal should be dismissed.

ROSKILL LJ. I agree that this appeal should be dismissed, and I only add a very few words out of respect for counsel for the charterers' argument. There are two

g points in this case which I should mention. First, for my part I feel somewhat disturbed at the course adopted before Mocatta J in that, notwithstanding the form of the award of the very experienced umpire, it was apparently agreed by counsel and the learned judge that the judge might look at cl 13 of the Baltime charter. The judge thought that it was sufficient for him to look only at that clause. In the event, of course, he was right in that view. But, with great respect to him, it cannot

h be right in principle for a court, if it is to look at all at a document which is alleged to be incorporated in an award, to look only at part of that document. The matter, however, goes rather further than that. Counsel for the charterers referred to the well-known case of *F R Absalom Ltd v Great Western (London) Garden Village Society Ltd*⁴ as justifying the court looking at the whole charterparty including cl 13. The matter was not argued before us at any length, but it seems to me that, having regard to the

j form of the award, it is extremely doubtful whether it was proper in the circumstances to look at either the charterparty or that clause at all, particularly having regard to the earlier decision of the Judicial Committee in *Champsey Bhara & Co v Jivraj Balloo Spinning and Weaving Co Ltd*⁵ and also to the decision of this court in

3 [1959] 1 All ER at 507, [1959] 1 QB at 514

5 [1923] AC 480, [1923] All ER Rep 235

4 [1933] AC 592, [1933] All ER Rep 616

*D S Blaiber & Co Ltd v Leopold Newborne (London) Ltd*⁶. I refer in particular to the judgment of Denning LJ⁷. I only mention this lest otherwise the course adopted in this case should be thought to be the practice of the Commercial Court. What was done here must not become, as it were, the thin end of a judicial wedge, permitting an attack on the sanctity of arbitrators' and umpires' awards, particularly when neither party has seen fit to ask for a special case. It would have been much better, as Mocatta J pointed out, if it had been wished to raise the point of construction of cl 13, that it should be raised by way of a special case stated for the decision of the court and not ex post facto, on a motion to set aside the award for alleged error of law, a motion which in my judgment fails. I turn to deal with the second matter.

The real issue is the meaning if the word 'damage' in line 99 of the charterparty. Counsel for the charterers has argued that it has a narrow meaning, saying that it takes its colour from the preceding language of the clause. Counsel for the shipowners, on the other hand, has said it has a wide meaning, and that notwithstanding the meaning of the word earlier in the clause, nevertheless 'damage' in line 99 is wide enough to cover not only physical loss and damage, but also financial loss of any kind. The point is not entirely easy. It is for the shipowner to bring himself clearly within any exception on which he seeks to rely. But when one looks at the pattern of this clause, it seems to me that counsel for the shipowners is right when he says that the object of the clause is to establish a mutual code of shipowners' and charterers' responsibilities—not only for physical loss or damage, but for other kinds of loss and damage as well whether physical or financial. It is true that the clause is not very happily drawn. It starts by accepting liability for certain specified types of loss and damage. It then goes on to exclude certain other types of loss and damage. Not surprisingly, having regard to the somewhat illogical order of the clause, trouble arises when one has to decide whether the word 'damage' in line 99 of the charterparty would have a wide or a narrow construction; but, having regard to the general nature of this clause and the obvious intent to protect the shipowner as far as possible from claims other than claims of the kind and description which fall specifically within the words of the first sentence of the clause, I agree that the word 'damage' should be given a wide meaning and that it does not in any way extend its natural meaning too widely to give it the meaning for which the shipowners contend. It is not necessary in these circumstances to express any concluded view on the meaning of 'delay'. I see great force in counsel for the charterers' argument on this issue, but it seems to me that on the skeleton facts set out in the award on which it is sought to set it aside, it is impossible to form any view whether the relevant claim would or would not fall within the exception of 'delay'.

For these reasons I agree with the learned judge and the umpire: I think they both reached the right conclusion, and I agree that the appeal fails for the reasons Lord Denning MR and Cairns LJ have given.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: Middleton, Lewis & Co (for the charterers); William A Crump & Son (for the shipowners).

Wendy Shockett Barrister.

⁶ [1953] 2 Lloyd's Rep 427

⁷ [1953] 2 Lloyd's Rep at 429

^a Blausten v Inland Revenue Commissioners

COURT OF APPEAL, CIVIL DIVISION

SALMON, BUCKLEY AND ORR LJJ

21ST, 22ND OCTOBER 1971

- ^b Surtax – Settlement – Treatment of income as settlor's income – Discretionary power for benefit of settlor or spouse of settlor – Adjustment to exclude power – Settlor's wife included in specified class of beneficiaries – Power of appointment in favour of one or more of specified class other than wife in settlor's lifetime – Power to appoint any person other than settlor member of specified class with written consent of settlor – Purported exercise of power of appointment in favour of members of specified class – Appointment resettling capital 'upon the like trusts' subject to the omission of wife or widow from specified class – Validity of appointment – Effect – Whether power remaining to appoint wife to specified class – Whether power remaining to pay or apply for benefit of wife any part of income or property – Finance Act 1958, s 22 (1), (5).

- ^d Settlement – Trust – Uncertainty – Certainty of objects – Power of selection – Bare power not coupled with a trust – Settlement containing discretionary trusts in favour of specified class of beneficiaries – Power of trustees with written consent of settlor to include 'any other person or persons except the settlor' in the specified class – Whether power void for uncertainty.

Power of appointment – Exercise – Validity – Settlement – Discretionary trusts in favour of specified class of beneficiaries – Power to appoint that capital should be held on trust for any one of specified class – Specified class including settlor's wife or widow – Appointment of capital to be held on settlement trusts subject to the exclusion of settlor's wife or widow from specified class – Validity of appointment.

- ^e In 1956 the taxpayer made a settlement containing discretionary trusts for the benefit of members of a specified class which included the taxpayer's 'wife [or] widow'. The trustees were to apply the income of the trust fund for the maintenance, support or benefit of any one or more of the specified class in such manner and such proportions as they thought fit. The settlement conferred power on the trustees during the trust period to pay or apply capital of the trust fund to or for the benefit of any one or more of the specified class, and also power to appoint in writing 'that the whole or any part or parts of such capital shall be held upon such trusts (either revocable or irrevocable) for the benefit of any one or more of the specified class (but not so as to confer any benefit during the lifetime of the [taxpayer] in the capital or income of the Trust Fund upon the wife of the [taxpayer]) ...' Paragraph 5 of Sch 2 to the deed provided: 'The Trustees may with the previous consent in writing of the [taxpayer] appoint that any other person or persons except the [taxpayer] shall be included in the Specified Class ...' The settlement therefore fell within the terms of s 22 (1)^a of the Finance Act 1958 in that the taxpayer's wife was included in the class of beneficiaries, and thus rendered the taxpayer liable to surtax on the settlement income. Section 22 (5)^a of the 1958 Act however allowed the trustees by making

- ^a Section 22, so far as material, provides: '(1) If and so long as the terms of any settlement ... are such that any person has or may have power, whether immediately or in the future, and whether with or without the consent of any person—(a) to pay or apply to or for the benefit of the settlor or the wife or husband of the settlor the whole or any part of the income or property which may at any time arise under or be comprised in the settlement ... being a power exercisable at his discretion, any income arising under the settlement in any year of assessment ... shall ... be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year ... (5) Where, in the case of any settlement made before the ninth day of July, nineteen hundred and fifty-eight, any income arising under the settlement would, by virtue of the foregoing provisions of this section,

(Continued at foot of p 42)

appropriate adjustments to the settlement within a specified period to escape the charge imposed by s 22 (1). In order to take advantage of s 22 (5) the trustees under their power contained in the settlement irrevocably appointed that all the capital of the trust fund should be held on the like trusts and subject to the like powers and provisions as in the settlement save (a) that in the definition of the specified class the words 'wife widow' should be deemed to have been omitted and (b) that the words 'and the widow of the [taxpayer]' should be inserted after the words 'the specified class' in the power to advance capital and in the power of appointment. In the High Court^b it was held that despite the purported exercise of the power of appointment the trustees still had, or might have, power, whether immediately or in the future and whether with or without the consent of any person, to pay or apply to or for the benefit of the taxpayer's wife the whole or any part of the income or capital of trust fund since (a) the appointment was not a valid exercise of the power and wholly failed, and (b) even if the appointment were valid the trustees still had power under para 5 of Sch 2 to the settlement to reintroduce the taxpayer's wife into the specified class; accordingly, by virtue of s 22 (1) of the 1958 Act, the taxpayer was assessable to surtax on the basis that the income of the trust fund was to be treated as his income. The taxpayer appealed.

Held – The appeal would be allowed for the following reasons—

(i) although the immediate effect of the appointment was merely to exclude the taxpayer's wife from the objects of the discretionary trusts of the income, what was done was something that was clearly within the terms of the power of appointment; an appointment resettling trust funds on trusts identical with the existing trusts but excluding a particular power in the trustees was a good exercise of the power (see p 47 f to p 48 a and p 51 g, post); *Muir v Inland Revenue Comrs* [1966] 3 All ER 38 applied;

(ii) in the context of the appointment, the effect of which was to redeclare the trusts of the settlement subject to the modification stated and with the express embargo on any appointment which would confer any benefit on the taxpayer's wife during his lifetime, the power of the trustees under para 5 of Sch 2 to appoint that any person, other than the taxpayer, should be a member of the specified class, must be read as subject to the qualification that the trustees could not properly exercise the power so as to reintroduce the taxpayer's wife to the specified class during his lifetime, for such an exercise would be clearly contrary to the whole scheme and intention of the beneficial trusts as recast by the appointment; furthermore, since the power could only be exercised with the taxpayer's consent and in the circumstances it was inconceivable that he would consent to the reintroduction of his wife to the specified class in his lifetime, thereby defeating the object of avoiding liability to surtax on his income, the appointment did not have the effect of giving the trustees power to confer a benefit on the taxpayer's wife in the future by reintroducing her to the specified class (see p 48 j to p 49 e, p 51 g and p 52 g to p 53 b, post).

Per Curiam. It was not open to the taxpayer to argue that the power contained in para 5 of Sch 2 to the settlement was void for uncertainty. The power was not one which the trustees were under a duty to exercise; it was a power the exercise of which they were under a duty to consider from time to time. If the class of persons

(Continued from p 41)

fall to be treated . . . as the income of the settlor . . . but would not fall to be so treated apart from those provisions, it shall not be so treated if—(a) no power by reason of which it would fall to be so treated has been exercised after the eighth day of July, nineteen hundred and fifty-eight, or is or can become exercisable after the fifth day of April, nineteen hundred and fifty-nine, or such later date as the Commissioners of Inland Revenue may in any particular case allow; and (b) neither the settlor nor the wife or husband of the settlor has received or is entitled to any consideration or benefit in connection with the fulfilment of the condition set out in paragraph (a) of this subsection.

- a* to whose possible claims they would have to give consideration were so wide that it really did not amount to a class in any true sense at all, that would be a duty which it would be impossible for them to perform and the power would be invalid on that ground. Although the trustees had power to introduce to the class any person other than the taxpayer, that power could only be exercised with the written consent of the taxpayer and hence only during his lifetime. It could not therefore be said that the taxpayer had failed to set any metes and bounds to the beneficial interests which he intended to create or permit to be created under the settlement (see p 50 d to f and p 51 g, post).
- b*

Decision of Goff J [1971] 3 All ER 1085 reversed.

Notes

- c* For uncertainty of objects of a trust, see 38 Halsbury's Laws (3rd Edn) 835, 836, para 1399, and for certainty in relation to trust powers, see 30 Halsbury's Laws (3rd Edn) 213, para 375, and for cases on the subject, see 47 Digest (Repl) 46-49, 303-325, and 58-61, 419-450.

For treatment of settlement income as income of the settlor, see 20 Halsbury's Laws (3rd Edn) 587, 588, paras 1151-1153, and for cases on the subject, see 28 (1) Digest (Reissue) 435-439, 1566-1578

- d* For the Finance Act 1958, s 22, see 38 Halsbury's Statutes (2nd Edn) 500.
- In relation to the year 1970-71 and subsequent years of assessment s 22 of the Finance Act 1958 has been repealed by the Income and Corporation Taxes Act 1970, Sch 16, and replaced by ss 448, 449 of that Act.

Cases referred to in judgment

- e* *Gulbenkian's Settlement Trusts, Re, Whishaw v Stephens* [1968] 3 All ER 785, [1970] AC 508, [1968] 3 WLR 1127, Digest (Cont Vol C) 806, 1330b.
- Inland Revenue Comrs v Broadway Cottages Trust, Inland Revenue Comrs v Sunnyslands Trust* [1954] 3 All ER 120, [1955] Ch 20, [1954] 3 WLR 438, 35 Tax Cas 577, 47 Digest (Reissue) 48, 315.
- McPhail v Doulton* [1970] 2 All ER 228, [1971] AC 424, [1970] 2 WLR 1110, Digest (Cont Vol C) 805, 1324d.
- f* *Morice v Durham (Bishop)* (1805) 10 Ves 522, [1803-13] All ER Rep 451, 32 ER 947, 47 Digest (Repl) 47, 308.
- Muir v Inland Revenue Comrs* [1966] 3 All ER 38, [1966] 1 WLR 1269, 43 Tax Cas 367, Digest (Cont Vol B) 419, 1287b.
- Park, Re, Public Trustee v Armstrong* [1932] 1 Ch 580, [1931] All ER Rep 633, 101 LJCh 295, 147 LT 118, 37 Digest (Repl) 403, 1328.
- g*

Appeal

- The taxpayer, Cyril Blausten, appealed to the Special Commissioners of Income Tax against the following assessments to surtax: 1961-62 £1,824; 1962-63 £5,871; 1963-64 £5,863. The question for decision was whether income of a trust created by a deed of settlement dated 19th July 1956 and made between the taxpayer and the trustees (Malcolm Slowe and others), having regard to the terms of a deed of appointment supplemental thereto dated 19th January 1959, was required by virtue of the provisions of s 22 of the Finance Act 1958 (relating to settlements containing a discretionary power for the benefit of the settlor etc) to be treated as income of the taxpayer for surtax purposes.
- h*

The settlement recited:

- j* '(A) The [taxpayer] has immediately before the execution hereof paid to the Trustees the sum of One hundred pounds and has transferred to the Trustees the investments specified in the First Schedule hereto
- '(B) In this Settlement "the specified class" means the persons for the time being alive and included amongst the persons and classes of persons specified in the Second Schedule hereto

(C) The [taxpayer] is desirous of making provision for the specified class in manner hereinafter appearing and for this purpose has irrevocably directed the Trustees to hold the said sum and said investments upon the trusts declared by this Settlement concerning the same' a

and provided: 'THIS DEED made in consideration of the natural love and affection of the [taxpayer] WITNESSETH' (inter alia) as follows:

'1. THE Trustees shall henceforth stand possessed of the said sum and said investments and all other the property from time to time representing the same or otherwise subject to the trusts hereof (all of which are hereinafter collectively referred to as "the Trust Fund") upon trust . . . b

'2. THE Trustees shall hold the Trust Fund on the trusts following namely:—

'(A) During the period commencing on the date hereof and ending on the expiration of twenty years after the death of the last survivor of all the persons now living who are either members of the specified class or lineal descendants of His late Majesty King George V (which period is hereinafter called "the Trust Period") the Trustees shall pay divide or apply the income of the Trust Fund to or between or for the maintenance support or benefit of all or any one or more of the specified class in such proportions and in such manner as the Trustees shall in their uncontrolled discretion think fit PROVIDED ALWAYS that the Trustees may at any time or times during the Trust Period if in their uncontrolled discretion they think fit pay or apply the whole or any part or parts of the capital of the Trust Fund to or for the benefit of any one or more of the specified class or in writing appoint that the whole or any part or parts of such capital shall be held upon such trusts (either revocable or irrevocable) for the benefit of any one or more of the specified class (but not so as to confer any benefit during the lifetime of the [taxpayer] in the capital or income of the Trust Fund upon the wife of the [taxpayer]) and subject to such powers and discretions exercisable by any person or persons (other than the [taxpayer] acting solely) and generally in such manner as the Trustees shall think fit but so that all interests so created shall vest within the Trust Period c

'(B) Subject to the trusts aforesaid the Trustees shall hold the Trust Fund in trust as to both capital and income for the children of the [taxpayer] living at the date of this Settlement in equal shares as an accretion to their respective residuary estates.' d

Schedule 2 (the heading of which was 'THE SPECIFIED CLASS') was as follows:

'1. The wife widow children and remoter issue of the [taxpayer]. 2. The brothers and sisters of the [taxpayer] and their respective children and remoter issue. 3. The spouses widows and widowers of any of the children and remoter issue aforesaid. 4. For the purpose of the foregoing provisions:—(a) A widow or widower shall not become excluded therefrom by reason of any remarriage; and (b) A child shall be deemed to include a stepchild and an adopted child and "children" and "remoter issue" shall be construed accordingly. 5. The Trustees may with the previous consent in writing of the [taxpayer] appoint that any other person or persons except the [taxpayer] shall be included in the Specified Class as from the date of any such appointment the person or persons specified therein shall be included accordingly.' e

The appointment recited:

'(A) By Clause 2 (a) of the Settlement it is inter alia provided that the Trustees thereof may (subject as therein mentioned) in writing appoint that the whole or any part of the funds subject to the trusts thereof shall be held upon such revocable or irrevocable trusts for the benefit of the specified class (as defined by the Settlement) or any of them and subject to such powers and discretions and generally in such manner as such Trustees shall think fit f

- a* (B) The Appointors are the present Trustees of the Settlement and have determined to make such irrevocable declaration and appointment as is hereinafter contained' and provided:

- b* 'THIS DEED WITNESSETH and the Trustees hereby irrevocably declare and appoint that henceforth and until the expiration of the Trust Period as defined in the said Clause 2 (a) of the Settlement all the property from time to time representing the capital subject to the trusts of the Settlement (hereinafter called "the Trust Fund") shall be held upon the like trusts and with and subject to the like powers and provisions as are declared and contained in the Settlement in all respects as if the same were herein repeated save only that:—(a) In the definition of the specified class contained in the Schedule to the Settlement the words "wife widow" shall be deemed to have been omitted; and (b) In clause 2 (a) of the Settlement there shall be deemed to have been inserted after the words "the specified class" where those words occur for the third and fourth times the words "and the widow of the [taxpayer]".'
- c*

- d* It was contended on behalf of the taxpayer: (1) that in ascertaining the scope of the power of inclusion in the specified class under para 5 of Sch 2 regard should be had to the terms of the settlement as originally made, without reference to the provisions contained in the appointment; (2) that accordingly the provisions contained in sub-para (a) of the appointment as to the omission of the words 'wife widow' in the definition of the specified class contained in the schedule did not have the effect of widening the scope of para 5 thereof so as to enable the trustees with the consent in writing of the taxpayer to appoint that his wife (as being within the words 'any other person or persons') be included in the specified class; (3) that any appointment purporting to include the wife of the taxpayer in the specified class would be an excessive use of the powers of the trustees and, therefore, void in that respect; (4) that the provisions of s 22 of the 1958 Act were not therefore applicable to the settlement for the relevant years

- f* It was contended on behalf of the Crown: (1) that in ascertaining the scope of the power of inclusion in the specified class under para 5 of Sch 2 regard should be had to the terms of the schedule as modified by the provisions of the appointment; (2) that the provisions contained in sub-para (a) of the appointment as to the omission of the words 'wife widow' in the definition of the specified class contained in the schedule had the effect consequentially of bringing the wife within the scope of para 5 and so empowered the trustees with the consent in writing of the taxpayer to appoint under that paragraph that his wife (as being within the words 'any other person or persons') be included in the specified class; (3) that any such appointment would be a competent exercise of the powers of the trustees; (4) that the provisions of s 22 of the Finance Act 1958 were therefore applicable to the settlement for the relevant years; (5) alternatively, that if the appointment went beyond the terms of cl 2 (A) of the settlement because it did confer a benefit 'during the lifetime of the [taxpayer] in the capital or income of the Trust Fund upon the wife of the [taxpayer]', the appointment would be invalid and the position would fall to be considered on the terms of the settlement alone, and that in that event the provisions of s 22 would likewise be applicable.
- g*
- h*

The commissioners' decision was as follows:

- j* 'We the Commissioners who heard the appeal were of opinion that the Appointment did not go beyond the power of appointment conferred by the Settlement and that it was not accordingly invalid. As to the effect of the Appointment, we considered that on a proper construction of the provisions thereof it required the specified class as set out in the above-mentioned Second Schedule to be ascertained as if the words "wife widow" in paragraph 1 of that

Schedule had been omitted, with such consequential effect as that might have on subsequent provisions of the Schedule, and accordingly that after the making of the Appointment the words "any other person or persons" in paragraph 5 of the Schedule fell to be construed as including the wife of the [taxpayer].'

They held therefore that in principle the appeal failed, and on the basis of that decision adjusted the assessments as follows: 1961-62 £1,798; 1962-63 £5,560; 1963-64 £5,659.

On 5th July 1971 as reported, at [1971] 3 All ER 1085, Goff J dismissed the taxpayer's appeal by way of case stated against that decision. The taxpayer appealed to the Court of Appeal.

J E Vinelott QC and S J L Oliver for the taxpayer.

B L Bathurst QC and P W Medd for the Crown.

BUCKLEY LJ delivered the first judgment at the invitation of Salmon LJ. This is an appeal against a decision of Goff J¹ affirming a decision of the Special Commissioners of Income Tax who had upheld assessments to surtax on the appellant taxpayer in respect of the fiscal years 1961-62 to 1963-64 inclusive. The assessments were made under the provisions of the Finance Act 1958, s 22, and were rightly made if, on the facts, it was the case that by the terms of the relevant settlement in the relevant years the trustees of the settlement had or might have power whether immediately or in the future and whether with or without the consent of any person to pay or apply to or for the benefit of the taxpayer's wife the whole or any part of the income or capital of the trust fund.

The taxpayer made a settlement in July 1956, the relevant terms of which are set out in the case stated², and of the beneficial trusts the first was a discretionary trust of income for the members of a specified class during a specified trust period of considerable duration. Particulars of the specified class in question were set out in Sch 2 to the settlement and that class included the wife or widow of the taxpayer. The next provision in the beneficial trusts is a power in cl 2 (A) for the trustees during the trust period to pay or apply capital of the trust fund to or for the benefit of any one or more of the specified class and that is followed by a power of appointment conferred on the trustees, which is of importance in the case, in the following terms:

'... or in writing appoint that the whole or any part or parts of such capital shall be held upon such trusts (either revocable or irrevocable) for the benefit of any one or more of the specified class (but not so as to confer any benefit during the lifetime of the [taxpayer] in the capital or income of the Trust Fund upon the wife of the [taxpayer]) and subject to such powers and discretions exercisable by any person or persons (other than the [taxpayer] acting solely) and generally in such manner as the Trustees shall think fit but so that all interests so created shall vest within the Trust Period.'

Then there follows an ultimate trust of the capital and income of the trust fund for the children of the settlor living at the date of the settlement in equal shares. It has been questioned whether the words in parenthesis in the power of appointment which I have read qualify only the power of appointment or whether they also qualify the power to advance capital, but nothing I think turns on that.

Schedule 2 to the deed, headed 'THE SPECIFIED CLASS', contains the following in para 5:

'The Trustees may with the previous consent in writing of the [taxpayer] appoint that any other person or persons except the [taxpayer] shall be included

¹ [1971] 3 All ER 1085, [1971] 1 WLR 1696

² See pp 43, 44, ante

- a in the Specified Class and as from the date of any such appointment the person or persons specified therein shall be included accordingly.'

After the enactment of the Finance Act 1958, and with the fairly clear intention of taking the benefit of s 22 (5), the trustees executed an appointment, and by that deed, which was expressed to be made under the power contained in cl 2 (A) of the settlement which is the power of appointment to which I have referred, the trustees

b irrevocably appointed that thenceforth until the expiration of the trust period all the property from time to time representing the capital of the trust fund should be held on the like trusts and with and subject to the like powers and provisions as were declared and contained in the settlement in all respects as if the same were therein repeated, save only that (a) in the definition of the specified class contained in Sch 2 to the settlement the words 'wife widow' should be deemed to have been

c omitted and (b) in cl 2 (A) of the settlement there should be deemed to have been inserted after the words 'the specified class' where those words occur in the power to advance capital and in the power of appointment but not elsewhere the words 'and the widow of the [taxpayer]'.

The question for consideration is whether in the three fiscal years in question in that state of affairs the case is one which falls within the terms of s 22 or not. The

d learned judge disposed of the case on a point which had not been raised before the Special Commissioners at all, which he shortly expressed in these terms³:

'In my judgment, the appointment was not effective at all. I do not think that an appointment of the capital on the like trusts and with and subject to the like powers and provisions as were declared and contained in the settlement,

e with the two modifications specified, was really an appointment of the capital for the benefit of any one or more of the specified class at all. It was really simply an attempt to delete members from the specified class, which there was no power to do, and then to read in the widow of the taxpayer as a possible object of the discretionary trust, leaving her still with nothing but a spes.'

f The appointment was in terms a resettlement on new trusts of the capital of the trust fund. The new trusts were trusts which were declared referentially by reference to the settlement, but they differed in the particular respects stated in the appointment from the trusts of the settlement. The appointment was only to operate during the trust period and it is I think right that the only operative effect of the appointment was to take the taxpayer's wife out of the specified class for the purposes

g of the discretionary trust and of the power to advance capital and of the power of appointment and to restore her to the class of persons in whose favour capital could be advanced or benefits could be conferred under an appointment as from the time when she might become the widow of the testator. The immediate effect was to exclude her from the objects of the discretionary trusts of the income and that was clearly one of the major objectives of the exercise.

h In my judgment, however, what was done by the deed of appointment was something which was clearly within the terms of the power of appointment. It was an appointment under which the capital was directed to be held on trusts for the benefit of members of the specified class and, although the objective of the trustees in making the appointment may not have been the kind of objective which the taxpayer had in mind when he conferred the power of appointment on the trustees, the

i appointment nevertheless in my judgment falls within the power.

A rather similar question was considered in the Court of Appeal in *Muir v Inland Revenue Comrs*⁴ and this court came to the conclusion that a resettlement of the trust fund in that case on trusts identical with the existing trusts but excluding a

3 [1971] 3 All ER at 1091, [1971] 1 WLR at 1701, 1702

4 [1966] 3 All ER 38, [1966] 1 WLR 1269

particular power in the trustees was a good exercise of the power. Similarly in the present case in my judgment this appointment was a good exercise of power and accordingly I do not feel able to agree with the view which the learned judge⁵ took in the passage which I have read. a

It is necessary, therefore, to consider what the effect of the appointment was and its relevance to s 22 of the Act of 1958. Before the Special Commissioners an initial point was taken which is no longer pursued and which I need do no more than state fairly shortly. It was argued before them that in the settlement in its original form 'other person or persons' in para 5 could not have included the taxpayer's wife because she was a member of the specified class; so in the referential trusts declared by the deed of appointment para 5 should be construed in precisely the same sense and the taxpayer's wife should not be treated as being within the class of persons who might be introduced into the specified class under that power. That argument, as I say, is no longer pursued and I think rightly no longer pursued, for I do not think it could be a valid argument. b

The next point which is taken by the taxpayer is this. Counsel for the taxpayer draws attention to the fact that the power of appointment itself is subject to the qualification contained in the words in parenthesis: c

'(but not so as to confer any benefit during the lifetime of the [taxpayer] in the capital or income of the Trust Fund upon the wife of the [taxpayer])'.

Counsel says having regard to the circumstances in which the appointment was made and the clear intention to avoid liability to tax under s 22 of the Finance Act 1958, the appointment must be construed in such a way as to exclude the wife of the taxpayer during his lifetime from any benefit; and so para 5 of Sch 2 as incorporated in the referential trusts declared by the appointment must be construed as subject to a qualification that no benefit shall be conferred on the taxpayer's wife under that power during his lifetime. d

As an alternative argument counsel for the taxpayer says that, if the effect of the appointment was to confer a benefit on the taxpayer's wife by including her in the class of persons who might be added to the specified class under the power contained in para 5 of Sch 2, then the appointment was in excess of the power because the power was subject to an express qualification in that respect. He says that the excess appointment is a severable element of the appointment and that the appointment so far as excessive is bad but so far as permissible remains good. On one or other of those grounds he contends that para 5 of Sch 2 as redeclared in the new trusts set up by the appointment must be construed in such a way as to exclude any possibility that the trustees should reintroduce the taxpayer's wife into the specified class. e

For myself I find some difficulty in saying that when the trustees by the appointment conferred on themselves the power which is contained in para 5 of the settlement they were conferring any benefit on the wife within the meaning of the word 'benefit' in the words in parenthesis in the power of appointment. The wife might have benefited had the trustees reintroduced her to the specified class but by conferring on themselves the power in para 5, if it is to be read in the full extent of its language, the trustees were conferring on themselves a power to confer a benefit on the taxpayer's wife, but were not at that stage conferring any benefit on her. But it should be appreciated that the effect of the appointment was to redeclare all the trusts of the settlement, subject only to the modifications stated in the deed of appointment, and so in those trusts one would find, first, a discretionary trust for members of the specified class, which initially at any rate must exclude the taxpayer's wife; then a power to advance capital to members of the specified class and the taxpayer's widow; then a power to appoint the whole or any part of the capital on trust for the benefit f

a of members of the specified class and the taxpayer's widow with an express embargo placed on any appointment which would confer any benefit during the lifetime of the taxpayer on his wife; and then the ultimate trusts in favour of the children of the taxpayer.

b Now in that context it seems to me to be clear that the power of the trustees under para 5 in Sch 2 to appoint that any person other than the members of the specified class as constituted by the deed of appointment, except the taxpayer, should be included in the specified class must be read as subject to this qualification, that that power is one which the trustees could not properly exercise in such a way, as to reintroduce the taxpayer's wife to the specified class during his lifetime, because such an exercise of the power would, as it seems to me, be clearly contrary to the whole scheme and intention of the beneficial trusts as recast by the appointment.

c So, although for myself I do not think it is right to say that one can as a matter of semantics construe the words 'other person or persons' in para 5 of Sch 2 as it is found in the trusts set up by the appointment as excluding the taxpayer's wife, I think one does find a context which makes it clear that the power conferred on the trustees was one which they could not properly exercise in such a way as to reintroduce the taxpayer's wife to the specified class. Moreover, it is to be observed that the power is one which could only be exercised with the previous consent in writing of the taxpayer, and in the circumstances of the case it seems to me inconceivable that the taxpayer would have consented to the reintroduction of his wife to the specified class in his own lifetime; for it is clear that the object of this exercise was to take advantage of the escape route which was permitted under s 22 (5) of the Act of 1958 and such a course would have defeated that object. So that as a matter of construction in that way I reach the conclusion that the appointment did not have the effect of giving the trustees power to confer a benefit on the taxpayer's wife in the future by reintroducing her to the specified class. That is, I think sufficient to dispose of the case.

e However, a further point has been argued and it is this. It is said that the power which is found in para 5 of Sch 2 is so wide that it is bad for uncertainty. I should perhaps say a word on that part of the argument which has been addressed to us. f It is said that, where a power is given to trustees by virtue of their office, they are under a duty to consider from time to time whether they should exercise it, and that such consideration is impossible where the power is of such a wide nature as this which, it is suggested, would enable the trustees to propose to include in the specified class anyone in the world.

g In that connection we have been referred to a number of authorities including *Re Gulbenkian's Settlement Trusts*, *Whishaw v Stephens*⁶, and the more recent decision of the House of Lords in *McPhail v Doulton*⁷. In the latter case the House of Lords has laid down that questions of validity depend on the same or similar tests whether the provision under consideration is a power or a trust. Lord Wilberforce in his speech said this⁸:

h 'The conclusion which I would reach, implicit in the previous discussion, is that the wide distinction between the validity test for powers and that for trust powers, is unfortunate and wrong, that the rule recently fastened on the courts by *Inland Revenue Comrs v Broadway Cottages Trust*⁹ ought to be discarded, and that the test for the validity of trust powers ought to be similar to that accepted by this House in *Re Gulbenkian's Settlement Trusts*⁶ for powers, namely that the trust is valid if it can be said with certainty that any given individual is or is not a member of the class.'

6 [1968] 3 All ER 785, [1970] AC 508

7 [1970] 2 All ER 228, [1971] AC 424

8 [1970] 2 All ER at 246, [1971] AC at 456

9 [1954] 3 All ER 120, [1955] Ch 20

Later Lord Wilberforce said¹⁰:

'Assimilation of the validity test does not involve the complete assimilation of trust powers with powers. As to powers, I agree with my noble and learned friend Lord Upjohn in *Re Gulbenkian's Settlement*¹¹ that although the trustees may, and normally will, be under a fiduciary duty to consider whether or in what way they should exercise their power, the court will not normally compel its exercise. It will intervene if the trustees exceed their powers, and possibly if they are proved to have exercised it capriciously. But in the case of a trust power, if the trustees do not exercise it, the court will: I respectfully adopt as to this the statement in Lord Upjohn's opinion [in the *Gulbenkian* case¹²]. I would venture to amplify this by saying that the court, if called on to execute the trust power, will do so in the manner best calculated to give effect to the settlor's or testator's intentions.'

Then Lord Wilberforce went on to explain how that might be done.

Now the power in para 5 of Sch 2 to the settlement is certainly given to the trustees *virtute officii*, but it is not in my judgment a power which they are under a duty to exercise. It is a power the exercise of which they are under a duty to consider from time to time. If the class of persons to whose possible claims they would have to give consideration were so wide that it really did not amount to a class in any true sense at all no doubt that would be a duty which it would be impossible for them to perform and the power could be said to be invalid on that ground. But here, although they may introduce to the specified class any other person or persons except the taxpayer, the power is one which can only be exercised with the previous consent in writing of the taxpayer and, perhaps I may say in parenthesis, in my judgment could only be exercised in the lifetime of the taxpayer. Therefore on analysis the power is not a power to introduce anyone in the world to the specified class, but only anyone proposed by the trustees and approved by the taxpayer. This is not a case in which it could be said that the taxpayer in this respect has not set any metes and bounds to the beneficial interests which he intended to create or permit to be created under this settlement.

We were referred to what was said by Clauson J in *Re Park, Public Trustee v Armstrong*¹³:

'It is clearly settled that if a testator creates a trust he must mark out the metes and bounds which are to fetter the trustees or, as has been said, the trust must not be too vague for the Court to enforce, and that is why a gift to trustees for such purposes as they may in their discretion think fit is an invalid trust; there are no metes and bounds within which the trust can be defined, and unless the trust can be defined the Court cannot enforce it.'

Here the taxpayer reserves to himself the power to say how far the trustees in exercise of their powers under para 5 can enlarge the class of beneficiaries and the only person who can be introduced into the class of beneficiaries is one approved by both the trustees and the taxpayer. In my judgment this is not a power which suffers from the sort of uncertainty which results from the trustees being given a power of so wide an extent that it would be impossible for the court to say whether or not they were properly exercising it and so wide that it would be impossible for the trustees to consider in any sensible manner how they should exercise it, if at all, from time to time. The trustees would no doubt take into consideration the possible claims of anyone having any claim on the beneficence of the taxpayer. That

¹⁰ [1970] 2 All ER at 247, [1971] AC at 456

¹¹ [1968] 3 All ER 785, [1970] AC 508

¹² [1968] 3 All ER at 793, [1970] AC at 524

¹³ [1932] 1 Ch 580 at 583, [1931] All ER Rep 633 at 634

a is not a class of persons so wide or so indefinite that the trustees would not be able rationally to exercise their duty to consider from time to time whether or not they should exercise the power.

I might in this connection refer to a short further passage from the speech of Lord Wilberforce in *McPhail v Doulton*¹⁴, where he said:

b 'Two final points: first, as to the question of certainty, I desire to emphasise the distinction clearly made and explained by Lord Upjohn¹⁵, between linguistic or semantic uncertainty which, if unresolved by the court, renders the gift void, and the difficulty of ascertaining the existence or whereabouts of members of the class, a matter with which the court can appropriately deal on an application for directions. There may be a third case where the meaning of the words used is clear but the definition of beneficiaries is so hopelessly wide as not to form "anything like a class" so that the trust is administratively unworkable or in Lord Eldon LC's words one that cannot be executed (*Morice v Bishop of Durham*¹⁶). I hesitate to give examples for they may prejudice future cases, but perhaps "all the residents of Greater London" will serve. I do not think that a discretionary trust for "relatives" even of a living person falls within this category.'

d Earlier in his speech in passages which I will not read Lord Wilberforce had indicated the sort of way in which trustees could properly carry out their duty where they have to consider the claims of persons who fall within a very widely described class of a kind in respect of which it would be quite impossible to make a complete list of the members at any given time.

e In my judgment this power in para 5 of Sch 2 is not one which is bad for uncertainty. It is a power of a kind which I think the trustees could properly carry out with due regard to their fiduciary duty to give consideration to the question whether and how the power should be exercised from time to time, and it is a power which is framed in such a way that it makes it impossible to say that the taxpayer failed to set due metes and bounds to the benefits capable of arising under the trusts he has set up. So that had the matter not been one which I think falls to be disposed of on the earlier grounds I have discussed I should not have thought that this appeal should succeed on the uncertainty ground. But in my opinion it does succeed on the points which I discussed earlier as to the construction and effect to be given to the referential trusts set up by the deed of appointment read as a whole and on that ground I would allow this appeal.

g **ORR LJ.** I agree and do not wish to add anything.

SALMON LJ. I agree and I add a word only because we are differing from the learned judge¹⁷ and out of respect for the argument of counsel for the Crown. I propose to confine myself to the point on which, in my view, this appeal should be allowed.

h Counsel for the Crown has said that no doubt anybody can guess or indeed be reasonably sure that when the appointment of 19th January 1959 was made the trustees were seeking to take advantage of s 22 (5) of the Finance Act 1958. Nevertheless, says counsel, that is nihil ad rem because the taxpayer cannot succeed unless on a true construction of the appointment it can be shown that the trustees have no power to pay or apply for the benefit of the settlor's wife the whole or any part of the income of the property comprised in the settlement. I entirely accept that argument. It has been conceded by counsel for the taxpayer that the appointment

¹⁴ [1970] 2 All ER at 247, [1971] AC at 457

¹⁵ [1968] 3 All ER at 793, [1970] AC at 524

¹⁶ (1805) 10 Ves 522 at 527

¹⁷ [1971] 3 All ER 1085, [1971] 1 WLR 1696

which was made nearly 12 years ago, and for which neither he nor his learned junior had any responsibility, is hardly a miracle of felicitous draftsmanship. I would like to cite a passage from the speech of Lord Reid in *Re Gulbenkian's Settlement Trusts*, *Whishaw v Stephens*¹⁸, where he said—

'the client must not be penalised for his lawyer's slovenly drafting. Under modern conditions it may be necessary to relax older and stricter standards. If I adopt methods of construction appropriate for commercial documents and documents inter rusticos I must consider whether underlying the words used any reasonably clear intention can be discerned.'

Counsel for the Crown quite rightly said that it is important to emphasise the phrase 'whether underlying the words used any reasonably clear intention can be discerned'. One has to look at the words used in their context and see what they really mean.

I do not propose to recite the passages in the settlement and the appointment to which Buckley LJ has already referred. Plainly the appointment constituted a resettlement under cl 2 (A) of the original settlement of all the capital and income comprised in that settlement and on the same terms save for amendments introduced by the appointment. In my judgment, it is crystal clear that the trustees when they made the appointment intended that the wife of the taxpayer should receive no benefit under the income trust during her husband's lifetime or even after he was dead and no capital benefit until after he was dead. This appointment was made in 1959 with the natural intention, as I understand is conceded, of taking advantage of the Act.

Looking at the terms of the original settlement which, as modified, are incorporated in the resettlement, it is plain that the intention was that the wife was to take no benefit. Now it is argued that that intention, which to my mind not only underlies the words used in the resettlement but is what those words plainly express, is stultified because para 5 is left in Sch 2. As I understand the argument it is said that the appointment creating the resettlement deletes the wife and widow in para 1 of Sch 2 and adds the words 'and the widow of the [taxpayer]' after the words 'the specified class' where they are mentioned thirdly and fourthly in cl 2 (A), i.e. in relation to the application of capital and resettlement of capital. The resettled property is held on the same trusts and subject to the same powers and provisions as are declared and contained in the original settlement in all respects as if the same were therein repeated save only in the respects to which I have referred. Counsel for the Crown contends correctly that para 5 of Sch 2 therefore survives in the resettlement effected by the appointment.

What is the true construction of para 5 in its new context? I agree with Buckley LJ that if trustees were to purport to exercise their powers under para 5 by adding the wife back in the class of possible beneficiaries it would be an improper exercise of their powers. For my part I would go further or perhaps merely put the point in a different way. Paragraph 5 as it appeared in the original settlement could not have had any reference to the wife or the widow because she was already one of the specified class by reason of para 1. Therefore one could not have added her as a person to be included in the specified class. She was already there. When para 5 is considered in the context of the resettlement, its language read literally is undoubtedly wide enough to allow the wife to be added to the specified class because she is 'any ... person ... except the [taxpayer]'. It is not uncommon however to apply a canon of construction which allows very general words to be given a restricted meaning if the context in which they are used clearly so requires. Here, in my view, the context does so require.

Since it seems to me that the clearest intention is expressed in the resettlement looked at as a whole that in no circumstances is the wife to take any benefit so far as income is concerned, and that as far as capital is concerned she is to take no benefit

until after her husband's (the taxpayer's) death, i.e. until she ceases to be a wife and has become a widow, I for my part would hold that although the words of para 5 are wide enough to include the wife, they must on a fair construction be given a restricted meaning and read as excluding the wife. To my mind it is impossible to give effect to the intention of the trustees expressed in the document read as a whole without narrowing the meaning which could be attributed to the language of para 5 if it appeared in a different context. But it matters little whether one looks at it in that way or whether one says that having regard to the clear intention expressed in the resettlement read as a whole, the trustees would not properly exercise their powers under para 5 were they to add the wife to the specified class. I accordingly agree that the appeal should be allowed.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: Malcolm Slowe & Co (for the taxpayer); Solicitor of Inland Revenue.

F A Amies Esq Barrister.

Wallwork v Rowland

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, BROWNE AND BRIDGE JJ

8th, 9th NOVEMBER 1971

Road traffic – Motorway – Restrictions on stopping – Vehicle remaining at rest on carriage-way – Meaning of ‘carriageway’ – Vehicle parked on hard shoulder of motorway – Hard shoulder part of ‘verge’ not carriageway – Hard shoulder distinguished from ‘marginal strip’ – Marginal strip part of carriageway – Motorways Traffic Regulations 1959 (SI 1959 No 1147), regs 3 (1) (a), (d), (h), 7 (1).

The appellant was found by the police in a parked car on the hard shoulder of a motorway. He was sitting in the car eating his sandwiches. Under the Motorways Traffic Regulations 1959 the hard shoulder was a place where motorists could only stop in certain defined emergencies. The appellant was charged with contravening reg 7 (1)^a of the 1959 regulations which prohibited a vehicle from stopping or remaining at rest on a carriageway. It was contended by the appellant that the hard shoulder was part of the ‘verge’ as defined by reg 3 (1) (h)^b of the 1959 regulations and not part of the ‘carriageway’ as defined by reg 3 (1) (a)^b and that accordingly he should have been charged under reg 9^c which prohibited vehicles from being driven, moved, stopped or remaining at rest on any verge. Before the justices it was accepted by all parties that the expression ‘marginal strip’, as defined in reg 3 (1) (d)^b, was intended to refer to the hard shoulder; the justices held that the marginal strip was part of the carriageway and accordingly convicted the appellant of the offence under reg 7 (1). On appeal,

Held – Although the justices were correct in holding that, on the true construction of reg 3 (1) (d), the marginal strip was part of the carriageway, the expression ‘marginal strip’ referred not to the hard shoulder but to the white line which bordered the running surface of the nearside lane; the hard shoulder was part of the verge and not part of the carriageway; accordingly the appellant was wrongly convicted under reg 7 (1) and the appeal would be allowed (see p 56 b and p 57 f to h, post).

^a Regulation 7 (1) is set out at p 55 e, post

^b Regulation 3 (1), so far as material, is set out at p 55 h to p 56 a, post

^c Regulation 9 is set out at p 55 f, post

Notes

For motorways and provisions relating thereto, see Supplement to 19 Halsbury's Laws (3rd Edn) para 641A.

For the Motorways Traffic Regulations 1959, regs 3, 7, 9, see 10 Halsbury's Statutory Instruments (2nd Re-issue) 75, 77, 78

Case cited in argument

Stephenson v Johnson [1954] 1 All ER 369, [1954] 1 WLR 375.

Case stated

This was an appeal by way of case stated by justices for the county of Lancaster acting in and for the petty sessional division of Bolton in respect of their adjudication as a magistrates' court sitting at Bolton on 3rd March 1971.

On 16th February 1971 an information was preferred by the respondent, John Desmond Rowland, an inspector of police, against the appellant, Hubert Wallwork, that he on 9th January 1971, at Westhoughton in the county of Lancaster did contravene reg 7 of the Motorways Traffic Regulations 1959 in that he did unlawfully cause a motor vehicle to remain at rest on the northbound carriageway of the M61 motorway, contrary to the regulation and s 13 of the Road Traffic Regulations Act 1967.

The following facts were found. At 1.00 pm on 9th January 1971 the motor vehicle JPP 116C was stationary on that part of the motorway known as the hard shoulder of the northbound carriageway of the M61 at Westhoughton. The M61 was a motorway to which the 1959 regulations applied. The appellant was seated in the front seat of the motor vehicle eating sandwiches. The motor vehicle was not stationary in any of the circumstances mentioned in reg 7 (2) of the 1959 regulations. At the point where the appellant's vehicle was stationary the motorway consisted of three lanes of carriageway for the use of vehicles travelling north, a hard shoulder and a grass verge. The surface of the road at the point where the appellant was stationary was constructed with a surface suitable for the passage of vehicular motor traffic along the motorway. The surface of the hard shoulder was of a different colour from the surface of the other three lanes. The appellant caused the motor vehicle to be stationary.

It was contended by the appellant that the information was wrong in law in that that part of a motorway known as the hard shoulder did not form part of the 'carriageway' within the meaning of reg 7, but was part of the 'verge' and accordingly the appellant should have been prosecuted for failure to conform to reg 9 of the 1959 regulations.

The justices were referred to the definition of 'marginal strip' in reg 3 (1) (d) which it was contended distinguished between the 'marginal strip' and the carriageway by reference to the surface colour and stated that the 'marginal strip' was 'at the side of that carriageway'. It was further contended that, by virtue of reg 3 (1) (h), the 'marginal strip' must therefore be part of the 'verge' as defined. (It was accepted that the marginal strip was not a central reservation.)

It was contended by the respondent that the term 'carriageway' was defined by reg 3 (1) (a) and that the marginal strip was within the term as there defined. It was contended that reg 3 (1) (a) must mean that the distinctive feature of a 'carriageway' was that each side consisted of either a marginal strip or a raised kerb; that in this case the nearside 'consisted of' a marginal strip and accordingly the marginal strip was part of the carriageway. It was further contended that the definition of 'marginal strip' stated that the marginal strip meant 'a narrow strip of the surface of a carriageway' and that the phrase 'which is at the side of the carriageway' was used not to distinguish the marginal strip from the carriageway but to indicate its position within the total width of the carriageway.

The justices were of the opinion that unless the context required otherwise the term 'carriageway' had to be construed in accordance with reg 3 (1) (a). They were

a of the opinion that 'carriageway' as there defined stated that its distinctive feature was that one side consisted of a marginal strip (or a kerb) and whilst they found some difficulty in reconciling the definition of 'marginal strip' with this, such a reconciliation is possible on the construction contended for by the respondent. Accordingly they convicted the appellant of the offence as charged, for which offence he was adjudged to pay a fine of £5.

b The question for the opinion of the High Court was whether that part of a motorway known popularly as the 'hard shoulder' formed part of the carriageway for the purposes of reg 7 of the 1959 regulations.

N E Beppard for the appellant.

P B B Mayhew for the respondent.

c **BRIDGE J** delivered the first judgment at the invitation of Lord Widgery CJ. The appellant appeals against his conviction by Lancashire justices sitting at Bolton of an offence in contravention of the Motorways Traffic Regulations 1959¹. On 9th January 1971 the appellant was found by the police in a parked motor car on the hard shoulder of the northbound carriageway of the M61 motorway. He was sitting d in the motor car eating his sandwiches. There is no doubt whatever that there was a contravention of the relevant regulations. One is not allowed to have one's picnic on the hard shoulder of the motorway. On any construction of the regulations, the hard shoulder is a place where motorists can stop only in certain defined emergencies, and in this case there was no emergency. The question, and the only question, raised by the appeal is: which regulation was contravened.

e There are two candidates to be considered as the appropriate provision prohibiting the offence which the appellant committed. Regulation 7 (1) provides:

'Subject to the following provisions of this Regulation, no vehicle shall stop or remain at rest on a carriageway.'

Regulation 9 enacts that:

f 'No vehicle shall be driven or moved or stop or remain at rest on any verge except in accordance with paragraphs (2) and (3) of Regulation 7.'

These are the provisions which authorise stopping on the verge in an emergency.

g What happened here was that the prosecution charged the appellant with a contravention of reg 7. Before the justices and in this court it has been contended for the appellant that he was wrongly charged under reg 7 and should have been charged with contravening reg 9. In other words, the short point for our decision is simply whether, as the prosecution alleged and as the justices decided, the hard shoulder of the motorway is part of the 'carriageway' as defined in the regulations, or whether, as has throughout been contended on the part of the appellant, the hard shoulder is part of the 'verge'.

h I go to the definitions in reg 3 (1):

i '... (a) "carriageway" means that part of a motorway which is constructed with a surface suitable for the regular passage of vehicular motor traffic along the motorway and is distinguishable from the other parts of the motorway by the fact that on each side that part of the motorway either consists of a marginal strip or is contiguous to a raised kerb, but the said expression does not include any part of a central reservation ["Central reservation" is defined but nothing turns on it] ... (d) "marginal strip" means a continuous narrow strip of the surface of a carriageway which is at the side of that carriageway and is distinguishable from the rest of that surface by having a colour which is different from the

colour of the rest of that surface; . . . (h) "verge" means any part of a motorway which is not a carriageway or a central reservation.' a

It is right to point out before going any further that it appears to have been assumed and accepted by all parties before the justices that the expression 'marginal strip' in the regulations was intended to refer to the hard shoulder. On the basis of that assumption it was nevertheless argued for the appellant before the justices that 'marginal strip' was not part of the carriageway. The justices in my judgment rightly rejected that argument. The language which I have just read defining 'carriageway' and 'marginal strip' makes it clear beyond doubt that the 'marginal strip', whatever that may be, is part of the carriageway. b

But in this court the argument for the appellant has proceeded on quite a different basis. Counsel for the appellant's submission is that the expression 'marginal strip' as defined in reg 3 is intended to refer not to the hard shoulder, but to what in layman's language one might call the white line which is to be found on any motorway bordering the nearside lane of the running surface of the motorway. It is true that there is no finding in the case as to the presence of such a white line at the relevant part of the M61, but counsel has invited us to look at a picture of a motorway which appears in the Highway Code², and to take judicial notice of what is common knowledge, and that is, I think, our own knowledge as to how motorways are constructed. c As I understand it, counsel for the respondent does not resist the submission that we may take judicial notice of a matter of this kind, and may recognise that motorways are constructed with a strip or line, generally rather wider than a lane line or hazard line, marking the near side edge of the running surface of a motorway, and in one sense one might say dividing the running part of the motorway from the hard shoulder. Approaching the matter on the basis that there was such a line here, then counsel for the appellant's submission, as I have said, is that it is to that line and to nothing else that the phrase 'marginal strip' in the regulations refers. Counsel for the respondent on the other hand submits that 'marginal strip' is a wholly inappropriate and incongruous expression to find the draftsman of legislation using to describe what can conveniently and appropriately be described as a white line or 'longitudinal line', which is the expression used in certain other regulations to which counsel for the respondent has drawn our attention. d e f

If the matter had to be resolved simply on a construction of the language used in the definition regulation, the arguments might be nicely balanced; but happily it does not have to be resolved on that basis alone. To see which construction is to be preferred, it is legitimate, and indeed right, to look at the operative provisions of these regulations, and see which of the two rival constructions contended for accords more readily with the sense and policy of the regulations as a whole. g

Regulation 5 provides:

'Subject to the following provisions of these Regulations, no vehicle shall be driven on any part of a motorway which is not a carriageway.'

I have already referred to reg 7 (1). Regulation 7 continues: h

'(2) Where it is necessary for a vehicle which is being driven on a carriageway to be stopped while it is on a motorway [and then there follow paragraphs (a) to (d) defining the four different types of emergency which may make a stop imperative for a motorist on a motorway] the vehicle shall, as soon and in so far as is reasonably practicable, be driven or moved off the carriageway on to, and may stop and remain at rest on, the verge which lies on the left-hand or near side of that vehicle while it is proceeding along that carriageway in accordance with the provisions of Regulation 6 [Regulation 6 being the regulation which governs the direction of driving]. j

a '(3) A vehicle which is at rest on a verge in any of the circumstances specified in paragraph (2) of this Regulation—(a) shall so far as is reasonably practicable be allowed to remain at rest on that verge in such a position only that no part of it or of the load carried thereby shall obstruct or be a cause of danger to vehicles using the carriageway ...'

Finally, reg 12 provides:

b 'No person shall at any time while on foot go or remain on any part of a motorway other than a verge except [in certain circumstances which are set out]'.
Counsel for the appellant submits that if 'marginal strip' is construed as referring to the white line on the nearside of the nearside lane of the motorway, then these provisions make sense and accord with every motorist's common understanding as to what parts of the motorway are intended for the passage of traffic, and what parts are intended for vehicles which have broken down or stopped in some other emergency. It accords with common sense, he says, and motorists' ordinary understanding that the hard shoulder is available for the broken down vehicle but is not available or intended for regular use by moving traffic. If, as he points out, the hard shoulder is part of the carriageway, then where there is no verge beyond the hard shoulder, there will be no part of the motorway where a vehicle which has broken down may legitimately remain, even for a short period. He draws our attention to the Highway Code³ which in terms states:

'If you have a breakdown get your vehicle off the carriageway on to the hard shoulder so that it does not get in the way of other traffic ...'

e Counsel for the respondent on the other hand boldly submits that the intention of the regulations is in effect that the hard shoulder should not be available for vehicles stopping in an emergency, but should function as what might be called a super slow lane. In my judgment as soon as one considers these rival arguments, it is plain that there can be only one answer, namely that the hard shoulder of a motorway is part of the verge and not part of the carriageway, and that 'marginal strip' in these regulations is, as counsel for the appellant submits, intended to refer not to the hard shoulder but to the white line which borders the running surface of the nearside lane.

f For those reasons I reach the conclusion that, technical as the point may be, this appellant was convicted of the wrong offence. I would allow the appeal and quash the conviction.

g **BROWNE J.** I felt great doubt and difficulty about this case, but I do not think I need burden the pages of the law reports with my mental processes, because in the end I have come to the conclusion that I agree with the judgment that has just been given by Bridge J, and accordingly I also agree with the result which he proposes.

h **LORD WIDGERY CJ.** I also agree with the judgment and with Bridge J's reasons. It may be that part of the trouble in this case is that the regulations⁴ were made in 1959 when motorways were still comparatively in their infancy, and some of the practice and layout has varied slightly since that time. However, the appeal will be allowed and the conviction quashed.

j *Appeal allowed. Conviction quashed.*

Solicitors: J B Izod, agent for Adam F Greenhalgh & Co, Bolton (for the appellant); Solicitor, Lancashire Police Authority, Preston.

N P Metcalfe Esq Barrister.

³ 1968 Edn, rule 120

⁴ 1c The Motorways Traffic Regulations 1959 (SI 1959 No 1147)

Moore v Clerk of Assize, Bristol

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, EDMUND DAVIES AND MEGAW LJJ

16th DECEMBER 1970

Contempt of court – Threatening witness – Threats after witness having given evidence at criminal trial – Trial still continuing – Threats so as to punish witness for what witness has said – Unnecessary to prove that other potential witnesses would get to know of threats.

C, a schoolgirl aged 14, gave evidence at the trial of a number of men charged with affray. After she had completed her evidence and been released by the judge she went to a café for a meal. There she was approached by the appellant who reproved her for giving evidence against his brother, one of the accused, and threatened her, clenching his fist and shouting at her. C was frightened and left the café. The appellant was brought before the judge and sentenced to three months' imprisonment for contempt. On appeal,

Held – The appeal would be dismissed; it was contempt of court to threaten a witness after he had given evidence so as to punish him for what he had said whether or not other potential witnesses got to know of the threats which had been made; accordingly the appellant was guilty of contempt (see p 59 c and h, post).

A-G v Butterworth [1962] 3 All ER 326 and dictum of Lord Denning MR in *Chapman v Honig* [1963] 2 All ER at 517 applied.

Notes

For contempt of court by interference with fair trial, and by obstruction of witnesses, see 8 Halsbury's Laws (3rd Edn) 10, 11, para 13-14, para 22, and for cases on the subject, see 16 Digest (Repl) 39, 328-336, 44-45, 386-396.

Cases referred to in judgments

A-G v Butterworth [1962] 3 All ER 326, [1963] 1 QB 696, [1962] 3 WLR 819, Digest (Cont Vol A) 454, 395a.

Chapman v Honig [1963] 2 All ER 513, [1963] 2 QB 502, [1963] 3 WLR 19, Digest (Cont Vol A) 454, 391a.

Appeal

This was an appeal by Colin Anthony Moore from the order of Park J dated 20th November 1970 and made at Bristol Assizes committing the appellant to prison for three months for contempt of court. The facts are set out in the judgment of Lord Denning MR.

M R Coombe for the appellant.

Gordon Slynn for the respondent.

LORD DENNING MR. On Thursday 19th November 1970 Park J at the Bristol Assizes was trying a number of men for an affray. A schoolgirl aged 14, Christine Margaret Chojnacki, gave evidence in the course of the morning in respect of one of the accused named Graham Moore. At the end of her evidence the judge released her. On the same day she went with another girl to a café nearby for a meal. She saw some men sitting at a table. One of the men was Colin Moore. He called Christine over to him and reproached her for giving evidence against his brother Graham. He said, 'That was tight of you—splitting on Graham'. Christine said, 'I never said it was definitely him, I said I think it was him'. Colin Moore said that his brother had never dragged anyone out. Another girl said to her, 'You'll be dragged along in a minute'. Colin Moore heard that remark and said to Christine 'You had better get

a out of here fast'. At the same time he clenched his fist with his elbow on the table. He was shouting. He was a big man—big to her, anyway. She was frightened. She went out of the café and told the police.

The judge had Colin Moore brought before him. He asked counsel to represent him. He heard evidence on the next day in the absence of the jury. The judge accepted Christine's evidence. He held that Colin Moore had been guilty of a contempt of court. He sentenced him to three months' imprisonment. Colin Moore appeals b to this court.

The first question is whether this was a contempt. The law has been settled by *A-G v Butterworth*¹. The court will always preserve the freedom and integrity of witnesses and not allow them to be intimidated in any way, either before the trial, pending it or after it. Here it was after the girl had given evidence. It is a contempt c of court to assault a witness after he has given evidence: it is also a contempt of court to threaten him or put him in fear, if it is done so as to punish him for what he has said. There is no doubt whatever that this conduct of Colin Moore was a contempt.

The next question is, what is the appropriate sentence? This is more difficult. We have had before us Colin Moore's record. He is a man of 21. His record is not too good. In 1963, when he was much younger, for stealing, a probation order was d made against him. Two years ago for disorderly behaviour and using insulting words he was fined £30 and bound over. In October 1970 at the Portsmouth Magistrates' Court he was found guilty of stealing and fined £10 and 5 guineas costs. Now, within six weeks of that last conviction, he is threatening this schoolgirl of 14, frightening her in the middle of a case then being heard. I think the judge was amply justified in sentencing him then and there to three months' imprisonment. e I would dismiss the appeal.

EDMUND DAVIES LJ. I agree. I regard this as a quite substantial contempt of court, and I merely add the shortest postscript to the observations of Lord Denning MR. In *A-G v Butterworth*² Donovan LJ said:

f '... in this kind of case, it must be proved by the Crown that knowledge of the revenge taken on one who has given evidence is likely to come to the knowledge of potential witnesses in future cases.'

In the course of learned counsel's submission I ventured respectfully to doubt whether there was any incumbency on the Crown to prove any such thing. It thereafter emerged that in *Chapman v Honig*³ Lord Denning MR said:

g 'In my judgment the victimisation of a witness is a contempt of court and unlawful, irrespective of whether other people get to know of it or not. It is a gross affront to the dignity and authority of the court and a grievous wrong to the individual affected.'

I respectfully adopt those words, for I do not think there is any obligation on the h Crown to do more than prove that which has been abundantly established in the present case. As to the sentence, I concur with Lord Denning MR in all he has said.

MEGAW LJ. I agree.

j Appeal dismissed.

Solicitors: Victor J Lissack (for the appellant); Treasury Solicitor.

L J Kovats Esq Barrister.

¹ [1962] 3 All ER 326, [1963] 1 QB 696

² [1962] 3 All ER 326 at 333, [1963] 1 QB 696 at 726

³ [1963] 2 All ER 513 at 517, [1963] 2 QB 502 at 512

Provincial Properties (London) Ltd v Caterham and Warlingham Urban District Council ^a

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, CAIRNS AND ROSKILL LJJ

12th OCTOBER 1971 ^b

Compulsory purchase – Compensation – Purchase notice – Assumptions on valuation – Assumption that planning permission would be granted – Land comprised in development plan – Land in ‘area allocated primarily for a use specified in’ development plan – Residential use – Refusal of permission for building houses – Planning policy not to grant permission for development on land in question – Evidence that permission would never be granted – Permission not ‘reasonably to be expected’ – Grant of permission not to be assumed – Land Compensation Act 1961, s 16 (2). ^c

A large house with six acres of grounds was situated on a high ridge of land commanding a lovely countryside. The six acres were zoned for use for residential purposes in the county development plan, although the remaining land on the ridge was zoned to be kept open as part of the green belt. The claimants, who were the owners of the house and grounds, were granted planning permission for houses on part of the grounds but on four or five occasions were refused permission in respect of the remainder of the grounds. The reason for the refusal was to preserve the view of the ridge from the valley by ensuring that the skyline was studded with trees rather than houses. As was conceded, this planning policy made it clear that permission would never be granted for building houses on the remainder of the grounds. After the council had rejected an application to put up houses on a portion of the grounds which consisted of two-thirds of an acre on the top of the ridge the claimants served a notice under s 129 of the Town and Country Planning Act 1962, which was confirmed by the Minister, requiring the council to purchase it compulsorily. They claimed compensation amounting to £10,500 as the value of the land on the ground that, by virtue of s 16 (2)^a of the Land Compensation Act 1961, it was to be assumed that planning permission would be granted for its residential development. It was common ground that if the grant of planning permission could not be assumed the value of the land would be only £500. ^d

Held – Although para (a) of s 16 (2) of the 1961 Act was satisfied in that the land was in an area shown in the current development plan as allocated primarily for residential use and the development proposed was ‘development for the purposes of that use’, para (b) of s 16 (2) also had to be satisfied before it could be assumed that planning permission would be granted; on the admitted facts para (b) had not been satisfied because the proposed development was not ‘development for which planning permission might reasonably have been expected to be granted’; the evidence showed that planning permission would never be granted; accordingly the claimants were only entitled to £500 compensation (see p 62 e g and h, p 63 b and g and p 64 e and f, post). ^e

Dictum of Russell LJ in *Devotwill Investments Ltd v Margate Corpn* [1969] 2 All ER at 102 not followed. ^f

Notes ^g

For the assumption of planning permission in assessing compensation, see 10 Halsbury's Laws (3rd Edn) 107-109, paras 181, 182. ^h

^a Section 16 (2) is set out at p 62 c and d, post ⁱ

a For the Land Compensation Act 1961, s 16, see 6 Halsbury's Statutes (3rd Edn) 255.

For the Town and Country Planning Act 1962, s 129, see 42 Halsbury's Statutes (2nd Edn) 1096.

Case referred to in judgments

b *Devotwill Investments Ltd v Margate Corpn* [1969] 2 All ER 97; *rvsd* HL sub nom *Margate Corpn v Devotwill Investments Ltd* [1970] 3 All ER 864, 134 JP 19, Digest (Cont Vol C) 979, 176d.

Case stated

c Caterham and Warlingham Urban District Council ("the council") appealed by way of case stated against a decision of the Lands Tribunal (Sir Michael Rowe QC President) given on 21st December 1970 determining at £10,500 the amount of compensation due to the claimants, Provincial Properties (London) Ltd, in respect of the acquisition by the council of their land on the east side of the Torwood Land, Whyteleafe, Caterham and Warlingham, Surrey, in pursuance of a purchase notice under s 129 of the Town and Country Planning Act 1962 confirmed by the Minister of Housing and Local Government by a letter dated 9th December 1966. The council claimed that d the proper compensation was £500. The facts are set out in the judgment.

G N Eyre QC and M H Spence for the council.

M L M Chavasse QC and A B Dawson for the claimants.

e **LORD DENNING MR.** At Whyteleafe in Surrey there is a high ridge of land which commands a lovely countryside. On it there used to be a large house called Bleak House, with grounds of some six acres. Surrey County Council made a development plan for the county. It was confirmed by the Minister in 1958. In that development plan Bleak House and its six acres of ground were zoned for residential purposes. The remaining ground on the ridge was zoned to be kept open and not built on. It was part of the green belt.

f The owners of Bleak House and its grounds were the claimants, Provincial Properties (London) Ltd. They applied for planning permission to build houses there. They got permission for a portion of the six acres, but not for the whole. They got planning permission for Bleak House to be converted into two dwellings and for eight detached houses to be built in a small part of the grounds. This permission was specially limited so as to keep houses on the west side of the ridge below the skyline. That permission was given for that part and the houses were built. g The owners made four or five other applications to build in the remainder of the grounds, but every one was refused. The reason for the refusal was to preserve the view of the ridge from the valley; so that the skyline should be studded with trees and not houses. This planning policy was so plain that it became clear that planning permission would never be granted for the remainder of the grounds.

h Now we come to the case in question. At the very top of the ridge here was a stretch of land of only two-thirds of an acre. It had been part of the grounds of Bleak House, and zoned accordingly for residential purposes. The owners applied for planning permission to put up three houses on that small two-thirds of an acre. On 11th May 1966 the council rejected it. Thereupon the owners served a notice requiring the local council to purchase the land compulsorily. The owners said it had been rendered sterile by refusal. It was a piece of rough grassland and had become incapable of any beneficial use in its existing state (s 129 of the Town and Country Planning Act 1962). The local council said that it could be used for agricultural purposes. On appeal, the Minister thought the owners were right. j On 6th December 1966 he confirmed the purchase notice. Accordingly, the local council were deemed to have served a notice to treat on the owners in respect of the land, so as compulsorily to acquire it as at that date (s 133 of the 1962 Act).

So the question is: what is the compensation to be paid for this little piece of land? It is two-thirds of an acre at the top of the hill. It is zoned for residential purposes, but it is agreed on all hands that in no circumstances will planning permission ever be granted for it. It is also agreed that if planning permission could be expected for it, the value would be £10,500. (I assume that is three plots for three houses at £3,500 a plot.) But, if planning permission could not be expected for it, the value would only be £500. (I assume that is agricultural value, plus 'hope' value.) So the owners claim £10,500. The council say £500. (Incidentally, since all these happenings, this little piece of land has been removed from the residential zone. It is now designated as part of the metropolitan green belt. But that does not affect our present case, because at the material time it was still zoned as residential.)

This question depends on the true interpretation of the Land Compensation Act 1961. Section 16 (2) provides:

'If the relevant land or any part thereof (not being land subject to comprehensive development) consists or forms part of an area shown in the current development plan as an area allocated primarily for a use specified in the plan in relation to that area, it shall be assumed that planning permission would be granted, in respect of the relevant land or that part thereof, as the case may be, for any development which—(a) is development for the purposes of that use of the relevant land or that part thereof, and (b) is development for which planning permission might reasonably have been expected to be granted in respect of the relevant land or that part thereof, as the case may be.'

Applying that section here, the opening words are clearly satisfied. The current development plan was the Surrey Development Plan. The relevant land was this two-thirds of an acre. It was part of an area which was shown in the current development plan as allocated primarily for residential use. That was a use specified in the plan in relation to the area. Then the section goes on: 'it shall be assumed that planning permission would be granted ... for any development which—(a) is development for the purposes of that use ...', that is, in this case will be granted for any development which is residential; there the important conjunction is 'and'—'and (b) is development for which planning permission might reasonably have been expected to be granted ...'

It is quite plain that para (a) is satisfied for residential development, but that para (b) is not satisfied. On all the evidence planning permission could not reasonably be expected to be granted for this little two-thirds of an acre. It would be refused. So one of the assumptions does not exist. You cannot assume that planning permission would have been granted. No houses would be permitted on this piece of land.

What is the compensation payable, therefore, for land which is in an area zoned for residential use, but for which planning permission will not be given? This is often the position. Cases often arise where land is in an area zoned for residential use but permission is refused on some ground or other. It may be refused because of difficulties of access, or objections from the neighbours, or because houses on that particular piece would spoil the view; and so forth. The mere fact that land is within residential zoning does not in the least mean that planning permission could reasonably be expected in respect of it. If planning permission could not reasonably be expected, then compensation is to be assessed accordingly. The owner gets its value without planning permission, i.e. usually as agricultural land, not as building land.

Some reference was made to s 16 (6). That only means that if it is a case where you are to assume that planning permission will be granted, then you are further to assume that it will be granted subject to such conditions as might be expected to be imposed. That subsection does not apply at all to a case where, as in the present case, the owners could not expect planning permission at all. Test it this way. Suppose the owners of this land were to offer it for sale on the market? No purchaser

- a would give much for it. He would know that planning permission had been refused, and would be refused. The owner would not get any more than £500 for it. Now suppose that is the subject of compulsory purchase. Is the owner to get £10,500 on the footing that planning permission would be given for these houses? Clearly not. He is only to get the £500 which it is worth without planning permission. I would, therefore, allow the appeal and say the proper compensation is £500, and not £10,500.

- CAIRNS LJ.** I agree that this appeal should be allowed for the reasons given by Lord Denning MR. I agree with the construction which he has placed on s 16 (2) of the Land Compensation Act 1961. I am bound to say that but for the view tentatively expressed by Russell LJ in *Devotwill Investments Ltd v Margate Corpn*¹, and for the conclusion arrived at by the President of the Lands Tribunal in this case (to which I pay great respect because his knowledge of this Act is infinitely greater than mine), I should have thought the meaning of this section was quite plainly that which Lord Denning MR has indicated. The subsection provides that it is to be assumed that planning permission would be granted in respect of the land for any development which fulfils two conditions. The two conditions are stated—(a) and (b); and unless it can be shown that the development fulfils those two conditions, it seems to me on the plain meaning of the subsection that the assumption cannot be made. The contrary view was indicated in the report to which I have been referred by Russell LJ in these terms. He said²:

- e ‘(It is not material in the present case, but I am inclined to disagree with the view expressed by the Lands Tribunal on the construction of the section that it is possible to find that no such development might reasonably have been expected to have been permitted: I would prefer the view that the function of s 16 (2) (b) is to restrict the carte blanche of the rest of the subsection but never to extinguish its operation).’

- f That was the view with which Sir Michael Rowe QC, President of the Lands Tribunal, agreed, and it has been put before this court by counsel for the claimants. But it does not seem to me that the right approach to this subsection is to look at the effect of para (a) standing by itself and then to ask whether its effect can be restricted or extinguished under para (b). The two paragraphs have to be applied together, and unless they are both fulfilled, then the assumption which is called for by the body of the subsection cannot be made. For those reasons I agree that the construction placed on this subsection by the Lands Tribunal was wrong.

- g An alternative argument was advanced by counsel for the claimants on which Sir Michael Rowe QC did not give any decision. It was not necessary for him to do so having regard to the conclusion that he formed on the other part of the case. This is an argument based on s 133 of the Town and Country Planning Act 1962, and on certain sections of Part V of that Act to which reference is made in s 133. I can only say that for my part I cannot see how the section has anything whatever to do with the assessment of this compensation, and therefore I am not able to see how that argument of counsel could assist the case of the claimants here. For these reasons I agree that the appeal should be allowed.

- j **ROSKILL LJ.** I also agree that the appeal should be allowed. I only add a few words out of respect to the President of the Lands Tribunal, Sir Michael Rowe QC, from whom we are differing and, who, as Lord Denning MR has said, has great experience in this field. The learned President said: ‘In the present case there was never a hope of permission’. The argument before him proceeded on the admission

¹ [1969] 2 All ER 97 at 102

² [1969] 2 All ER at 102

on the part of the claimants that they could not get and could not expect thereafter to get planning permission for any number of houses on this small area of land. The learned president said (rightly in my view) that the argument before him centred on the true construction of s 16 (2) (b) of the Land Compensation Act 1961. He stated the rival arguments thus—I quote from his decision:

‘Does that [i.e. para (b)] mean that although you must assume under [para] (a) that planning permission would be granted for the purposes of the use shown for the land in the development plan, namely primarily for residential use, you must nonetheless look to see whether at the date of the notice to treat there was any reasonable expectation that planning permission would have been granted for any residential development and that if there was not, you must disregard the paragraph (a) assumption? Or as the claimants contended, does it mean only that having made the assumption under (a), you must then consider the sort of residential development for which planning permission might reasonably be expected, i.e. what density, what means of access and so on?’

The learned President accepted the argument of counsel for the claimants in favour of the latter view. This argument has been repeated in this court and came to this, that the view for which authority contended involved construing para (b) as cutting down and indeed emasculating para (a). For my part, I do not think that is the right approach; nor do I think that the true construction has that effect. Before the compensation can be assessed under s 16 (1) (b) there are two conditions which must be fulfilled. First, the development has to be development for the purpose of the relevant use—that is residential use of the relevant land. No one has disputed that. Secondly, it has to be development for which planning permission might reasonably have been expected to be granted in respect of the relevant land. On the finding and indeed the concession that there was no hope of permission being granted, it seems to me, with great respect to the argument of counsel for the claimants, that on the true construction of s 16 (2) (b) the answer is clear. As to what Russell LJ said in *Devotwill Investments Ltd v Margate Corp*³, it is perhaps necessary to say that we were told that this point did not directly arise either in this court or subsequently in the House of Lords⁴, and the learned lord justice did not have the benefit of hearing any argument on it, such as we have had.

So far as the alternative argument of counsel for the claimants under s 133 of the Town and Country Planning Act 1962 is concerned, I am unable to see how that affects the assessment of compensation under s 16 (2). If therefore the claimants’ claim fails, as it does in my judgment, on the true construction of that section, I do not think they can pray in aid s 133 as producing any different result. For those reasons I think the appeal must be allowed.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Sharpe, Pritchard & Co* (for the council); *I M Wimborne & Co* (for the claimants).

F A Amies Esq Barrister.

3 [1969] 2 All ER 97 at 102

4 [1970] 3 All ER 864

^a R v Andrews Weatherfoil Ltd and others

COURT OF APPEAL, CRIMINAL DIVISION

LORD WIDGERY CJ, DONALDSON AND EVELEIGH JJ

27th, 28th, 29th SEPTEMBER, 11th OCTOBER 1971

- ^b Criminal law – Corruption – Officer of public body – Gift, loan, fee, etc, to officer as reward for acts in respect of transaction in which public body concerned – Reward – Payment in respect of past favours – No future favours contemplated at time of making agreement for payment – Whether necessary to establish a corrupt agreement for reward in contemplation of future favours – Public Bodies Corrupt Practices Act 1889, s 1.
- ^c Criminal law – Company – Criminal liability – Act of servant – Identification of servant with company – Status and authority of servant – ‘Responsible agent’ or ‘high executive’ not necessarily identifiable with company – Corrupt practices – Necessity for jury to find as a fact that servant had status which would in law identify his acts with those of company.

- ^d Criminal law – Evidence – Admissibility – Co-accused – Evidence of system – Evidence in respect of one accused admissible in relation to co-accused – Counts against each accused based on same transaction – Corrupt practices – Officer of public body – Counts alleging receiving of bribe by one accused and giving by other accused – First accused charged on number of counts with receiving bribes from different persons – Second accused charged with only one offence of giving bribe – Evidence of first accused’s activities in relation to other bribes admissible as evidence of corrupt motive – Evidence relevant to charge against second accused.

- ^e Criminal law – Separate trials – Accused tried separately on charges arising out of same offence – Juries returning different verdicts in separate trials – Whether verdict of guilty necessarily unsafe – Corruption – Officer of public body – Charges of giving and receiving bribes – One accused acquitted of giving bribe – Other accused convicted at separate trial of receiving bribe.

- ^f The appellants S, D and A Ltd, were charged on a number of counts with offences of bribery and corruption under s 1^a of the Public Bodies Corrupt Practices Act 1889. The charges related to the activities of S during the time when he had been a member and chairman of a local authority housing committee and member of the council. The prosecution’s case was that S had used his position on the council to obtain sums of money from a number of building firms, including A Ltd and JLC Ltd, in return for support in obtaining building contracts from the council.

- ^g A Ltd were charged with corruptly offering emoluments from employment to S for favouring them, and S was charged with agreeing to receive those emoluments. It was alleged that three employees of A Ltd, the managing director, a ‘technical director’ and the manager of the housing division, had been concerned in offering employment to S in return for favours to A Ltd. In his direction to the jury the judge stated that if the corrupt act was done by someone who was a responsible agent of the company, or who held a ‘high executive’ position, such that he could recommend that a person such as S should be employed by the company, and was done with a corrupt motive to further the interests of the company, the company was liable for a criminal offence. A Ltd and S were duly convicted on those charges.

- ^j S was also convicted of corruptly accepting emoluments from one X. At a separate trial, X had been acquitted of offering those emoluments to S.

D was charged with corruptly offering £500 to S as a reward for promoting the interests of JLC Ltd and S was also charged with agreeing to receive that sum. In relation to those two counts it was established that, in April 1965, S had met D, and

^a Section 1 (1) is set out at p 72 g and h, post

a representative of JLC Ltd from whom D stood to receive a commission in the event of JLC Ltd being awarded a contract by the council, and there was evidence that thereafter S furthered JLC Ltd's interests at council meetings until, in April 1966, a letter of intent was sent by the council to JLC Ltd with the object of employing them. In September 1966 JLC Ltd signed a contract of employment with S under which the payment of £500 was made to S. The jury found as a fact that D knew about this arrangement and was a party to it. Although the contract between the council and JLC Ltd was not concluded until March 1967 the prosecution case was not presented on the basis that S was being remunerated in September 1966 for any assistance thereafter. The judge referred to the respective counts against S and D as 'mirror counts' thereby indicating to the jury that they should stand or fall together. S and D were both convicted on those counts.

A Ltd, S and D appealed against conviction on the relevant counts. On behalf of S and D it was contended, *inter alia*, that s 1 of the 1889 Act had no application where the reward was made for a past favour and further, on behalf of D, that the judge was wrong in indicating to the jury that the counts against S and D stood or fell together.

Held – (i) The appeal of A Ltd would be allowed. It was not every 'responsible agent' or 'high executive' or 'agent acting on behalf of a company' who could by his actions make the company criminally responsible; it was necessary to establish whether, on the facts, the natural person in question had the status and authority which, in law, would make his acts the acts of the company itself; accordingly it was necessary for the judge to invite the jury to consider whether or not there were established those facts which the judge had decided as a matter of law were necessary to identify the person concerned with the company; since that had not been done in the present case the conviction of A Ltd should be quashed (see p 70 b, c and e, post).

Dicta of Lord Reid in *Tesco Supermarkets Ltd v Natrass* [1971] 2 All ER at 131, 134 applied.

(ii) The appeals of S and D would be dismissed for the following reasons—

(a) although X had been acquitted on the charge of corruptly offering emoluments to S it did not follow that S's conviction for corruptly accepting those emoluments was unsafe, since it was inevitable that, so long as it was possible for persons concerned in a single offence to be tried separately, the verdicts returned by the different juries would on occasion appear to be inconsistent with one another; this could be accounted for by differences in the evidence presented to the respective juries, or the different views which the juries had separately taken of the witnesses, and reflected the fact that the verdict 'not guilty' included 'not proven'; inconsistency alone did not, therefore, render a verdict of 'guilty' unsafe, and, since in the present case there was no suggestion that evidence favourable to S had been given in the trial of X which was not given in the trial of S, there were no grounds for concluding that the verdict against S was unsatisfactory (see p 71 h and j to p 72 c, post);

(b) it was not necessary under s 1 of the 1889 Act to establish a corrupt agreement for reward in contemplation of future favours; in the context of s 1 it would be unnatural not to give a post facto meaning to the word 'reward' and accordingly it was open to the jury to convict S and D on the basis that the agreement for the payment to S made in September 1966 related solely to favours performed by S in furthering JLC Ltd's interests prior to April 1966 (see p 73 d and e, post);

(c) although two counts in an indictment might be so closely connected that an acquittal on one and a conviction on the other might, on the face of it, appear to be inconsistent, it was undesirable for the judge to indicate that the two counts should stand or fall together, for strict regard for the rules of evidence might lead to different verdicts and, in cases of corruption, it was possible to envisage a bribe being corruptly offered and innocently received or vice versa; however on the facts it was impossible

- a to conceive that the payment was corruptly received by S unless corruptly given by D; furthermore, although it was clear that S's conduct on the council in relation to the other accused was an important factor in the deliberations of the jury, the evidence thereof was admissible in the case against D; evidence of S's activities was admissible as evidence of system in relation to the issue whether S was acting with a corrupt motive; the fact that the conduct was that of S and not of D did not detract from the relevance of the evidence (see p 73 j to p 74 d and e, post); dictum of A T Lawrence J in *R v Bond* [1904-07] All ER Rep at 41 applied.

Notes

- For bribery of public officers, see 10 Halsbury's Laws (3rd Edn) 617, 618, para 1159, and for cases on the subject, see 15 Digest (Repl) 807, 808, 7688-7698.
- c For criminal liability of a company, see 6 Halsbury's Laws (3rd Edn) 440, para 853, and 10 *ibid* 281, 282, para 521.
- For admissibility of evidence to prove system, see 10 Halsbury's Laws (3rd Edn) 443, 444, para 819, and for cases on the subject, see 14 Digest (Repl) 424, 425, 4119-4128.
- For ground of allowing appeal if verdict unsafe or unsatisfactory, see Supplement to 10 Halsbury's Laws (3rd Edn) para 985.
- d For the Public Bodies Corrupt Practices Act 1889, s 1, see 8 Halsbury's Statutes (3rd Edn) 231.

Cases referred to in judgment

- R v Bond* [1906] 2 KB 389, [1904-07] All ER Rep 24, 75 LJKB 693, 95 LT 296, 22 Digest (Repl) 56, 360.
- Tesco Supermarkets Ltd v Natrass* [1971] 2 All ER 127, [1971] 2 WLR 1166.

Appeals

- On 23rd March 1971 at the Central Criminal Court before Judge Edward Clarke QC and a jury the appellants, Andrews Weatherfoil Ltd, heating and ventilating engineers, Sidney Frederick Charles Sporle, and Peter George Day, were charged with bribery and corruption under s 1 of the Public Bodies Corrupt Practices Act 1889, in relation to building contracts of the Battersea Metropolitan Borough Council and the London Borough of Wandsworth Council when the appellant Sporle was a member and chairman of the housing committee or member of the council. The appellants Andrews Weatherfoil Ltd were found guilty on one count of offering the appellant Sporle emoluments in connection with their employment on council housing projects and were fined £10,000; the appellant Sporle was found guilty on seven counts of corruption and sentenced to six years' imprisonment; the appellant Day was found guilty on the only count on which he was charged, that of corruptly offering £500 to the appellant Sporle for the appellant Sporle's wife as an inducement for promoting the interests of a company of building contractors, and he was sentenced to 18 months' imprisonment. The appellants Andrews Weatherfoil Ltd were given leave to appeal against conviction on two grounds and applied for leave to appeal on other grounds after refusal; the appellant Sporle applied for leave to appeal against conviction on five counts; and the appellant Day applied for leave to appeal against conviction: in each case from refusal by a single judge. The facts are set out in the judgment of the court.

Victor Durand QC and J G Nutting for the appellants Andrews Weatherfoil Ltd.
 J B R Hagan QC and A C L Lewisohn for the appellant Sporle.
 J F F Platts-Mills QC and P J Crawford for the appellant Day.
 J H Buzzard and M H D Neligan for the Crown.

Cur adv vult

11th October. **EVELEIGH J** read the judgment of the court so far as it concerned appeals or applications for leave to appeal against conviction at the invitation of Lord Widgery CJ. On 23rd March 1971 at the Central Criminal Court in a trial which lasted over six weeks the appellants, Andrews Weatherfoil Ltd, Sidney Frederick Charles Sporle and Peter George Day, were charged with bribery and corruption under s 1 of the Public Bodies Corrupt Practices Act 1889, in relation to council building contracts of the Battersea Metropolitan Borough Council and the London Borough of Wandsworth Council when the appellant Sporle was member and chairman of the housing committee or member of the council.

Count 1 charged that the appellant Sporle on 4th January 1965 corruptly agreed to receive a salary from Ellis (Kensington) Ltd as an inducement to or reward for favouring them. Count 2 alleged a similar agreement in respect of salary from Property Estates Development Ltd again for favouring Ellis (Kensington) Ltd. Count 3 alleged a similar agreement on 27th January 1967 to receive a motor car from Property Estates Development Ltd for favouring Ellis (Kensington) Ltd. Count 4 alleged that the appellant Sporle corruptly solicited from one Culpin employment for Ellis (Kensington) Ltd on account of the appellant Sporle favouring or forbearing to disfavour Mr Culpin. Count 5 charged the appellant Sporle with agreeing on 2nd September 1966 to receive £500 for his wife from the appellant Day 'as an inducement to or reward for . . . promoting the interests of John Laing Construction Limited'. Count 6 charged the appellant Day with corruptly offering the £500. Count 7 alleged that between 31st October 1966 and 29th April 1967 the appellant Sporle corruptly agreed to receive emoluments from employment by the appellants Andrews Weatherfoil Ltd for favouring them. On count 8 the appellants Andrews Weatherfoil Ltd were charged with corruptly offering the appellant Sporle the emoluments. Count 9 alleged that the appellant Sporle on 28th April 1967 corruptly solicited from one Harding employment for the appellants Andrews Weatherfoil Ltd on a housing scheme of the borough council on account of the appellant Sporle favouring or forbearing to disfavour Mr Harding's firm. In this count the appellants Andrews Weatherfoil Ltd and their employee Green were charged with aiding and abetting the appellant Sporle. Count 10 alleged that the appellant Sporle between 1st November 1965 and 6th July 1967 agreed to receive emoluments from one T D Smith for favouring Fleet Press Services Ltd.

The appellants Andrews Weatherfoil Ltd were found guilty on count 8 but they and Mr Green were acquitted on count 9. The appellant Sporle was found guilty on all counts except count 3. The appellant Day was found guilty on count 6. Mr T D Smith was granted a separate trial in respect of offering the emoluments referred to in count 10. One J C Bianco was granted a separate trial in respect of a charge alleging that he corruptly solicited advantages for the appellant Sporle from Mr Culpin in return for the appellant Sporle favouring Mr Culpin. Both Mr Smith and Mr Bianco were subsequently acquitted by the jury.

The appellants Andrews Weatherfoil Ltd were given leave to appeal against conviction on two grounds, in their notice of appeal, and seek leave to appeal after refusals on other grounds. The appellant Sporle seeks leave to appeal against conviction in respect of counts 1, 5, 7, 9 and 10 and the appellant Day seeks leave to appeal against his conviction, in each case after refusal by the single judge.

The Crown's case was that the appellant Sporle used his position on the council to obtain sums of money in return for support in obtaining building contracts from the council. The evidence showed, it was said, a systematic course of conduct to show favour where he had financial expectations and that when he acted in purported discharge of his duties to the council he failed to disclose his interest. In this way it was sought to show that he acted intending to benefit his employers or their nominees without regard to the interest of the council. Once his support for candidates for contracts from the council was shown to be given with improper intentions or motives

- a (it being too much of a coincidence that so often those he supported turned out to be his employers) there was material relevant to the question of the existence of an antecedent agreement to do so in return for benefits to himself which the evidence showed he received. In this connection the fervour of his support for the cause of his employers was also relied on. Thus it was said he was so determined to assist Ellis (Kensington) Ltd that he even threatened Mr Culpin—an independent architect
- b appointed to carry out some of the council's plans—with the possible loss of council work unless Ellis (Kensington) Ltd were given sub-contracts. So too, in relation to the appellants Andrews Weatherfoil Ltd, he made a similar threat to Mr Harding. Both of these gentlemen refused to be coerced.

The appellants Andrews Weatherfoil Ltd

- c The grounds on which the appellants Andrews Weatherfoil Ltd were given leave to appeal were: failure properly to direct on law as to the criminal responsibility of a limited liability company for the act of a servant and failure to deal with the correct factors that in law determine the question whether a criminal intention in an employee is also that of the company. On examination these two grounds overlap, for in the present case the offence was not an absolute statutory offence but involved criminal conduct and a guilty mind on the part, it was said, of the company's senior
- d employees. The question, therefore, of the status and authority of the person or persons responsible was of great importance.

- The Crown concedes, and in the view of this court rightly concedes, that the learned judge's direction was not adequate. There were three people who were alleged by the Crown to have the status and authority to involve the company itself in criminal liability for corruption in connection with the offer of employment to the
- e appellant Sporle as a reward for anticipated favours from him. Those three were Mr Neuman, the managing director, Mr Allen, a 'technical director' and Mr Williams, the manager of the or a housing division. That these three were concerned in the engagement of the appellant Sporle there is no doubt. The actual offer of employment was made by Mr Neuman in a letter which Mr Allen had some part in drafting. Whether or not it was one, two or all of these three who sought or were party to
- f seeking favours for the appellants Andrews Weatherfoil Ltd from the appellant Sporle as a return for the offer of employment was, as is usually the case, a matter of inference from the evidence. The learned judge directed the jury as follows:

- 'If an act is done by anyone who is in control of a company and who is in authority to perform an important act of that sort then that act of that person can be the act of the company itself . . . if an act is done by a responsible agent or a
- g company; if in the course of that act that agent commits an offence and he does it in the name of the company then the company is liable . . . if an agent acts corruptly on behalf of the company the corruption of the agent is the corruption of the company. That is not an absolute rule; it is a principle which depends on the circumstances of the offence . . . if one of these people, Williams or Allen or Neuman or any combination of them acting as a high executive of Andrews Weatherfoil indulges in the employment of a person to act corruptly to further the interests of the company of which that man is one of the executive directors the company is responsible and the company is guilty of a criminal offence.'
- h

On counsel drawing the judge's attention to the fact that Mr Williams was not a director he continued:

- i 'There is no magic in being a director. If you are the manager of the housing department or in any high executive position in such a way that you can recommend to your managing director that someone should be employed, as it is said Allen (sic) recommended Sporle, in those circumstances the person who recommends it, who is in a high position, if you are satisfied that he did that in the name of the company and it was corrupt the company can be liable. That

is a matter for you as to whether or not you are satisfied that that employment by Sporle was done with the approval and knowledge of a high executive of Andrews Weatherfoil acting as an agent of the company for the purpose of his employment and that employment to the knowledge of the executive or executives was corrupt.' a

It is not every 'responsible agent' or 'high executive' or 'manager of the housing department' or 'agent acting on behalf of a company' who can by his actions make the company criminally responsible. It is necessary to establish whether the natural person or persons in question have the status and authority which in law make their acts in the matter under consideration the acts of the company so that the natural person is to be treated as the company itself. It is often a difficult question to decide whether or not the person concerned is in a sufficiently responsible position to involve the company in liability for the acts in question according to the law as laid down by the authorities. As Lord Reid said in *Tesco Supermarkets Ltd v Natrass*¹: b

'It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability.' c

Lord Reid added²: d

'I think that the true view is that the judge must direct the jury that if they find certain facts proved then as a matter of law they must find that the criminal act of the officer, servant or agent including his state of mind, intention, knowledge or belief is the act of the company.' e

It follows that it is necessary for the judge to invite the jury to consider whether or not there are established those facts which the judge decides as a matter of law are necessary to identify the person concerned with the company. This was not done in the present case.

The court was invited to apply the proviso to s 2 (1) of the Criminal Appeal Act 1968. It is not possible, however, to decide whether or not the jury regarded Mr Neuman, Mr Allen or Mr Williams, or any or what combination of them as responsible for the criminal act. Mr Williams's position in the company is not at all clear and the description 'housing manager' does not succeed in making it so. To a less extent this is true of Mr Allen. Consequently it is impossible to say that the jury would have arrived at the same verdict if properly directed and it follows that this appeal must succeed. f

Insofar as the appellants Andrews Weatherfoil Ltd seek leave to appeal on other grounds it will be sufficient to say that leave is not granted. g

The appellant Sporle

Count 1. The appellant Sporle contended that the judge failed clearly to direct the jury that corruption had to be proved at the time of the appellant entering the employment of Ellis (Kensington) Ltd and that proof of a later supervening corruption was not enough. The Crown had presented the case on that basis. The date alleged in the particulars, namely, 4th January 1965, was not vital in this kind of charge but coupled with the way in which the case had been presented it meant, as counsel for the Crown properly conceded, that the beginning of the appellant Sporle's employment was the material period. Whilst it is true that the judge said 'Whether it was the 4th January or thereabouts matters not' he went on to say that the allegation in count 1 was that the appellant Sporle was employed on that date substantially h

¹ [1971] 2 All ER 127 at 131, 132, [1971] 2 WLR 1166 at 1176

² [1971] 2 All ER at 134, [1971] 2 WLR at 1179 j

- a for the purpose of putting forward Ellis's interests and that he was paid over £1,000 a year from 1st January so that—
 'if you are satisfied so that you are sure that he agreed to receive that money in return for those favours you ought to find him guilty. If you are not satisfied you find him not guilty.'
- b It was also contended that the judge failed to remind the jury that there was no evidence of corruption until after the appellant Sporle had become employed by the company. The judge did in fact remind the jury that the appellant Sporle had been employed by a Mr Nixon, the sales manager (Mr Ellis did not give evidence), and that according to Mr Nixon there had been some preliminary discussion as to approaching the council, but it was made clear to the appellant Sporle that he was debarred from doing so. The judge further told the jury that the nub of the allegation
- c against the appellant Sporle was his threat to Mr Culpin in March 1965, that is after he began to work for Mr Ellis. The appellant Sporle's contentions are unfounded. The judge summed up the facts fairly to the jury and there was clear evidence from which the jury were entitled to infer a corrupt agreement at the beginning of the appellant Sporle's employment.
- d Count 5. This count can conveniently be dealt with at the same time as count 6 on which the appellant Day applies for leave.
Count 7. It is claimed that if the appellants Andrews Weatherfoil Ltd succeed on the two grounds stated in their notice of appeal, the appellant Sporle's conviction is unsatisfactory.
- e In returning a verdict of guilty against the appellants Andrews Weatherfoil Ltd, the jury must have concluded that a corrupt offer of employment with the company had been made to the appellant Sporle and accepted by him. This court had only decided that the jury were not properly directed whether or not the person making the offer was in such a position as to involve the company in criminal liability. This decision in no way affects the question whether or not the appellant Sporle corruptly agreed to accept employment.
- f Count 9. It is claimed that if the appellants Andrews Weatherfoil Ltd succeed as above, the conviction of the appellant Sporle on count 9 is unsatisfactory. This argument is very difficult to follow for count 9 alleges that the appellant Sporle personally made a corrupt request himself to Mr Harding. The point of law in the appeal of the appellants Andrews Weatherfoil Ltd on count 8 has no relevance to the question whether or not the appellant Sporle made such a request.
- g Count 10. It is said that as Mr Smith was acquitted on 12th July 1971 on the charge of corruptly offering emoluments to the appellant Sporle, the appellant Sporle's conviction for corruptly accepting those emoluments is unsafe.
- h As long as it is possible for persons concerned in a single offence to be tried separately, it is inevitable that the verdicts returned by the two juries will on occasion appear to be inconsistent with one another. Such a result may be due to differences in the evidence presented at the two trials or simply to the different views which the juries separately take of the witnesses. That the result produced by such inconsistency is 'unsatisfactory' cannot be disputed but it is the unsatisfactory character of the guilty verdict to which s 13 of the Criminal Justice Act 1968 is directed, rather than an unsatisfactory result of the two trials as a whole. When inconsistent verdicts are returned by the same jury, the position is usually more simple. If the inconsistency shows that that single jury was confused, or self-contradictory, its conclusions
- i are unsatisfactory or unsafe and neither verdict is reliable. Very often, however, an apparent inconsistency reflects no more than the jury's strict adherence to the judge's direction that they must consider each case separately and that evidence against one may not be admissible against the other; e.g. where there is a signed confession. So, too, where the verdicts are returned by different juries the inconsistency does not, of itself, indicate that the jury which returned the verdict was

confused or misled or reached an incorrect conclusion on the evidence before it. The verdict 'not guilty' includes 'not proven'. We do not, therefore, accept the submission of counsel for the appellant Sporle that inconsistent verdicts from different juries ipso facto renders the guilty verdict unsafe. If, as will usually be the case, the evidence at the two trials was significantly different this not only explains the different verdicts but also defeats the claim that inconsistency alone renders the guilty verdict unsafe. If the difference in the evidence consists of additional material favourable to the accused being called at the second trial, the first accused should seek to call that evidence in this court and not rely merely on the inconsistent verdicts. The jury in the present case had the opportunity of hearing the appellant Sporle in the witness box, and there has been no suggestion that evidence favourable to the appellant Sporle was given in Mr Smith's trial which was not given in the trial of the appellant Sporle. There are, therefore, no grounds for concluding that the verdict against the appellant Sporle was unsatisfactory.

The appellants Sporle and Day

Counts 5 and 6. In April 1965 in the Grosvenor Hotel the appellant Sporle met the appellant Day and one Cameron, employed by John Laing Construction Ltd, from whom the appellant Day stood to receive commission in the event of Laing's being awarded a contract by the council. There was evidence that subsequent to this meeting the appellant Sporle furthered the interest of Laing's until April 1966 when a letter of intent was sent by the council to Laing's with the object of employing them. On 1st September 1966 Mr Brennan, managing director of the company, signed a contract of employment between the company and the appellant Sporle. The appellant Day was out of the country. On 2nd September it was arranged between the appellant Sporle and Mr Brennan that the sum of £500, being the appellant Sporle's fee under the contract, should be paid to the appellant Sporle's wife. Although the letter of intent was not the final contract, and there were further necessary negotiations before the contract was concluded in March 1967, the case was not presented on the basis that the appellant Sporle was being remunerated in September 1966 for any assistance thereafter.

It was contended on behalf of the appellants Sporle and Day that it was necessary in a charge under s 1 of the Public Bodies Corrupt Practices Act 1889 to establish a corrupt agreement for reward in contemplation of future favours, and that a reward post facto unrelated to any such earlier agreement was not enough. It was contended that the judge did not make this clear to the jury. Section 1 (1) of the 1889 Act provides:

'Every person who shall by himself or by or in conjunction with any other person, corruptly solicit or receive, or agree to receive, for himself, or for any other person, any gift, loan, fee, reward, or advantage whatever as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned, shall be guilty of a misdemeanour.'

There is no doubt that the word 'reward' can be given the natural meaning of a post facto gift without any antecedent agreement.

It was argued, however, that the word 'doing' was the present participle and that to bring within the section a reward made without an agreement which preceded the favour was to construe the verb as though it read 'having done'. A similar argument was directed to the use of the present tense in the phrase 'in which the said public body is concerned'. The court's attention was drawn to the wording of s 1 of the Prevention of Corruption Act 1906, in which the past tense is specifically used in the phrase 'for having after the passing of this Act done or forborne to do any act',

a etc. However, the specific use of the past participle in that Act was by way of contrast to preceding present participles in order to express Parliament's intention that a reward for a past act without antecedent agreement would only be an offence in respect of an act done after the passing of the Act. It was also pointed out that s 99 (2) (b) of the Representation of the People Act 1949 uses the words 'corruptly does any such act as aforesaid on account of any voter having voted or refrained from voting'. Again this court does not find the reference to the wording of another statute helpful in construing the relevant section in the present case. Section 99 of the Representation of the People Act 1949 sets out in separate clauses the different acts which were made to constitute bribery. A distinction appears in the clause to which counsel referred in that the word 'corruptly' is introduced which does not appear in the other clauses setting out other acts which are made to constitute bribery.

c The court does not say that another statute in *pari materia* may not be looked at as an aid to construction in an appropriate case but when, as in the present case, the court is satisfied as to the meaning on the natural wording of the section it is neither necessary nor desirable to refer to other statutes enacted for different purposes.

d This court is of the opinion that it would be unnatural not to give a post facto meaning to the word 'reward'. It is to be noted that that word is not only used in association with the words 'gift', 'loan', 'fee' and 'advantage' but is repeated in contradistinction to 'inducement' in the phrase 'as an inducement to, or reward for'. The use of the present tense in the phrase commencing with the words 'doing or forbearing to do' is equally applicable to past or future conduct seeing that that phrase is simply descriptive of the nature of the activity for the time being contemplated as the subject-matter of the inducement or reward. This court then is of the opinion that the Act covers receipt of money for a past favour without any antecedent agreement and it was open to the jury to convict both accused on this basis.

e However, the judge in fact left the case to the jury on a more favourable basis, for taken as a whole his direction indicated that they should look for an agreement before April 1966. He specifically said:

f '... of course, if the £500 and any suggestion of any money was not given until after everything was over, and there was no suggestion that he was to have an inducement or reward beforehand that would not be good enough.'

There was in fact ample evidence from which an antecedent agreement could be inferred and consequently this ground for leave to appeal fails.

g Counsel for the appellant Day made a number of points on various passages in the summing-up, and contended that the jury had not been reminded of parts of the evidence favourable to his client. The court has carefully considered those submissions, but it has no doubt that the case for the appellant Day was adequately and fairly put.

h It was also said that the judge wrongly directed the jury to the effect that the appellant Day would be responsible for the contract signed by Mr Brennan when the appellant Day was out of the country. In the view of this court the judge made it perfectly clear that it was necessary for the jury to be satisfied that the appellant Day, as the judge himself said, 'knew that this was going to be done and was a party to it.'

i It was further argued that the judge had wrongly referred to counts 5 and 6 as 'mirror counts' indicating to the jury that they should stand or fall together. It was said that on the facts of the present case this resulted in the jury taking into account the appellant Sporle's activities in relation to the other transactions such as those concerning Ellis and the appellants Andrews Weatherfoil Ltd.

Two counts in an indictment may be so closely connected that an acquittal or conviction on one would appear logically to a layman to lead to an acquittal or conviction on another. The strict regard for the rules of evidence and the burden of proof, however, may lead to different verdicts, as those practising in the courts are

well aware. It is consequently undesirable, however closely connected the facts of the two counts may be, for the judge to adopt the expression 'mirror counts'. In cases of corruption it is possible to envisage a bribe being corruptly offered and innocently accepted and possible even the other way round. On the facts of the present case, however, it is impossible to conceive that the £500 was corruptly received by the appellant Sporle unless corruptly given by the appellant Day. The court recognises that the appellant Sporle's conduct on the council in relation to the other accused would be an important factor in the deliberations of the jury, but it is of the opinion that the evidence relating thereto was admissible in the case against the appellant Day.

In the forefront of the case was the allegation that the appellant Sporle was actively engaged in supporting Laing's quarrels with the council. This the appellant Sporle was entitled to do if he was acting with the council's interests in mind, but was not entitled to do if he acted with a corrupt motive. The state of the appellant Sporle's mind was consequently relevant. Evidence of system is admissible for this purpose to show the appellant Sporle's intention and whether his support in the council was proper and innocent on the one hand, or improper and corrupt on the other. In *R v Bond*³ A T Lawrence J said:

'Where, however, acts are of such a character that, taken alone, they may be innocent, but which result in benefit or reward to the actor and loss or suffering to the patient, repeated instances of such acts at least shew that experience has fully informed the actor of all their elements and details, and it is only reasonable to infer that the act is designed and intentional, and its motive the benefit or reward to himself or the loss or suffering to some third person.'

One might appropriately add 'or to benefit or reward those from whom he had expectations'. The fact that the conduct was that of the appellant Sporle and not of the appellant Day does not detract from the relevance of the evidence.

The result is that the appeal of the appellants Andrews Weatherfoil Ltd will be allowed on the two grounds in their notice of appeal and their conviction will be quashed. In relation to the other grounds and to the applications of the appellants Sporle and Day leave to appeal is given and the appeals dismissed.

LORD WIDGERY CJ. I now pass to sentence. It is not necessary to deal with the considerations at very great length because they are really all apparent from the judgment which has already been delivered, save only to add that which has been so admirably added by counsel for the appellant Sporle, the very large credit side of the account which the appellant Sporle can claim in view of his long and distinguished record with these local authorities. This is an example of a case, which happily does not arise often, where a man of perfect character who has done a great deal of exceptionally good work for the community commits a serious breach of his trust and eventually stands his trial and is convicted for it. The courts have always, we think rightly, taken the view that such cases must be marked with a substantial sentence of imprisonment. There are many others in the books of recent years of which that can be said.

It is, however, considered that when due regard is had to what I have called the credit side of the account, that a total of six years is excessive and is greater than is merited by the circumstances of this case. We find it unnecessary to say more than that. We accede to that argument; we think it is possible now, having reviewed both sides of the matter, to reduce the sentence on the appellant Sporle to some degree, and in regard to the application for leave to appeal against sentence we shall grant leave to appeal with the consent, which I am sure will be forthcoming, from counsel for the appellant Sporle; we shall treat the application as the hearing of the appeal and in respect of each sentence of 18 months we shall substitute a sentence of 12

a months. This will result in a total period of imprisonment of 4 years as against the period of 6 years' imprisonment imposed by the learned trial judge.

So far as the appellant Day is concerned, it is we think obvious that he should be regarded on the same basis as the appellant Sporle in regard to the one incident with which he was concerned, and we shall make a corresponding reduction in his case. Accordingly, we shall grant him leave to appeal against sentence; with counsel
b for the appellant Day's concurrence we shall treat the application as the hearing of the appeal, and for the sentence of 18 months' imprisonment we shall substitute a sentence of 12 months' imprisonment.

Appeal of the appellants Andrews Weatherfoil Ltd against conviction allowed. Applications of the appellants Sporle and Day to appeal against conviction granted but appeals dismissed. Appeals of the appellants Sporle and Day against sentence allowed in part. Sentences varied.
c

Leave to appeal to the House of Lords refused but the court certified under s 33 (2) of the Criminal Appeal Act 1968 that a point of law of general public importance was involved, i e whether on the true construction of s 1 of the Public Bodies Corrupt Practices Act 1889, it is an offence corruptly to agree to offer (or receive) a reward in respect of past acts or forbearances.

d 30th November 1971. The appellate committee of the House of Lords refused leave to appeal.

Solicitors: Lawrence, Graham & Co (for the appellants Andrews Weatherfoil Ltd); Kingsley Napley & Co (for the appellant Sporle); J R Phillips & Co (for the appellant Day); Director of Public Prosecutions.

Mary Rose Plummer Barrister.

e

R v Buswell

COURT OF APPEAL, CRIMINAL DIVISION

PHILLIMORE LJ, PARK AND GRIFFITHS JJ

12th NOVEMBER 1971

f *Drugs – Dangerous drugs – Possession – Unauthorised possession – Drugs lawfully obtained by patient under doctor's prescription – Patient mistakenly believing drugs destroyed – Patient obtaining fresh supply from doctor – Patient subsequently discovering original supply – Whether possession of original supply after discovery unlawful – Drugs (Prevention of Misuse) Act 1964, s 1 (1).*

The appellant was a drug addict. In November 1969 he was prescribed 70 amphetamine tablets by his doctor. He put the tablets in a pocket of his jeans which he placed in a drawer in his bedroom. A few days later he discovered that his mother had taken his jeans and washed them. He thereupon came to the genuine conclusion that, in washing the jeans, his mother had destroyed the remaining tablets which he had not yet taken. He told the doctor what had happened and obtained a prescription for a further supply to make good the loss. In September 1970, months after the treatment had been completed, the appellant discovered that the missing tablets were still in his bedroom drawer. Thereafter the police made a search and found the tablets. In consequence he was charged with unlawful possession of the tablets contrary to s 1 (1)^a of the Drugs (Prevention of Misuse) Act 1964. It was argued, inter alia, by the Crown that the tablets were only prescribed for a particular course of treatment and that the appellant had no business to be in possession of them once the
g treatment had been concluded; further that, since possession involved at least two elements, i.e. actual custody and the mental element of knowledge, the appellant's mistaken belief that they had been destroyed meant that he thereupon ceased to be in possession and, consequently, the rediscovery constituted a new possession which was not by virtue of any prescription and which was, therefore, unlawful. The court accepted the Crown's argument and the appellant was convicted. On appeal,
h
j

a Section 1 (1), so far as material, is set out at p 77 d, post

Held – The appeal would be allowed for the following reasons—

(i) where a person was in lawful possession of drugs under a doctor's prescription, the possession of those drugs which remained unconsumed did not automatically become unlawful once the treatment was concluded (see p 78 c, post);

(ii) where a person who was in lawful possession of drugs forgot their existence, or mistakenly thought that they had been disposed of or destroyed, although in fact they remained in his custody, he did not thereby cease to be in possession of them; it followed that the continued possession remained lawful; accordingly the tablets were in the appellant's possession by virtue of the doctor's prescription (see p 78 e f and h, post).

Lockyer v Gibb [1966] 2 All ER 653 and *Warner v Metropolitan Police Comr* [1968] 2 All ER 356 distinguished.

Notes

For the unauthorised possession of drugs, see Supplement to 26 Halsbury's Laws (3rd Edn) para 491A, and for cases on the subject, see Digest (Cont Vol B) 522, 243b, 243c, and Digest (Cont Vol C) 671, 243d.

For the Drugs (Prevention of Misuse) Act 1964, s 1, see 21 Halsbury's Statutes (3rd Edn) 942.

Cases referred to in judgment

Lockyer v Gibb [1966] 2 All ER 653, [1967] 2 QB 243, [1966] 3 WLR 84, 130 JP 306, Digest (Cont Vol B) 522, 243b.

Warner v Metropolitan Police Comr [1968] 2 All ER 356, [1969] 2 AC 256, [1968] 2 WLR 1303, 132 JP 378, 52 Cr App Rep 373, Digest (Cont Vol C) 671, 243d.

Appeal

This was an appeal by Peter William Buswell against his conviction at Reading Borough Quarter Sessions on 21st January 1971 on a charge of unlawful possession of drugs contrary to s 1 (1) of the Drugs (Prevention of Misuse) Act 1964. The facts are set out in the judgment of the court.

I D G Alexander for the appellant.

H Wilson for the Crown.

PHILLIMORE LJ delivered the judgment of the court. This is an appeal against conviction by the certificate of the deputy recorder. The appellant appeared at Reading Borough Quarter Sessions on 21st January 1971 and, after he had given his evidence, he was found guilty by the direction of the deputy recorder of unlawful possession of drugs contrary to s 1 (1) of the Drugs (Prevention of Misuse) Act 1964. He was conditionally discharged for two years.

The learned deputy recorder gave a certificate stating that the case—

‘raises the question of law whether, on the facts, admitted by the [appellant], his possession of the drugs was lawful or unlawful.’

It is that point we have to determine.

The facts were these. The appellant was a drug addict. It appears that he was for a time under treatment in the Royal Berkshire Clinic, but then, in August 1969, his treatment was transferred from the clinic to his own doctor, a Dr Taylor. From August onwards Dr Taylor was prescribing certain weekly doses of amphetamine for the appellant on a gradually decreasing scale. Indeed the treatment finally concluded in January 1970.

Now, in the course of that treatment, on 11th November 1969, Dr Taylor prescribed 70 amphetamine tablets. We have not seen the actual prescription, but the doctor explained that he anticipated that the appellant, being an addict, would take them all in the course of the week following. It appears that the appellant either put them, or thought that he had put them, in the pocket of his jeans which in turn

a he put in a drawer in his bedroom. Of course he took a few in the immediately succeeding days. Then on 15th November he discovered to his horror that his mother had been through his drawer and washed his jeans. He came to the conclusion—and there does not seem to be any doubt that this was a genuine conclusion—that in washing his jeans, she had dissolved the balance of his supply, namely about 40 tablets. So he went back to Dr Taylor and explained what had happened or what he believed to have happened and asked for a prescription to make good his loss. The doctor b having checked the facts with the boy's father, who assured him that the story was true, prescribed a new lot of 40 tablets to supplement the loss. So matters went on.

In September 1970, months after the treatment had been completed, the appellant, apparently at his mother's behest, started to clear out his drawer altogether, and in the course of so doing he found his missing tablets. He could not resist the temptation of taking some of them, and then the police had cause to make a search and they c found that he had 18 still in his possession that he had not consumed. Hence this prosecution for being in unlawful possession of those tablets.

Of course this was an offence laid under the Drugs (Prevention of Misuse) Act 1964, s 1 (1), which provides, after dealing with possible regulations:

d '... it shall not be lawful for a person to have in his possession a substance for the time being specified in the Schedule to this Act [needless to say amphetamines are specified in the Schedule] unless—(a) it is in his possession by virtue of the issue of a prescription by a duly qualified medical practitioner or a registered dental practitioner for its administration by way of treatment to him, or to a person under his care . . .'

What is said by the Crown here and accepted by the deputy recorder, who directed e the jury to convict, is this: it may be that when he got his original 70 under the prescription, he was lawfully in possession; but of course, they were designed for his treatment and in fact these tablets which were found in his possession in September 1970 could no longer be said to be lawfully in his possession by virtue of the issue of the prescription, because subsequently they had been replaced as a result of a new prescription. And it is said that anyhow they were only prescribed for this f particular course of treatment and he had no business to be in possession of them once that treatment had been concluded. And finally, and perhaps more important, what is said is this, that possession involves at least two elements: (1) actual custody of the article, and (2) a mental element, the fact that one knows that one has got it, what is called 'animus', and so, it is said, inasmuch as the appellant thought that these tablets had been disposed of by being dissolved when the jeans were washed, he then g ceased to be in possession of them, albeit they remained in his drawer, and he was not in possession of them at all until he rediscovered them some nine or ten months later. That, it is submitted, was a rediscovery and a new possession and not by virtue of any prescription. There it is. That is the argument.

This court has been referred to two cases of possession of drugs: one is *Lockyer v Gibb*¹, and the other a case that went to the House of Lords, *Warner v Metropolitan h Police Comr*². In those cases a good deal of consideration was given to this question of 'animus'; they were cases which dealt with something very different, i.e. the question whether an article ever came into the individual's possession at all. For example, supposing somebody slipped an article into your pocket, and it was there without your knowledge, the question whether it could be said to be in your possession; or if a lady was going along in the street with one of those shopping baskets and somebody put an article into that without her knowledge, whether it could be said that i it was in her possession; or supposing somebody handed a parcel to you which you believed to contain scent, but which in fact contained drugs, whether it could be said that those drugs were in your possession.

It seems to this court that that is a very different problem from a case where an

1 [1966] 2 All ER 653, [1967] 2 QB 243

2 [1968] 2 All ER 356, [1969] 2 AC 256

article is undoubtedly in your possession and the question is whether, because you forget you have got it or because you think wrongly that it has been disposed of or destroyed, it could be said that it has gone out of your possession, even though it remains physically in a drawer in your house. a

As to the argument about the second prescription, as it were, destroying the legality of the first, and the end of the treatment rendering drugs prescribed in the course of it no longer lawfully in your possession, this court thinks nothing of those points. As I have indicated, we have not seen this prescription. There is no reason to suppose that it is stated on the face of it that the drugs prescribed must be consumed not later than a certain date or anything of that sort. Nor indeed that at the conclusion of the treatment the doctor said 'Well, now, you must hand back any surplus drugs which you may have'. I suppose there are very few households in this country which do not contain a few little bottles with some drugs, possibly specified in the schedule, which have not been consumed in the course of treatment and which have been kept at the back of the medicine cupboard and forgotten all about. To suggest that a member of the household who received them under a perfectly proper lawful prescription is in unlawful possession once the treatment is concluded seems to this court to be an extraordinary proposition. b

Dealing with what seems to be the one real problem here, namely the question whether drugs lawfully acquired by a prescription in some way pass out of your possession if you forget you have got them, or if you think that they have been destroyed, whereas in fact they are still sitting in your drawer, this court thinks that it cannot be said that simply as a result of your mistaken belief or your failure to appreciate that you have got them, thereby they in some way passed out of your possession. Of course it is quite different if I hand something over to someone else to destroy, so that it passes from my custody and they officiously put it back in my house without telling me; or if I throw something into the dustbin for disposal by the borough council and some officious person decides that I could not have meant to throw it away and puts it back in my house, so that I have it without knowing. In those sort of cases you are back on the problem which was dealt with in the cases to which I have referred, i.e. whether something comes into your possession. But if you have got it in your custody and you put it in some safe place, and then forget that you have got it, and discover a year or two later, when you happen to look in that particular receptacle that it is still there, it seems to this court idle to suggest that during those two years it has not been in your possession. It has been there under your hand and control. If it has not been in your possession, in whose possession has it been? Presumably it has not been in a state of limbo. Again with the question of destruction. This court thinks that it is idle to say that if mistakenly you think your mother has dissolved the tablets which you put in the pocket of your jeans, whereas in fact they are still in the drawer, they have in some way passed out of your possession. They have never left your care and control and accordingly, as I think, remain in your possession. c

For these reasons the court thinks that this conviction was entirely wrong. These drugs came into the appellant's possession by virtue of a perfectly lawful prescription. They were in his possession when he rediscovered them, and in his possession still as a result of that prescription. In the judgment of this court in those circumstances this appeal must be allowed and this conviction must be quashed. d

Appeal allowed. Leave to appeal to the House of Lords granted, the court certifying under s 33 (2) of the Criminal Appeal Act 1968 that a point of law of general public importance was involved, i.e. whether the possession of drugs originally obtained by lawful means became unlawful when, in the belief that the original supply had been disposed of or destroyed, a further supply was prescribed, and the original supply was rediscovered. e

Solicitors: Registrar of Criminal Appeals (for the appellant); J Malcolm Simons, Oxford (for the Crown). f

Francesca Durley Barrister. g

a Snelling v John G Snelling Ltd and others

QUEEN'S BENCH DIVISION

ORMROD J

18th, 19th, 27th MAY 1971

- b** Contract – Stranger to contract – Benefit of contract – Agreement between creditors of stranger – Agreement to forfeit loans in specified circumstances – Action by one of creditors to enforce debt against stranger after loan forfeited under agreement – All parties before court in proceedings to enforce debt – Stay of proceedings – Dismissal of action – Company – Plaintiff, as director, owed sum on loan account by company – Loan by finance company to company – Covenant by plaintiff and co-directors not to reduce respective loans to company until loan repaid to finance company – Separate agreement between plaintiff and co-directors that if any of them voluntarily resigned before loan repaid to finance company moneys due to him from company would be forfeited – Company not a party to agreement – Plaintiff voluntarily resigning – Plaintiff claiming from company sum owing to him – Co-directors joined as defendants claiming declaration that plaintiff's loan forfeited – Co-directors entitled to judgment – Stay of proceedings against company – Dismissal of plaintiff's action against company – Supreme Court of Judicature (Consolidation) Act 1925, s 41.

The plaintiff and the second and third defendants were brothers and co-directors of the first defendants ('the company'). Prior to 1967 the company had been financed by loans from each of the brothers. In 1968 additional finance was required and, on 22nd March, a mortgage on the company's properties was executed under which **e** a finance company agreed to advance £40,000 to the company, repayable over ten years. All three brothers were parties to this mortgage agreement and each of them covenanted with the mortgagees that they would not reduce the amounts of their respective loans to the company below the sum shown in the accounts on 31st March 1966. On 22nd March 1968 the brothers entered into an agreement between themselves which was to remain in force until the loan by the finance **f** company had been repaid. By cl 4 and 5 it was agreed that in the event of any director voluntarily resigning he would immediately forfeit all money due to him from the company by way of his loan account and that if this event occurred the remaining directors might use the money in furtherance of the intention to repay the loan from the finance company but not in such a way as to benefit themselves personally. In June 1968 the plaintiff voluntarily resigned as a director and claimed **g** payment from the defendant company of the sum in his loan account at the date of his resignation. The company denied that the plaintiff was entitled to the relief claimed and joined the co-director brothers as defendants. They adopted the company's defence and further counterclaimed for a declaration that the sum due to the plaintiff on the loan account had been forfeited. The issues arose whether the agreement between the brothers was intended to create legal relations and **h** whether the defendant company could rely on a term in the agreement when it was not a party to it even though the agreement was for the company's benefit.

Held – (i) The agreement between the plaintiff and the second and third defendants was intended to affect the legal rights of all concerned and was therefore legally binding and enforceable (see p 85 h and p 86 a c and d, post).

j (ii) The second and third defendants, having proved the contract between the plaintiff and themselves and having proved a breach of it by the plaintiff, or an undoubted intention on his part to repudiate it, were entitled to a declaration that the provisions of the agreement were binding on the plaintiff (see p 87 f and j, post).

(iii) The company, on the other hand, was not entitled to rely directly on the terms of the agreement since it was not a party to it (see p 87 g and p 89 g, post); nevertheless, the second and third defendants having made out an unambiguous

case and succeeded on their counterclaim, and all parties, including the promisees under the agreement and the party to be benefited, being before the court, it was a proper case for a stay of all further proceedings under s 41^a of the Supreme Court of Judicature (Consolidation) Act 1925 in the plaintiff's action against the company; furthermore, since the reality of the matter was that the plaintiff's claim had failed, the right course was to dismiss the claim rather than merely to grant an order staying further proceedings (see p 89 a and j to p 90 a, post).

Beswick v Beswick [1967] 2 All ER 1197 considered.

(iv) Accordingly the plaintiff's claim would be dismissed and judgment given for the second and third defendants on the counterclaim with a declaration that, in the events which had happened, the plaintiff was not entitled to call on the defendant company to repay to the plaintiff the whole or any part of the sum due from the company to the plaintiff on his loan account on the date of his resignation (see p 90 b, post).

Notes

For the rights of strangers to a contract, see 8 Halsbury's Laws (3rd Edn) 66-68, paras 110-117, and for cases on the subject, see 12 Digest (Repl) 45, 227-241.

For the definition of a contract, see 8 Halsbury's Laws (3rd Edn) 54-59, paras 90-96, and for cases on the subject, see 12 Digest (Repl) 21-23, 1-14.

For the Supreme Court of Judicature (Consolidation) Act 1925, s 41, see 25 Halsbury's Statutes (3rd Edn) 713.

Cases referred to in judgment

Balfour v Balfour [1919] 2 KB 571, [1918-19] All ER Rep 860, 88 LJKB 1054, 121 LT 346, 12 Digest (Repl) 21, 3.

Beswick v Beswick [1967] 2 All ER 1197, [1968] AC 58, [1967] 3 WLR 932, Digest (Cont Vol C) 161, 245a.

Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847, [1914-15] All ER Rep 333, 84 LJKB 1680, 113 LT 386, 12 Digest (Repl) 234, 1754.

Gore v Van der Lann (Liverpool Corpn intervening) [1967] 1 All ER 360, [1967] 2 QB 31, [1967] 2 WLR 358, Digest (Cont Vol C) 947, 498b.

Hirachand Punamchand v Temple [1911] 2 KB 330, 80 LJKB 1155, 105 LT 277, 12 Digest (Repl) 519, 3897.

Porter (William) & Co Ltd, Re [1937] 2 All ER 361, 9 Digest (Repl) 485, 3180.

Scruttons Ltd v Midland Silicones Ltd [1960] 2 All ER 737, [1961] 1 QB 106, [1960] 3 WLR 372; *aff'd* HL [1962] 1 All ER 1, [1962] AC 446, [1962] 2 WLR 186, Digest (Cont Vol A) 271, 261a.

Slater v Jones, Capes v Ball (1873) LR 8 Exch 186, 42 LJEx 122, 29 LT 56, 5 Digest (Repl) 1255, 10077.

Tweddle v Atkinson (1861) 1 B & S 393, [1861-73] All ER Rep 369, 30 LJQB 265, 4 LT 468, 25 JP 517, 121 ER 762, 12 Digest (Repl) 45, 227.

West Yorkshire Darracq Agency Ltd v Coleridge [1911] 2 KB 326, 80 LJKB 1122, 105 LT 215, 9 Digest (Repl) 485, 3176.

Action

By a writ issued on 13th August 1969 the plaintiff, Brian Grenville Snelling, brought an action against John G Snelling Ltd ('the defendant company') claiming £15,268

a Section 41, so far as material, provides: 'No cause or proceeding at any time pending in the High Court or the Court of Appeal shall be restrained by prohibition or injunction, but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might formerly have been obtained, whether unconditionally or on any terms or conditions, may be relied on by way of defence thereto: Provided that— (a) Nothing in this Act shall disable either of the said courts, if it thinks fit so to do, from directing a stay of proceedings in any cause or matter pending before it . . .'

a as money payable by the defendant company to the plaintiff being money lent by the plaintiff to the defendant company between 1st April 1962 and 31st March 1968.

By their defence the defendant company admitted that they were, on 21st March 1968, indebted to the plaintiff on loan account in the sum of £15,219 8s 1d but, by paras 2 to 7 of their defence, alleged: 2. At all material times up to 26th June 1968 the plaintiff was a director of the defendant company. The other directors of the defendant company were the plaintiff's brothers, John Peter Snelling and Barrie Walter Snelling ('the brothers') and the plaintiff's father, John Grenville Snelling. 3. By a mortgage dated 22nd March 1968 and made between the defendant company of the first part, certain other companies of the second, third and fourth parts, the plaintiff and the brothers of the fifth part and Credit for Industry Limited ('the lender') of the sixth part, in consideration of the loan by the lender to the defendant company of the sum of £40,000 (repayable over ten years as therein provided) the defendant company and the other companies charged the properties therein mentioned with the repayment of the loan. By cl 10 of the mortgage the plaintiff and the brothers covenanted with the lender (inter alia) that so long as any money remained owing to the lender on the security of the mortgage they would not nor would any of them reduce the amounts of their loans to the defendant company beyond the balances of such loans as shown by the accounts of the defendant company as on 31st March 1966 without the previous written consent of the lender. 4. The amount of the plaintiff's loan account shown by the accounts of the defendant company as at 31st March 1966 was £6,443 16s 5d. Moneys remained owing to the lender on the security of the mortgage. The lender had not given its written consent to the plaintiff to call in the loan account. 5. By an agreement in writing dated 22nd March 1968 and signed by the plaintiff and the brothers it was agreed (inter alia) e (a) in the event of any of the parties to that agreement voluntarily resigning as a director of the defendant company such party would immediately forfeit all moneys declared with the defendant company by way of loan account; (b) the resigning director's loan account was to remain with the defendant company and was to be used by the remaining directors as they should think fit in furtherance of the parties' f declared intention to repay the mortgage loan, but not in such manner as to benefit themselves personally. 6. On or about 26th June 1968 the plaintiff voluntarily resigned as a director of the defendant company. 7. At a meeting of the board of directors of the defendant company held on 22nd May 1969 the following resolution was passed:

g 'Upon consideration of the difficulties occasioned to the Company by the resignation of Brian Grenville Snelling RESOLVED (1) that the loan Account of Brian Grenville Snelling be cancelled (2) that the sum of £15,219. 8. 1d thus released be carried to a separate account by way of provision for repaying the C.F.I. Loan, the same to be written off from time to time or otherwise against the first £15,219. 8. 1d repaid hereafter to C.F.I. by the Company.'

h This resolution was duly acted on by the defendant company.

On 6th January 1970 the brothers, John Peter Snelling and Barrie Walter Snelling, were joined as second and third defendants to the action. They adopted the defence of the defendant company and, by their counterclaim, repeated the allegations contained in paras 2 to 7 of the defence, and claimed (1) a declaration that the sum of £15,219 8s 1d (formerly due from the defendant company to the plaintiff on loan account) had been forfeited and was applicable in accordance with the resolution j of the board of directors of the defendant company passed on 22nd May 1969; alternatively, (2) a declaration that the plaintiff was not entitled to reduce the sum owing to him by the defendant company on loan account to less than £5,443 16s 5d except as provided in cl 10 of the mortgage dated 22nd March 1968.

By his reply and defence to counterclaim the plaintiff admitted paras 2 to 4 and 6 of the defence and further admitted that a document described as an agreement

dated 22nd March 1968 had been signed by the plaintiff and the second and third defendants and that it contained the provisions set out in para 5 of the defence. The plaintiff denied, however, that this document was intended to give rise to legal relations and contended that in any event the agreement was not supported by consideration moving from any party to it.

R J S Harvey QC and A A R Thompson for the plaintiff.

J W Mills QC and R R F Scott for the defendants.

Cur adv vult

27th May. **ORMROD J.** This is a tragic and alarming case—tragic because it has divided the plaintiff from the second and third defendants who are his brothers and formerly were his co-directors in a family company which is the first defendant; alarming, because it raises a number of difficult and interesting points of law and, for a family of this kind, the costs involved in resolving such points are likely to be ruinous.

The contention which has been put forward on behalf of the plaintiff, and on which he must succeed if he is to win this action, amounts to the proposition that, having made an agreement with his two brothers in an effort to put the family company on a secure business footing, he is entitled to repudiate it with impunity and that the court is not only impotent to restrain him, but is required to use its authority and its powers to assist him to carry his repudiation into effect by obtaining a judgment against the company in defiance of his agreement. The proposition is not attractive, but it is said to be the inevitable conclusion from the present state of the law. If that is correct the case for reform requires no further emphasis.

The relevant facts may be stated quite shortly and are not in dispute. The defendant company, John G Snelling Ltd, is a private company formed in 1945 to take over the building business founded by Mr John Snelling senior. In due course Mr Snelling's three sons, John Peter, Barrie Walter and Brian Grenville, joined him and became directors and shareholders of the company. Peter and Barrie are the second and third defendants to this action; Brian is the plaintiff. During the 1960's the business expanded and three or four other companies were acquired. In 1966 serious disputes began to arise between the brothers over the conduct of the business, the details of which are not relevant to this case. The business or businesses were also in need of additional finance and, early in 1967, negotiations were started with a finance house called Credit for Industry Ltd. Up to this time finance had been found from within the business itself. Mr Snelling senior over a long period had adopted the policy of ploughing back into the business part of its earnings. The three brothers had followed the same policy so that each of them was shown in the company's books as a creditor for a considerable sum. By March 1968 these loan accounts stood as follows: Peter Snelling (the second defendant), £16,000; Barrie Snelling (the third defendant), £14,000; Brian Snelling (the plaintiff), £15,000.

By February 1968 relations between the plaintiff and his two brothers had reached breaking point. In that month the plaintiff wrote a long letter addressed to 'The chairman and directors of John G Snelling Group of Companies'. (The chairman was the father of the three brothers.) In this letter he set out at length his opinion of his brothers in very uncomplimentary language and put forward suggestions for reorganising the business. The details are irrelevant except insofar as they demonstrate the extent of the estrangement between the brothers. There is, however, a passage in the letter which in the light of later events is of considerable importance in this case. That paragraph reads as follows:

'Failing written agreement, signed by the shareholders, at an Extraordinary General Meeting of the Companies, to the principle of either of the first two proposals by 29th February, 1968, I shall, on 31st March, resign my directorships

- a of all the Companies within the group and withdraw my assets from the Companies by the best means available.'

This letter came at a critical moment for the defendant company because negotiations with Credit for Industry Ltd were on the point of being concluded and, on 22nd March 1968, a mortgage was executed under which Credit for Industry Ltd agreed to advance £40,000 to the defendant company repayable over ten years by quarterly instalments of £1,000 plus interest, on the security of a mortgage on the property owned by the defendant company and its associated companies. All three brothers were parties to this mortgage and by cl 10 thereof, each of them covenanted with the mortgagees that so long as any part of this loan was unpaid they would not reduce the amounts of their respective loans to the company below the figure shown in the accounts of the defendant company on 31st March 1966. So far as the plaintiff is concerned the amount of his loan to the defendant company on 31st March 1966 stood at £6,443. It is relevant to observe that none of the three brothers was guarantor for the defendant company.

Between the date of the plaintiff's letter and the execution of the mortgage on 22nd March 1968 great efforts were made to overcome the dissensions which had been dividing the brothers. By 7th March 1968, as is shown by the minutes of the defendant company for that date, agreement had been reached between them and a draft had been prepared for their consideration. On that day the draft was approved and the third defendant was deputed to prepare a formal document for signature. This was done and according to the minutes for 21st March 1968, it was signed by each of the three brothers. The agreement itself was dated 22nd March 1968 (i.e. the same date as the mortgage). The vital terms of this agreement are cl 4 and 5 by which the three directors, Peter, Barrie and Brian, agreed that in the event of any director voluntarily resigning, or without reasonable cause neglecting the duties required of him, he would immediately forfeit all moneys due to him from any of the companies by way of loan account 'or similar'. Clause 5 provided that if this event occurred the companies and the remaining directors might use the moneys 'in furtherance of the intention to repay the loan from Credit for Industry but not in such a way as to benefit themselves personally'. There were other provisions covering such contingencies as resignation or neglect of duties for reasons beyond the director's control; cl 8 provided that the agreement would remain in force until the Credit for Industry loan had been repaid.

The efforts to compose the differences between the plaintiff and his two brothers proved in the end unavailing and the agreement between them short-lived, for on 27th June 1968 the plaintiff offered to resign his directorship. In a long letter in reply the third defendant offered once again to let bygones be bygones, but on 28th June 1968 the board formally accepted the plaintiff's resignation as a director. In August 1968 there was correspondence between the solicitors for the plaintiff and the defendant company about the plaintiff's loan account and other matters and ultimately, by a minute dated 22nd May 1969, the defendant company resolved to cancel the plaintiff's loan account and at the same time to carry it to a separate account by way of provision for repaying Credit for Industry's loan.

On 13th August 1969 the plaintiff issued the writ in this action against the defendant company, claiming payment of the sum of £15,268 as money due from the defendant company to the plaintiff. This, of course, represents the amount which was shown in the defendant company's accounts as due to the plaintiff on loan account as at the date of his resignation.

The defence which was delivered on 20th October 1969 is obviously a document which has been carefully and deliberately drafted by the pleader. It admits that on 21st March 1968 (i.e. the day on which the agreement between the brothers was signed by them) there was due to the plaintiff by the defendant company the sum of £15,219 8s 1d. (Nothing turns on the difference in the figures.) Paragraph 2

pleads the fact that up to 26th June 1968 the plaintiff and his brothers and his father were directors of the defendant company. Paragraph 3 recites the mortgage to Credit for Industry Ltd, and in particular cl 10, to which I have already referred, under which the plaintiff and his brothers agreed not to reduce the amount of their loans below the figures at which they stood in March 1966. Paragraph 4 alleges that the lenders had not consented to the plaintiff calling in the loan. Paragraph 5 recites the relevant parts of the agreement between the brothers of 22nd March 1968. Paragraphs 6 and 7 recite the plaintiff's resignation and the resolution of the defendant company dated 22nd May 1969 to cancel the plaintiff's loan account and to open the separate account which I have mentioned. The defence concludes with a denial that the plaintiff is entitled to the relief claimed or any other relief.

Later Peter and Barrie Snelling applied to be joined as defendants to the action and on 6th January 1970 it was ordered that they be joined as defendants. On 19th March 1970 they delivered a defence and counterclaim adopting the defendant company's defence and counterclaiming for a declaration that the sum due to the plaintiff on the loan account had been forfeited and is now applicable in accordance with the resolution of 22nd May 1969. The plaintiff delivered a reply and defence to counterclaim, the substance of which is that the document signed by all the brothers on 22nd March 1968 was not intended to give rise to legal relations and was not supported by any consideration.

It should be stated immediately that no attempt has been or could be made on behalf of the defendants to rely on cl 10 of the mortgage as a defence. It is pleaded simply as a relevant fact leading up to the agreement between the three brothers. In fact it appears that Credit for Industry was prepared to release the plaintiff from his obligation provided that the other parties agreed. This clause is, of course, a covenant with Credit for Industry Ltd, and not a covenant inter se between the plaintiff and the defendants or any of them. Similarly, it has not been argued on behalf of the plaintiff that there was no consideration to support the agreement between the brothers. Counsel for the plaintiff did, however, argue in the alternative that this agreement was too vague or uncertain to be enforced.

The resulting situation is at once simple and complex. To the layman the position is that the plaintiff having agreed to forfeit his loan account, i.e. to forgo the debt due to him by the defendant company, if he resigned his directorship voluntarily, has resigned voluntarily and is now suing the defendant company to obtain payment of the debt which he had agreed to forgo. To the lawyer, however, the difficulties are formidable because the case raises two points of principle, first whether the agreement of 22nd March 1968 between the three directors and brothers was intended to create legal relations and, secondly, if it is an agreement which is capable of enforcement at law whether the defendant company, for whose benefit it was made, can rely on it. I do not know whether this is the first case in which in similar circumstances this practice has been adopted of adding as defendants the actual parties to such a contract, but I have not been referred to any similar case other than *Beswick v Beswick*¹, to which I will return later. I confess that I would have welcomed guidance over the procedural problems which may flow from my decision. It will be convenient to deal first with counsel for the plaintiff's submission that the agreement between the second and third defendants and the plaintiff contained in the document dated 22nd March 1968 was not intended to give rise to legal relations between the three of them, and his alternative submission that the terms of the agreement are too vague to be enforceable at law.

On the first of these submissions I heard evidence from the plaintiff and the third defendant, and am satisfied that this agreement was intended by all of them to be binding on them, both in honour and in law. I do not think that it occurred to any of them that there was any difference between these two concepts. The agreement

a (and I refer to it as an agreement because it is expressed to be an agreement) was drafted by the third defendant who is, of course, a businessman and a layman, without legal assistance. He explained that they were all most anxious that no hint of the disagreements which were tearing the business apart should leak out to employees or to other persons and that was the reason why the lawyers were not called in. It is said, first of all, that this was a family matter, an attempt to compose the differences between members of the family, and that such arrangements were not intended to have legal effect. If it is to be suggested that this case is an extension of the principle in *Balfour v Balfour*², the answer is that the circumstances of that case were wholly different. In this case the family relationship had already been destroyed by dissensions; the plaintiff on the one hand, and the second and third defendants on the other, were at arm's length as is shown by the plaintiff's letter of February 1968. Nothing but the biological tie remained between them.

c Then it is said that this arrangement was essentially a statement of mutual intentions for the future and no more, or, in other words, that it was in substance a letter of intent. Considerable reliance is placed on the contents of the document itself in support of this argument. Undoubtedly, the first three clauses do not amount to anything which could be regarded as an operative agreement and do contain expressions of intention for future co-operation. Clause 6 is a mere statement of fact, and d cl 10 contains this phrase 'but by signing this agreement we are declaring our joint intentions' and so on, and goes on to refer to 'the court'. It must, however, be remembered that this document was drafted by a layman and that recitals are not uncommon in documents prepared by lawyers.

e To deal properly with this submission, however, it is necessary to consider the background against which the document came to be prepared. I have already described the position in some detail. It is only necessary to add that all the directors of the defendant company were greatly concerned about its financial stability and were well aware of the effect of a withdrawal of the assets of any one of them from the business. They had made mutual wills to provide against the death of one or other of them, the defendant company had taken out life policies on their lives to cover, f to some extent, the contingencies of the defendant company having to meet a call for a loan account to be paid off. They had already agreed to cl 10 of the mortgage but there remained one threatening possibility—the resignation of a director and a call for payment of the balance of his loan account so long as the mortgage debt to Credit for Industry Ltd remained outstanding. How real and immediate this threat was can be seen from the plaintiff's letter of February which I have already read. The third defendant said in evidence that it was a repetition of this situation g which they wished to guard against and that it was against this contingency that the agreement was made. Moreover, the plaintiff's was not the only threatened resignation which had been received during those troubled days.

All these facts point, in my judgment, very strongly to the view that this agreement of 22nd March was intended to be as full a protection as they could devise. While h they did not consider in terms whether they intended to be legally bound, it is difficult to suppose that they would have gone to such trouble to record so obvious a debt of honour or to phrase the agreement in terms of 'forfeit' unless they intended legal consequences to flow from the agreement. The third defendant explained cl 10 in terms which I accept without hesitation. He said quite simply that he did not know what his draft might achieve or what effect it might have in law, so he included this clause as an indication of what they had tried to do. The reference by an unsophisticated layman who clearly had nothing but the interests of the business at heart i to 'the court' suggests to me that he did envisage the possibility of legal proceedings arising out of this agreement. There are other indications in the document which point the same way. The phrase in cl 4 'we hereby agree' is often used as a way of

emphasising the formal significance which it is intended should be attached to the words which follow it. The care which has been taken to provide for various contingencies and the provision in cl 5 limiting the way in which the loan account is to be dealt with after forfeiture, all presuppose that the agreement will affect the legal rights of all concerned, including the company. a

The alternative contention is that the terms of this agreement are too vague or uncertain to be enforced. So far as the terms relating to forfeiting the loan account are concerned it is apparent on the face of the document that great care has been taken to express the intention of the parties as clearly and as fully as possible. Clauses 4, 7 and 8 are quite clear even though some ambiguity might be read into cl 8. No real difficulty, however, arises in interpreting it. Clause 5 may be more difficult to interpret but there again the intention is clear; the difficulty lies in the mode of its implementation rather than in ascertaining its meaning. In dealing with an agreement such as this, prepared by laymen themselves for themselves and each being on an equal footing with the others, the court, in my judgment, ought not to seek for ways of avoiding it but rather to do its utmost to give effect to it if it is possible to do so. For these reasons my conclusion is that the agreement between the plaintiff and the second and third defendants is legally binding and enforceable, unless there is some other reason why effect should not be given to it. None has been suggested or pleaded. No question arises, therefore, of penalty or of possible relief from the forfeiture. b

I now turn to the position of the defendant company. Counsel for the plaintiff contends that it has no defence to this claim and relies on the well-known case, *Scruttons Ltd v Midland Silicones Ltd*³, in which the House of Lords re-affirmed unequivocally the common law doctrine that in the absence of a trust or agency, a person cannot rely on a term in a contract to which he is not a party even if he is the person whom the contract is intended to benefit. Counsel contends, therefore, that the company cannot rely on the agreement between the brothers and claim that in the events which have happened the plaintiff's loan account has been forfeited, and consequently is no longer payable to him. There can be no doubt that this proposition is supported by the speeches in the *Midland Silicones* case³. Counsel for the defendants, however, submits that some of the broad statements of principle in that case went too far and relies on the later case of *Beswick v Beswick*⁴. c

These cases are examples of two different situations. In the *Midland Silicones* case³ a firm of stevedores sought to rely on a clause limiting liability for damage to goods in transit which was contained in a contract between the carriers, the United States Lines, and the consignees, the Midland Silicones Ltd. It was held that since they were not parties to that contract they were not protected by the clause limiting liability, although damage by stevedores was expressly referred to in it. In *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*⁵, Dunlops sought to sue Selfridges for breach of contract made by wholesalers with Selfridges which contained a clause fixing a minimum price below which Selfridges agreed not to sell tyres manufactured by Dunlops. The purpose of the clause was to enable Dunlops to operate a price maintenance scheme for their own benefit. It was held that since Dunlops were not a party to the contract with Selfridges they could not sue on the contract. d

*Beswick v Beswick*⁴ was a wholly different case. The late Mr Beswick made a written agreement with his son under which he assigned his business of a coal merchant to the son in consideration of a promise by the son to pay him a weekly sum as a consultant to the business for the rest of his life and thereafter to pay his widow an annuity at the rate of £5 per week. After the father's death the son repudiated the agreement and refused to pay the widow's annuity. In an action by the widow e

3 [1962] 1 All ER 1, [1962] AC 446

4 [1967] 2 All ER 1197, [1968] AC 58

5 [1915] AC 847, [1914-15] All ER Rep 333 f

a as administratrix of her late husband's estate, it was held that as administratrix she was entitled to a decree of specific performance of the agreement to pay the annuity to herself as beneficiary. In *Tweddle v Atkinson*⁶ Mr Tweddle senior made an agreement with a Mr Guy that each would pay a certain sum of money to the plaintiff, John Tweddle, the son, who had married Mr Guy's daughter. Mr Guy failed to pay and after the death of both Mr Tweddle senior and Mr Guy, John Tweddle sued Mr Guy's executors on the agreement. He failed because he was not a party to the contract.

b The critical difference between *Beswick v Beswick*⁷ and these other cases is that in all of them a person who was not a party to the contract from which the obligation in question arose, was attempting to enforce the contract. In *Beswick*⁷, the widow in her capacity as the personal representative of her deceased husband's estate, was the promisee under the contract out of which the son's obligation to pay the annuity of £5 per week arose. She was therefore entitled to enforce the obligation. The fact that in her personal capacity she was the beneficiary of it was clearly irrelevant. The principle appears to be that if the right parties, that is, the promisee and the promisor, are before the court the action will be maintainable although the nature of the remedy which the court will grant will depend on the circumstances of each case. Thus in *Tweddle v Atkinson*⁶ the promisee was Mr Tweddle senior and, so he, or his personal representatives, could have enforced the agreement against Mr Guy's estate although Mr Tweddle junior was the beneficiary. On the principle of *Beswick v Beswick*⁷ the court would presumably have ordered the defendant to perform the obligation to pay the agreed sum to Mr Tweddle junior. In *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*⁸ the wholesalers could have sued Selfridges for breach of contract in selling the tyres below the minimum price but in that case it seems probable that the court would have decided that nominal damages would be an adequate remedy. In the *Midland Silicones*⁹ type of case, on the other hand, the promisee is not in a position to initiate any form of proceedings except possibly a motion under s 41 of the Supreme Court of Judicature (Consolidation) Act 1925, for a stay of proceedings pending between the promisor, on the one hand, and a person intended to be benefited or protected by the contract on the other.

f The conclusion, therefore, is that the second and third defendants have proved the contract between the plaintiff and themselves and have proved a breach of it by the plaintiff or at any rate an undoubted intention on his part to repudiate it. They are consequently entitled to judgment on the counterclaim, but the nature of the relief to which they are entitled requires further consideration. The defendant company, on the other hand, is not entitled to rely directly on the terms of this contract, but whether the plaintiff is entitled to judgment against it on the claim also requires further consideration. To give judgment for the plaintiff against the defendant company for the amount claimed in the statement of claim and judgment for the second and third defendants on the counterclaim would be absurd, unless, which is clearly not the case here, the second and third defendants could be adequately compensated in damages. So far as they are concerned a judgment against the defendant company would frustrate the very purpose for which their agreement with the plaintiff was made. The next problem is to consider the relief to which they are entitled. They have claimed a declaration that the amount shown in the plaintiff's loan account has been forfeited to the defendant company and is now applicable in accordance with the resolution of the board of directors of the defendant company passed on 22nd May 1969, but I feel some doubt whether this is the appropriate form of declaration. They are certainly entitled to a declaration that the provisions in the agreement of 22nd March 1968 are binding on the plaintiff. Had these provisions

6 (1861) 1 B & S 393, [1861-73] All ER Rep 369

7 [1967] 2 All ER 1197, [1968] AC 58

8 [1915] AC 847, [1914-15] All ER Rep 333

9 [1962] 1 All ER 1, [1962] AC 446

been worded positively and not negatively, e g as a promise by the resigning director to release the company from its indebtedness to him, I think that, on the authority of *Beswick v Beswick*¹⁰, this would have been an appropriate case on the facts in which to order specific performance of that promise in whatever was the appropriate form. Similarly, had the second and third defendants themselves taken proceedings, before the plaintiff issued his writ, to restrain the anticipated breach they would have been entitled to an injunction restraining him from demanding payment by the company of his loan account. Had he subsequently started an action against the company it would, presumably, have been stayed as an abuse of the process of the court. But what is the appropriate form of order when the second and third defendants have been joined in the plaintiff's action, and succeeded on the counterclaim? This is the procedural problem on which I would have been grateful for authoritative guidance. An injunction against the plaintiff restraining him from pursuing the action is excluded by the provisions of s 41 of the 1925 Act. But once it is established that the second and third defendants are entitled to enforce their contract with the plaintiff, the court is bound to take some action against the plaintiff. One solution would be to stay all further proceedings in the action between the plaintiff and the defendant company, either under the proviso to s 41 or under the court's inherent jurisdiction to protect its process from abuse.

Counsel for the plaintiff has called my attention to *Gore v Van der Lann (Liverpool Corpn intervening)*¹¹ in the Court of Appeal and I must now deal with it. In that case the Liverpool corporation applied to the court under s 41 to stay an action which was proceeding between the plaintiff and a conductor of one of their buses for damages for negligent management of a bus. The plaintiff, as an old-age pensioner, had been given a permit by the corporation entitling her to travel at reduced rates or free on their buses. The permit contained a provision exempting the corporation and their servants, including the defendant conductor, from liability for negligence to persons travelling under it. The corporation sought to protect their conductor, who had been sued personally, by alleging that the plaintiff's claim was a fraud on the corporation, but they failed. The primary ground of the decision of the Court of Appeal was that the permit was a contract (not a licence as the corporation contended) and as such was caught by the Road Traffic Act 1960, s 151, which rendered any such exemption clause illegal. But, in the alternative, the Court of Appeal held that the exemption clause was not sufficiently precise in its terms to justify the granting of a stay of the plaintiff's action against the conductor. So in the present case counsel for the plaintiff says that there was no specific promise by the plaintiff not to sue the defendant company and consequently the court should refuse to stay the plaintiff's action. I do not think that the Court of Appeal can have intended to lay down a general proposition of law that the court will not stay proceedings in such circumstances unless the plaintiff has expressly undertaken not to sue. Such a ruling would appear to put an unjustified fetter on the discretionary powers of the court under s 41. I do not think that the Court of Appeal intended to go further than to say that the promise which is to be enforced by the granting of a stay must be clear and unambiguous. In this connection an observation by Kelly CB in *Slater v Jones*¹² is of assistance. In that case, which concerned the effect of a resolution of creditors to accept a composition, he said:

‘... I think that a person who is bound by such a resolution is also bound, by necessary implication, not to sue the debtor before the time for payment comes, and until default is made.’

So here, it is a necessary implication of cl 4 of the agreement of 22nd March 1968 that the plaintiff will not sue the company.

¹⁰ [1967] 2 All ER 1197, [1968] AC 58

¹¹ [1967] 1 All ER 360, [1967] 2 QB 31

¹² (1873) LR 8 Exch 186 at 190

a In my judgment, therefore, the second and third defendants have made out an unambiguous case and have shown that the interests of justice require that the plaintiff be not permitted to recover against the defendant company. It follows that this is a proper case in which to grant a stay of all further proceedings in the plaintiff's action against the company.

b Counsel for the defendants, however, has submitted that he is entitled to go further and ask for the plaintiff's claim against the company to be dismissed. He relies on three cases: *West Yorkshire Darracq Agency Ltd v Coleridge*¹³, *Hirachand Punamchand v Temple*¹⁴ and *Re William Porter & Co Ltd*¹⁵. In the *West Yorkshire* case¹³ all the directors of a company in liquidation agreed to forgo their respective claims to outstanding directors' fees. The liquidator was a party to an oral agreement to this effect. Horridge J held that the company was entitled to rely on the agreement as a good defence to a subsequent claim by one of the directors for his fees. The basis of the judgment was that the company, through the liquidator, was a party to the agreement, although no consideration moved from it to the plaintiff. In *Re William Porter & Co Ltd*¹⁵ the opposite situation arose. Following a resolution passed by the directors of a company that no directors' fees be paid until a further resolution was passed, the trustee in bankruptcy of the governing director submitted a proof in the liquidation of the company for subsequent fees due to the director. The liquidator rejected the proof. Simonds J held that the company was not a party to any agreement with the directors and that the *West Yorkshire* case¹³ did not apply. He went on to hold, however, that the directors, by assenting to the postponement or abrogation of their rights, had induced the company to a course of conduct from which it could have abstained. He, therefore, upheld the rejection of the proof by the liquidator.

e In the present case the defendant company was not specifically mentioned as a party to the agreement of 22nd March 1968 which, in form at any rate, was an agreement between the three directors concerned. On the other hand, the minutes of the defendant company contain references to it and it was an important item on the agenda at two meetings of the board of directors. There being no liquidator there was no physical person other than the directors who could have been a party to it on behalf of the defendant company, and they themselves never applied their minds to the question whether the company was to be a party to it or not. They regarded the business, the company and its associated companies, and themselves as an amalgam for most purposes, and their intention was to act for the benefit of the amalgam. However, it is not possible to distinguish this case on its facts from *Re William Porter & Co Ltd*¹⁵ in this respect. I must, therefore, hold that the defendant company was not a party to the agreement. I have no evidence that the defendant company took any action in reliance on the agreement which it would not otherwise have done so that Simonds J's decision cannot be relied on to support the view that the company is entitled to have this action dismissed.

h *Hirachand Punamchand v Temple*¹⁴, which was a wholly different case on the facts, concerned a claim by the plaintiff against a debtor on a promissory note, whose father had paid to the plaintiff a lesser sum than that due in settlement of their claim. The Court of Appeal dismissed the claim on two grounds: first, that the promissory note was extinct and, therefore, could not be relied on, and, secondly, that it would be an abuse of the process of the court to allow the plaintiff to sue.

j I am inclined to the view that in a case such as this where the promisees under the agreement and the party to be benefited by the agreement are all before the court and the promisees have succeeded against the plaintiff on their counterclaim, the right view is that the plaintiff's claim should be dismissed. I think that this accords

13 [1911] 2 KB 326

14 [1911] 2 KB 330

15 [1937] 2 All ER 361

with s 41 of the 1925 Act. If the action was left with no more than an order staying further proceedings on the claim, the plaintiff could start another action only to have it also stayed and so on ad infinitum. The reality of the matter is that the plaintiff's claim fails and the order of the court ought, if possible, clearly to reflect that fact. a

Accordingly, I think the plaintiff's claim should be dismissed and that there should be judgment for the second and third defendants on the counterclaim, together with a declaration in appropriate terms. My present view, subject to hearing counsel further, is that it ought to be in the form of a declaration that in the events which have happened the plaintiff is not entitled to call on the defendant company to repay to the plaintiff the whole or any part of the sum of £15,219 8s 1d, formerly due from the defendant company to the plaintiff. I would prefer not to make any declaration about the resolution passed by the company on 22nd May 1969, because the question whether the second limb of this resolution is in accordance with the agreement has not been gone into sufficiently thoroughly before me. b

Judgment for the second and third defendants on their counterclaim and a declaration that the plaintiff was not entitled to call on the defendant company to repay to the plaintiff the whole or any part of the sum of £15,219 8s 1d formerly due from the defendant company to the plaintiff. The plaintiff's action against the defendant company dismissed. c

Solicitors: Arnold, Cooper & Tompkins, Chichester (for the plaintiff); Thomas Eggar & Son, Chichester (for the defendants). d

Janet Harding Barrister.

Valentine v Jackson e

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, BROWNE AND BRIDGE JJ

9th NOVEMBER 1971 f

Intoxicating liquor – Licensed premises – Constable – Right of entry – Constable's right to enter premises for purpose of preventing or detecting commission of offence – Whether reasonable suspicion of commission of offence necessary prerequisite to exercise of constable's right – Licensing Act 1964, s 186 (1).

A police constable cannot demand admission to licensed premises under s 186 (1)^a of the Licensing Act 1964 unless he has reasonable grounds for suspecting that an offence is being, or is about to be, committed on those premises (see p 93 h, p 94 a f and g and p 95 a, post). g

Duncan v Dowding [1897] 1 QB 575 followed.

R v Dobbins (1883) 48 JP 182 not followed. h

Notes

For refusal of admission of a constable to licensed premises, see 22 Halsbury's Laws (3rd Edn) 689, paras 1471, 1472, and for cases on the subject, see 30 Digest (Repl) 102, 103, 755-760.

For the Licensing Act 1964, s 186, see 17 Halsbury's Statutes (3rd Edn) 1214. j

Cases referred to in judgment

Duncan v Dowding [1897] 1 QB 575, 66 LJQB 362, 76 LT 294, 61 JP 280, 30 Digest (Repl) 102, 756.

^a Section 186 (1) is set out at p 92 h, post

- a *Hinchliffe v Sheldon* [1955] 3 All ER 406, [1955] 1 WLR 1207, 15 Digest (Repl) 854, 8217.
R v Dobbins (1883) 48 JP 182, 30 Digest (Repl) 102, 755.

Case stated

- b This was an appeal by way of case stated by justices for the city and county of Bristol in respect of their adjudication as a magistrates' court sitting at Bristol on 26th February 1971. The respondent, Francis Jackson, an inspector of police, preferred informations against the appellant, Reginald Valentine, charging, inter alia, that he either by himself or through his employee, Peter Macey, had failed to admit on 8th and 13th December 1970 a police constable to certain licensed premises known as the Moulin Rouge Club in Clifton, Bristol, on the constable demanding entry in accordance with s 186 (1) of the Licensing Act 1964, contrary to s 186 (2) of that Act.
- c The following facts were, inter alia, found. The appellant was the licensee of a club called the Moulin Rouge at 72 Worrall Road, Clifton, holding a justices on-licence in respect of those premises subject to club conditions. He also held a certificate under s 68 of the 1964 Act, which was granted in respect of two raised areas used for the service of table meals on either side of a central dance floor. The general licensing hours for the division ended at 10.30 pm. The effect of the certificate was to extend the permitted hours to 11.30 pm in those restaurant areas with drinking-up time until midnight.

- d At 11.40 pm on 8th December 1970 Inspector Bates and Sergeant Ferrett parked a police car in the club's car park and approached the entrance of the club. The two glass doors on the outside of the foyer were closed. The foyer was illuminated and the doorman, Peter Macey, was standing in it. The inspector knocked on the external doors which were locked. The inspector then said: 'Open the door I want to inspect the premises.' Mr Macey replied: 'No I am not, we are closed.' The inspector said 'I am a police officer. I demand entry to inspect these premises. Open the door.' Mr Macey ignored the officer who again rang the bell and knocked on the door and said 'Fetch the manager.' Mr Macey went through the internal double doors of the foyer and at 11.44 pm reappeared with the appellant who opened the door and invited the officers into the club where the following conversation took place. Inspector:
- f 'At 11.40 pm when I came to these premises I could not enter as the doors were unable to be opened from outside. Your doorman would not open them as the club was closed. I did eventually manage to get him to fetch you. I have now gained entrance at 11.44 pm.' The appellant: 'That's my instructions. I have told the doorman not to let anyone in until he has fetched me.' Inspector: 'I am reporting you for contravening s 186 of the Licensing Act 1964.' The appellant: 'This is a private club and I will keep the doors shut and let in those people I want to.' The inspector and sergeant then went to the bar at the far end of the club looked round, found everything in order and then left. The intention of Inspector Bates and the sergeant on this evening was to carry out a routine inspection of the premises as on many other occasions. On 13th December 1970 Inspector Bates again visited the premises
- g at 1.00 am. The doors were locked but Mr Macey came into the foyer to let some persons out of the external doors. The inspector then entered and walked toward the internal doors of the foyer. At that moment Mr Macey stepped between the inspector and the doors putting his back to the doors and saying 'You're not going in there until I have fetched the manager'. The inspector said, 'Out of my way I am going to inspect the premises'. He brushed Macey aside and entered.
- h Inspector Bates then inspected the premises found everything in order and saw the appellant who said to him, 'You might as well be a member.' This visit on 13th December at 1.00 am was a further routine visit of inspection by the police. The delay caused to the inspector by Mr Macey was small, amounting to no more than a couple of seconds.
- i

It was contended for the appellant, inter alia, that the prosecution must prove that the entry by the constable was for the purpose of preventing or detecting the

commission of an offence, and there must be some reasonable ground for suspecting that an offence is taking place or is about to do so; that it must further be proved that the failure to admit the constable occurred when he was not only demanding entry but also was reasonably suspecting that an offence was being, or was about to be, committed; that the licensee of club premises could close his door whenever he liked. When the doors are closed the constable must disclose his authority and without doing so he has no right of entry.

It was contended for the respondent, *inter alia*, that a constable could not prevent or detect the commission of offences in licensed premises unless he gained admission.

The justices were of the opinion that the delay by Mr Macey in admitting the police was wilful. The justices accepted that he was acting on the instructions of the appellant in fetching the appellant before opening the door but they thought that those instructions were in conflict with the constable's rights under s 186, and that Inspector Bates, in carrying out routine visits to the premises, was carrying them out for the purpose of supervising licensed premises and to that extent preventing or detecting the commission of offences against the Licensing Act 1964. Accordingly it was their opinion that he was demanding entry in pursuance of s 186 and that the appellant through Mr Macey failed to admit him, and they convicted the appellant.

The questions for the opinion of the court were: whether or not a constable must have a reasonable ground for suspecting that the commission of an offence was taking place or was about to take place before he can demand entry under s 186 of the Act; whether on the facts found the justices were right in convicting the appellant of the two offences.

D W T Price for the appellant.

G B S Derham for the respondent.

LORD WIDGERY CJ. This is an appeal by case stated by justices for the city and county of Bristol who had before them on 26th February 1971 a number of summonses alleging that the appellant had failed to admit, either by himself or through his employee, Peter Macey, to certain licensed premises known as the Moulin Rouge Club in Clifton, Bristol, one Police Inspector Bates, a constable of the Bristol constabulary demanding entry thereto in accordance with s 186 (1) of the Licensing Act 1964. Of the seven summonses, five were dismissed for reasons which do not concern the present appeal, but in the other summonses a conviction was entered and the appellant appeals to this court accordingly.

Section 186, which has a distinguished ancestry in the licensing law, now provides as follows. The sidenote is: 'Right of constables to enter premises.' Subsection (1) provides:

'A constable may at any time enter licensed premises, a licensed canteen or premises for which or any part of which a special hours certificate is in force under section 78 of this Act, for the purpose of preventing or detecting the commission of any offence against this Act, other than an offence under section 155 or section 157 thereof.'

Then sub-s (2) goes on to create the offence of failing to admit a constable seeking to exercise his right of entry under sub-s (1).

The facts found by the justices show that on the two occasions which gave rise to the convictions, Inspector Bates and another police officer in uniform parked a motor car in the club's car park and approached the entrance to the club demanding admission pursuant to s 186. There was nothing, according to the justices' findings, which gave rise to any specific suspicion in the minds of the police officers that any offence was at that time being committed, and indeed the justices find in regard

a to the first offence that the intention of Inspector Bates and the sergeant on this occasion was to carry out a routine inspection of the premises as on many other occasions. In regard to the second offence they put the same point in somewhat similar terms; they say of the second visit that: 'It was a further routine visit of inspection by the Police.'

b The short but important point which this appeal raises is whether a police officer exercising, or purporting to exercise, his powers under s 186 must first have some grounds for suspecting that an offence is or may be committed on the premises. The alternative argument sustained by counsel for the respondent is that no such suspicion is a necessary preliminary to the exercise of this power, and that the police can therefore exercise a purely supervisory control over premises within the section by entering them as when and wherever they like, provided that they do so bona fide for the purpose of preventing or detecting the commission of an offence.

c The section, as I say, has been in the licensing law virtually unchanged ever since 1874, and there is some authority on this. The first case to which we have been referred is *R v Dobbins*¹; that again was an appeal by special case and the justices in their finding of fact in the special case came to a specific finding that the constable was visiting the house in the exercise of what he considered to be his duty, and that he sought to enter the house of the then appellant in order to prevent or detect a violation of the provisions of the Licensing Act 1874. There was nothing, as in the present case, to indicate he had any special grounds for suspicion. The justices in that case obviously took the view that this was his way of preventing or detecting offences against the licensing laws, and that provided his claim of entry was bona fide made in what he conceived to be his duty under the section, that was sufficient to justify the entry even though there was no specific ground of suspicion of a particular offence at that time.

e As opposed to that, there is a later decision, also of this court, in the contrary sense, that is *Duncan v Dowding*². That was a decision again on s 16 of the Licensing Act 1874 on which the present legislation is founded, and the main issue which was raised by *Duncan v Dowding*² was whether the licensee could be held to have wilfully refused admission to the premises to the police officer if the part of the premises
f which the police officer sought to enter was in the occupation on that night of a private party. That point, as Cave J observed, was not necessary to be decided at all, because in that case there were no specific grounds on which the police officer could sustain a belief that some particular offence was or might be committed. The decision of this court on that occasion is, in my judgment, clearly in favour of the present appellant's argument, namely that the power under s 186 of the 1964 Act cannot be exercised except when based on some suspicion of that kind. Cave J, having referred
g to s 16 of the 1874 Act, then said³:

h 'That, no doubt, gives him the power to enter for that purpose. But, before the occasion for the exercise of that power can arise, he must have reasonable ground for suspecting that circumstances exist, or are about to exist, constituting a violation of some provision of the Acts. The particular violation which it was here suggested that he was desirous of preventing or detecting was that of excessive drinking. But there was nothing which could reasonably lead him to suspect that the members of the lodge were drinking to excess. It would be monstrous to suggest that the mere fact that persons are singing and playing
i in a room in licensed premises points to the inference that they are getting drunk. If it had been shewn that on previous occasions members of the lodge had been seen to leave the room in a condition of intoxication, that would have been another matter; but there was nothing of that kind here. The recorder

1 (1883) 48 JP 182

2 [1897] 1 QB 575

3 [1897] 1 QB at 577, 578

seems to have thought that it was enough for the constable to say that he wanted to enter the room for the purpose of enforcing the law. I cannot agree.' a

That authority, standing alone, is in my judgment clear authority for the proposition that some antecedent suspicion is a prerequisite of the exercise of the power under s 186.

The only remaining authority is that of *Hinchliffe v Sheldon*⁴. This was a case in which a licensee had been charged with obstructing the police in the performance of their duty, and the question of the precise circumstances in which a police officer was entitled to enter the premises did not in my judgment arise. Lord Goddard CJ, in giving the judgment of the court, referred to s 151 of the Licensing Act 1953, which was the then current form of the legislation now contained in s 186, and having read the section he said⁵: b

'Therefore, the police have a right to go in to see whether or not there is any likelihood of an offence being committed. That is their right, and, therefore, it is their duty if they consider that circumstances call for investigation.' c

I pause to observe the reference to circumstances calling for investigation. Later on he said⁵: d

'They [the police] can go in to see whether it is likely that an offence will be committed. If they are detained from going in, that does obstruct them in the execution of their duty . . .'

Those words again, when taken in isolation, lend some force to the argument for the respondent, because although qualified to the extent that I have indicated, in that Lord Goddard CJ referred to circumstances calling for investigation, yet it might be said that standing alone they support the view that there is an unqualified right of entry as long as the police officer is acting bona fide in what he believes to be the interests of preventing or detecting the commission of an offence. e

For my part in that state of the authorities I think this court should take the view more favourable to the subject, and therefore sustain the view of Cave J in the 1887 case. I think that pending any change of the law on the part of Parliament, we ought to take the view that Cave J's judgment is still the law in this respect, and Inspector Bates in this instance did not disclose to the justices the necessary prerequisite of suspicion before demanding entry to the appellant's premises. I would accordingly allow the appeal and quash the convictions. f

BROWNE J. I agree. g

BRIDGE J. I also agree and I would only add this. If the point of construction arising in this appeal was in any way in doubt in relation to the antecedents of what is now s 186 (1) of the Licensing Act 1964, to my mind that doubt is conclusively resolved by the form of the present provision. Under the old Acts the power to enter licensed premises was related to the purpose of preventing or detecting offences against the Licensing Acts generally. Now the words with which the subsection concludes are: h

'... for the purpose of preventing or detecting the commission of any offence against this Act, other than an offence under section 155 or section 157 thereof.' j

Those are two sections which relate to the sale of alcoholic liquor out of the permitted hours and to off sales in licensed canteens.

4 [1955] 3 All ER 406, [1955] 1 WLR 1207

5 [1955] 3 All ER at 408, [1955] 1 WLR at 1209

a To my mind, when Parliament has said that a constable exercising this right of entry must have as his purpose the prevention or detection of an offence of one kind and not an offence of another, it is presupposed that the constable exercising the power must suspect, and therefore must have some ground to suspect, that a particular offence is being committed. For this reason in addition to those expressed by Lord Widgery CJ, I agree that this appeal should be allowed.

b *Appeal allowed.*

Solicitors: *Crossman, Block & Keith*, agents for *Cartwright, Taylor & Corpe*, Bristol (for the appellant); *W J Hutchinson*, Bristol (for the respondent).

c Jacqueline Charles Barrister.

Nast v Nast and Walker

PROBATE, DIVORCE AND ADMIRALTY DIVISION

PAYNE J

d 16th, 22nd, 30th JULY 1971

Divorce – Practice – Interrogatories – Adultery – Interrogatories inviting answers which tend to prove adultery allowable – Interrogatories which may properly be administered – Civil Evidence Act 1968, s 16 (5).

e Since the coming into operation of the Civil Evidence Act 1968, s 16 (5)^a, which abolished the rule that a witness in any proceedings need not answer any question tending to show that he or she had been guilty of adultery, a party may be given leave to administer interrogatories inviting answers which tend to establish adultery (see p 99 j, post).

Skone v Skone [1971] 2 All ER 582 applied.

f Observations on interrogatories which may properly be administered where adultery is in issue (see p 100 a to d and p 103 a to e, post).

Heaton v Goldney [1910] 1 KB 754, *Ramsay v Ramsay* [1956] 2 All ER 165, and *Hulbert v Hulbert* [1957] 2 All ER 226 considered.

Notes

g For leave to deliver interrogatories, see 12 Halsbury's Laws (3rd Edn) 77, 78, para 111, and for cases on the subject, see 18 Digest (Repl) 208, 209, 1808-1819.

For the Civil Evidence Act 1968, s 16, see 12 Halsbury's Statutes (3rd Edn) 929.

Cases referred to in judgment

E v E (1907) 24 TLR 78, 27 Digest (Repl) 512, 4546.

h *Heaton v Goldney* [1910] 1 KB 754, 79 LJB 541, 102 LT 451, 18 Digest (Repl) 188, 1622.
Hulbert v Hulbert [1957] 2 All ER 226, [1957] P 174, [1957] 2 WLR 808, 18 Digest (Repl) 157, 1395.

Kennedy v Dodson [1895] 1 Ch 334, 64 LJCh 257, 72 LT 172, 18 Digest (Repl) 176, 1516.

Ramsay v Ramsay [1956] 2 All ER 165, [1956] 1 WLR 542, 18 Digest (Repl) 193, 1661.

Redfern v Redfern [1891] P 139, [1886-90] All ER Rep 524, 60 LJP 9, 64 LT 68, 55 JP 37,

j 27 Digest (Repl) 267, 2147.

Skone v Skone [1971] 2 All ER 582, [1971] 1 WLR 812.

Case also cited

Griebart v Morris [1920] 1 KB 659.

a Section 16 (5) is set out at p 99 f, post

Appeal

On 17th October 1967 the husband petitioned for divorce on the ground of the wife's cruelty and on 6th April 1970 presented a supplemental petition on the grounds of the wife's adultery with the co-respondent. By their respective answers the wife and co-respondent denied the husband's allegations of cruelty and adultery. Following the coming into force of the Divorce Reform Act 1969 the husband applied for leave to present a second petition under s 2 (1) (a) and (b) of that Act and for leave to administer interrogatories to the wife and co-respondent. On 7th May 1971 Mr Registrar Stranger-Jones granted leave for the second petition to be filed and also granted leave to administer interrogatories in the following terms:

'It is ordered that the [wife] do answer on affidavit within 28 days from today the following interrogatories. 1. Since in or about the month of February 1967 or some other date and if so what earlier date did not the [co-respondent] sleep at the former matrimonial home, 130 Lodge Hill, Welling, Kent? 2. If aye, on how many occasions did he sleep at the said address since the first occasion that he did so? 3. In what room did he sleep at the said address on any of the occasions referred to in interrogatory 1? 4. Did he not have sexual intercourse with you on any and if so how many occasions at the said address? 5. Did not the [co-respondent] provide you with any and if so what financial support since the month of March 1967 or some other and if so what later date? 6. Did you follow any and if so what gainful employment since the withdrawal of the [husband] from the said matrimonial home in or about February 1967? 7. If aye, you are requested to give particulars of each employer and the earnings you received from such employment. 8. Did you receive any financial support from the Ministry of Social Security or from other and if so what source since in or about the month of February 1967? 9. Did you have any and if so what source of income other than the allowance sent to you by the [husband] since March 1967? 10. Did you not between 9th September 1968 and 16th September 1968 go on holiday to Babbacombe, Devon, without the children of the family? 11. Did not the [co-respondent] go to Babbacombe for his holiday at the same time? 12. At what hotel did you stay? 13. At what hotel did the [co-respondent] stay? 14. What was the number of the room into which you registered and in what name did you register at the said hotel? 15. What was the number of the hotel room into which the [co-respondent] registered and in what name did he register? 16. Did you arrange for the two children of the family to be left with the next door neighbour (naming her) while you went on holiday to Babbacombe as aforesaid during the said period? 17. Did you not commit adultery with the [co-respondent] between 9th September 1968 and 16th September 1968 at Babbacombe, Devon? 18. Did you not commit adultery with the [co-respondent] at his residence? If aye, on what date or dates did you do so?

'And it is further ordered that the . . . Co-Respondent do answer on affidavit within 28 days from today the following interrogatories 1. Since in or about the month of February 1967 or some other date and if so what earlier date did you sleep at the former matrimonial home of the [husband] 130 Lodge Hill, Welling, Kent? 2. If aye, on how many occasions did you sleep at the said address since the first occasion that you did so? 3. In what room did you sleep at the said address on any of the said occasions when you slept at the said address? 4. Did you not have sexual intercourse with the [wife] on any and if so how many occasions at the said address? 5. Did you not provide the [wife] with any and if so what financial support since the month of March 1967 or some and if so what later date? 6. Did you make any and if so what gifts to the [wife] since in or about the month of February 1967? 7. Did you not between 9th September 1968 and 16th September 1968 go on holiday to Babbacombe, Devon? 8. Did not the [wife] go to Babbacombe for her holiday at the same time? 9. At what hotel

- a did you stay? 10. At what hotel did the [wife] stay? 11. What was the number of the room into which you registered and in what name did you register at the said hotel? 12. Did you not commit adultery with the [wife] between 9th September 1968 and 16th September 1968 at Babbacombe, Devon? 13. Did not the [wife] spend the night on one or more (and if so how many) occasions at your residence? 14. Did you not commit adultery with each other on the occasions referred to in interrogatory 13?
- b

The wife appealed against both orders of the registrar. The appeal was heard in chambers and judgment delivered in open court. During the hearing of the appeal an amended set of interrogatories to be answered by the wife was presented to the judge in the following terms:

- c '1. Did not the co-respondent stay the night at your residence since February 1967? 2. If aye, give the best particulars you are able as to the number of occasions on which he stayed. 3. If the answer to interrogatory 1 is in the affirmative, you are required to state whether the co-respondent shared a bedroom with you on any occasion and whether there were any occasions when he did not share a bedroom with you on staying the night. 4. Did you not stay on holiday with the co-respondent in Babbacombe, Devon, in September 1968? 5. If aye, did you share a bedroom with him at a Hotel on such holiday? 6. Did you not after February 1967, stay the night at the residence of the co-respondent at 23, Raleigh Court, Lynne Road? 7. If aye, give the best particulars you are able as to the number of occasions on which you did. 8. If the answer to interrogatory 6 is in the affirmative you are required to say if you shared a bedroom with the co-respondent on any occasion and whether there were any occasions
- d
- e when you did not share a bedroom with him when you stayed the night.'

Jonathan Sofer for the husband.

Walter Blum for the wife.

J M Roberts for the co-respondent.

f

Cur adv vult

30th July. **PAYNE J** read the following judgment. The wife in this case is appealing from a decision of Mr Registrar Stranger-Jones of 7th May 1971, under which, first of all, he granted leave to the husband petitioner to administer interrogatories to the wife, and second, granting leave to the husband to file a further petition notwithstanding that another petition and supplemental petition were already on the file. It would be convenient to deal first with the second ground of appeal, the granting of leave for a second petition.

g

I can deal shortly with the facts of the marriage. On 13th September 1953 the parties were married. There were two children of the marriage, a girl, now 17 years of age, and a boy, now 12. On 17th October 1967 the husband presented a petition for dissolution of the marriage on the grounds of cruelty, and he sought the discretion of the court. On 12th September 1968 there was an answer denying the cruelty. There were steps taken for discovery, and the matter remained dormant for a long time. On 6th April 1970 the husband presented a supplemental petition on the grounds of the wife's adultery with one Arthur Walker. On 13th May 1970 there was the wife's answer denying adultery, and on 27th July 1970 the co-respondent

h

i filed an answer denying adultery.

On 1st January 1971 the Divorce Reform Act 1969 came into operation, and the husband now wishes to present a petition under s 2 (1) (a) and (b) of the Divorce Reform Act 1969 as alternatives to his former petition and supplemental petition based on cruelty and adultery. At the application before the registrar, he granted leave for the second petition to be filed, and that order is now appealed against. [His lordship then considered and dismissed this appeal.]

A more important matter is the other part of the registrar's order whereby he granted leave to the husband to administer interrogatories to the wife, those interrogatories relating to the adultery alleged between the wife and the co-respondent. In allowing the interrogatories, the learned registrar urged that an appeal should be made to one of the judges of this Division. I gather that one of his reasons was that this was, if not the first, certainly an early application of this kind to be made to this court since the Civil Evidence Act 1968, and on that account perhaps I ought to go into the matter rather more fully than otherwise I would, and it would be helpful to refer, I think, as briefly as I can to the history of this matter. a

Before 1851, and therefore before the parties to suits in the ecclesiastical courts and the Chancery Court were competent witnesses, discovery was enforced in those courts, but discovery whether by interrogatories or affidavit of documents was refused if it was sought for the purpose of proving adultery, because the courts could not compel a party to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture or ecclesiastical censure. Adultery was regarded as an offence of such gravity that the court should apply to it the principle that no one is bound to incriminate himself. b

In 1851—this is a stage which is sometimes overlooked—the Evidence Act 1851 was passed; by s 2 of the Act the parties became competent and compellable to give evidence either verbally or by deposition, according to the practice of the court. By s 3 it was provided (inter alia) that nothing in the Act should render any person compellable to answer any question tending to criminate himself. Then followed an important section, s 4: c

'Nothing herein contained shall apply to any action, suit, proceeding or bill, in any court of common law, or in any ecclesiastical court, or in either House of Parliament, instituted in consequence of adultery, or to any action for a breach of promise of marriage.' d

So that the parties then became competent and compellable witnesses in civil proceedings, but the alteration of the law in 1851 did not extend to a suit that was founded on adultery. e

The next change came about under the Evidence Further Amendment Act 1869, which did provide for the parties to give evidence in proceedings instituted in consequence of adultery, repealing to that extent s 4 of the Evidence Act 1851. But parties were still substantially protected. Section 3 of the 1869 Act provided: f

'The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her adultery.' g

That section was repealed and reproduced with modifications in later statutes, in particular the Supreme Court of Judicature (Consolidation) Act 1925, s 198, the Matrimonial Causes Act 1950, s 32 (3), and the Matrimonial Causes Act 1965, s 43 (2). The prohibition against asking a witness, including one of the parties, any question tending to show that he or she had been guilty of adultery, unless he or she had given evidence in disproof thereof, was throughout extended to questions by way of interrogatories, and these were disallowed if they tended to prove adultery. The practice has been consistently followed, not least on the authority of *Redfern v Redfern*¹, and other cases. It is not uninteresting to look at *E v E*². I read from the headnote: h

¹ [1891] P 139, [1886-90] All ER Rep 524

² (1907) 24 TLR 78 j

a 'A wife in her petition for divorce on the grounds of her husband's cruelty and adultery alleged in paragraph 4 as an act of cruelty, the wilful communication to her of a venereal disease, and in paragraph 7 she alleged an act of adultery with a woman unknown on the same date, whereby he had contracted the disease. The wife proposed to interrogate the respondent as to whether he was not suffering from venereal disease at the time in question, and whether a doctor did not attend him for it, contending that the interrogatories went solely to the charge of cruelty alleged in paragraph 4.'

b The interrogatories were:

c '(1) Were you in some and what period of the years 1903 and 1904 suffering from any and what form of venereal disease . . . (d) Did you not consult Doctor H. of Paris, or any other and what doctor, in relation to such disease, and were you not under his care and treatment in relation thereto for any and what period during the said years 1903 and 1904?'

d Bargrave Deane J in a short judgment said that he was quite satisfied that the proposed interrogatories ought not to be allowed. It was quite obvious to him that the paragraphs in the petition which had been referred to had been inverted. It was alleged in para 7 that in consequence of an act of adultery in 1903 the respondent had contracted a venereal disease, which disease the respondent was alleged in para 4 to have wilfully communicated to his wife in the same year. The summons must therefore be dismissed as by the statute the questions were inadmissible. As the matter was one of importance, should the petitioner desire to appeal, the summons would be reheard in open court for argument as he did not feel disposed at that stage to give leave to appeal.

e For reasons which appear later in this judgment, in my view the interrogatories which were disallowed in *E v E*³ would now be allowed. The whole position has now been radically changed by the Civil Evidence Act 1968, by s 16 (5) of which the following provision has been introduced:

f 'A witness in any proceedings instituted in consequence of adultery, whether a party to the proceedings or not, shall not be excused from answering any question by reason that it tends to show that he or she has been guilty of adultery, and accordingly the proviso to section 3 of the Evidence Further Amendment Act 1869, and, in section 43 (2) of the Matrimonial Causes Act 1965, the words from "but" to the end of the subsection shall cease to have effect.'

g The words which have gone, therefore, are:

'But no witness in any such proceedings, whether a party to the proceedings or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery.'

h The protection so long afforded to parties and witnesses has been removed, and, with it, the very foundation on which the practice of refusing interrogatories tending to show adultery rested. In *Skone v Skone*⁴ the House of Lords has accepted that one effect of s 16 of the Civil Evidence Act 1968 is that a husband can obtain discovery of documents against his wife and a co-respondent of letters passing between them notwithstanding that they tend to show that adultery has been committed, and in my view the section must be given the same effect with regard to interrogatories, so that questions inviting answers which tend to establish adultery may now be allowed.

j In these circumstances one must consider what interrogatories may properly

3 (1907) 24 TLR 78

4 [1971] 2 All ER 582, [1971] 1 WLR 812

be administered, and for that purpose the principles set out in *The Supreme Court Practice 1970*⁵ under RSC Ord 26, r 1, should be studied. The discretion of the judge, master or registrar exists in part for the protection of the party interrogated, and care must be exercised to ensure that the new freedom to interrogate with regard to adultery is not abused. A party charged with adultery in divorce proceedings is clearly entitled to persist in a denial of adultery contained in the pleadings and to put the other party to proof of his allegations. The other party in seeking to prove his case may make use of interrogatories if he can satisfy the court that they are permissible in the circumstances.

The principles to be followed are conveniently set out in *The Supreme Court Practice 1970*⁵ under RSC Ord 26, r 1. The first is that interrogatories which relate solely to credit are not allowed; secondly, interrogatories which relate to any matter in question in the cause or matter are admissible. Then one comes to the very important general principle⁶: '3. . . only such interrogatories will be allowed as shall be considered "necessary either for disposing fairly of the cause or matter or for saving costs"', and under that heading there are examples: '(b) Interrogatories will not generally be allowed where it is plain that no admission can be obtained' and '(e) Oppressive interrogatories will not be allowed'; and, a further general principle, '4. Interrogatories as to the evidence of the party interrogated will not be allowed'. The wife is urging in this case that the interrogatories which the learned registrar has allowed were not necessary for disposing fairly of the cause or matter or for saving costs, and further contends that they are oppressive.

Some assistance in this matter can be gained by examining one or two cases in which interrogatories have been allowed or disallowed. In the judgment in *Heaton v Goldney*⁷, which was a case of defamation and therefore not helpful for comparison, an observation of general application should be remembered. Vaughan Williams LJ said⁸:

'In my opinion each of the grounds on which it is alleged that these interrogatories are admissible fails. I wish to point out, before dealing with those grounds, one thing which ought to be remembered with regard to interrogatories and discovery generally. Ever since they were first invented it has been recognized that they constitute a process which might become oppressive, and be used for improper purposes; and therefore that the allowance or disallowance of interrogatories is a matter for the discretion of the judge, and they should be allowed or disallowed on the merits of the particular case.'

Then the learned lord justice went on⁸ to deal more particularly with their use in a defamation case.

In 1956 Davies J had to consider in *Ramsey v Ramsey*⁹ whether to allow a wife petitioner, who sought a decree on the grounds of desertion, to interrogate her husband as to the contents of certain letters which had been written by the wife to the husband and subsequently lost or destroyed. The learned judge said¹⁰:

'My attention was called to the well-known passage in the judgment of A. L. SMITH, L.J., in *Kennedy v. Dodson*¹¹. As was emphasised by counsel for the wife this morning, the facts of that case were far removed from those of the present case. The passage relied on for the husband was at the opening part of the judgment: "In my opinion, the legitimate use, and the only legitimate use, of interrogatories is to obtain from the party interrogated admissions of facts which

⁵ Vol 1, pp 399-407, paras 26/1/1-26/1/20

⁶ *Ibid*, pp 400-402, paras 26/1/3, 26/1/4

⁷ [1910] 1 KB 754

⁸ [1910] 1 KB at 758

⁹ [1956] 2 All ER 165, [1956] 1 WLR 542

¹⁰ [1956] 2 All ER at 168, [1956] 1 WLR at 546

¹¹ [1895] 1 Ch 334 at 341

a it is necessary for the party interrogating to prove in order to establish his case; and if the party interrogating goes further, and seeks by his interrogatories to get from the other party matters which it is not incumbent on him to prove, although such matters may indirectly assist his case, the interrogatories ought not to be admitted.” On the pleadings as they are before me in the present suit, are these interrogatories as to how many letters the wife wrote to the husband, when he got them, and what was in them, and the matters that might there be elicited, necessary for her to establish her case? In my opinion, they are not. The case is one of simple desertion, and I cannot say that it is necessary for her to prove these letters in establishing her case.’

The interrogatories which had been allowed by the registrar in that case were therefore disallowed on appeal.

c In *Hulbert v Hulbert*¹² the wife filed a petition for divorce on the ground of cruelty alleging assaults and violence to which the husband pleaded not guilty. The wife filed a supplemental petition in which she alleged that the husband had sent Christmas cards to mutual friends in which he defamed her with the object and effect of embarrassing and distressing her, and when he was visiting Holland he had spoken to women and made similar defamatory statements. In addition, he visited the Law Society in London and informed the legal aid department that the wife had provided the national assistance board with false information. To the additional charges of cruelty the husband pleaded not guilty of the cruelty as therein alleged. The wife obtained from the registrar leave to administer interrogatories in respect of the additional charges of cruelty, and the husband appealed to Willmer J in chambers. The question was whether the interrogatories were permissible in a divorce suit for cruelty. The matter went from the judge who had approved the registrar’s order allowing the interrogatories to the Court of Appeal, where Denning LJ, having stated the facts, said¹³:

f ‘The first five interrogatories are put for the purpose of saving costs . . . of calling the witnesses from different parts of this country and from Holland; and the last interrogatory, about the Law Society, is put because it is said that there may be a statutory prohibition preventing a witness from the Law Society giving that evidence. On this account it is said these interrogatories are necessary for fairly disposing of the case and for saving costs.’

At the end of his judgment Denning LJ said¹⁴:

g ‘In these circumstances, I think that, in cases alleging cruelty or desertion, interrogatories are permissible where they are necessary either for fairly disposing of the case, or for saving costs. Rule 23 of the Matrimonial Causes Rules, 1950¹⁵, is quite general. It must be read with Ord. 31, r. 1 and r. 2, of the Rules of the Supreme Court. I agree that in a divorce case it is rare that interrogatories are necessary for fairly disposing of the case or for saving costs; but in this case the registrar and the judge were so satisfied, and I agree with them.’

h In my view, it would be neither possible nor prudent to attempt within these principles to define further the kind of questions which might be allowable in cases founded on adultery, and I shall do no more than indicate what interrogatories I would myself allow in the present case.

i The husband alleges that his wife has committed adultery (1) since 1967 at the matrimonial home in Kent; (2) at the co-respondent’s residence on occasions unspecified until after discovery; and (3) between 9th and 16th September 1968 at an

12 [1957] 2 All ER 226, [1957] P 174

13 [1957] 2 All ER at 227, [1957] P at 176

14 [1957] 2 All ER at 227, 228, [1957] P at 178

15 SI 1950 No 1940

hotel in Devon. In support of the application for interrogatories, the husband's solicitor has filed an affidavit in which it is explained that the above allegations are founded on statements made to the husband by his daughter, who is now with the wife, and on enquiries made at the hotel in Devon by an enquiry agent. The husband is disinclined to call either of the children as witnesses if the suit is contested, and I have every sympathy with that view. Insofar as his interrogatories are otherwise justifiable, I would regard the release of the children as a further sound reason for allowing them. As to the enquiry agent, it is said that his evidence so far about the holiday in Devon does not sufficiently identify the wife and the co-respondent, and it would be foolish and unwarrantable to spend time and incur costs in further possibly extensive investigations if the wife and co-respondent are disposed to make such admissions as would lead to an inference of adultery failing adequate explanation of their conduct. It is not difficult to see that a great deal of expense could be wasted in the investigation of an hotel case if at the trial admissions were to be made rendering the investigations otiose.

I approach the present interrogatories against that background. The husband presented to the learned registrar one set of interrogatories¹⁶ against the wife and one against the co-respondent. All were allowed by the registrar. In the course of argument on the appeal, an amended set of interrogatories¹⁷ was presented to me. In my opinion, both sets of interrogatories, with one or two exceptions, are objectionable and I do not think it would be helpful to deal with them *seriatim*. The following observations will suffice, and I will deal first with the interrogatories¹⁶ allowed by the registrar against the wife. (1) The first three questions put to the wife are too vague, are oppressive, and ask for evidence rather than admissions of fact. Question 2, 'On how many occasions did he sleep at the said address' cannot be justified. (2) The fourth interrogatory, 'Did he not have sexual intercourse . . .?' This is the allegation which is denied in the answer and which the husband has to prove. He may seek to prove it by asking the court to draw inferences from facts admitted in proper interrogatories, but not by a bald question in this form. This question in my view must be disallowed. (3) The questions relating to financial support, questions 5, 6, 7, 8 and 9, are not necessary for fairly disposing of the case or saving costs and should be put to the wife in the witness box if the suit is contested. Insofar as they relate to the wife's earnings, they are relevant in maintenance proceedings. (4) Questions 10 to 17 relating to the holiday in Devon are admissible but should be redrafted. (5) Question 18, 'Did you not commit adultery . . .?' is not, in my view, allowable on the ground that the wife and the co-respondent are entitled to put the husband to proof of this allegation. As I have said already, if he obtains on the other interrogatories such admissions as lead to an inference of adultery, the wife and co-respondent must go into the witness box if they wish to rebut the inference, and they can then be cross-examined as to adultery.

As to the interrogatories to be answered by the co-respondent¹⁶ and allowed by the registrar: (6) Questions 1 to 4, and 13 and 14, are in my view objectionable for the reasons given in para (1) above. (7) Questions 5 and 6 relating to financial support and gifts are objectionable for the reasons given in para (3) above. (8) Questions 7 to 10 are in my view permissible, but should be redrafted. (9) Question 11 is objectionable as seeking evidence rather than admissions. (10) Question 12 is objectionable for the reasons given in para (5) above.

The interrogatories contained in the second set¹⁷ put before me on the appeal display many of the same defects, and some are even more objectionable and oppressive. For example, interrogatory 2: '... give the best particulars you are able as to the number of occasions on which he stayed'; and interrogatory 3: '... state whether the co-respondent shared a bedroom with you on any occasion, and whether there were any occasions when he did not share a bedroom with you on staying the night'.

a In these circumstances, whilst I allow the appeal against the registrar's order, it occurs to me that it might be more helpful to all concerned in this case if I were to indicate what interrogatories I would myself be prepared to allow as necessary within the principles described in this judgment. I have accordingly drafted a set of interrogatories which I would give leave to administer as follows.

Interrogatories to be answered by the wife

b ' (1) Did you not between the 9th and 16th days of September, 1968, or on other and what days in the said month, spend a holiday in Devon? (2) Did not the co-respondent, Arthur Edward Walker, accompany you on the said holiday? (3) Did you not during the said holiday stay at the Babbacombe Cliff Hotel, Babbacombe? (4) Did not the co-respondent during the said holiday stay at the said Babbacombe Cliff Hotel? (5) Did not you and the co-respondent at the said hotel on any and what dates during the said holiday occupy the same bedroom? (6) Did you not sign the register at the Babbacombe Cliff Hotel, Babbacombe? (7) Did not the co-respondent sign the register at the said hotel? (8) Did you and the co-respondent, or either of you, sign the said register in the name of Mr. and Mrs. A. E. Walker? (9) If "yes", did you and the co-respondent together occupy room No. 22 at the Babbacombe Cliff Hotel, Babbacombe, from the 9th September, 1968, for one week or for some other and what period during the said month? If the answers to interrogatories 3 and 4 are "no", then: (10) Did you not during the said holiday stay at the Babbacombe Hotel, Devon? (11) Did not the co-respondent during the said holiday stay at the said Babbacombe Hotel? (12) Did not you and the co-respondent at the Babbacombe Hotel on any and what dates during the said holiday occupy the same bedroom?'

e Then I should allow a similar set of interrogatories, with necessary amendments, against the co-respondent.

In those circumstances, the appeal against the registrar's order allowing the interrogatories is allowed.

f *Appeal allowed.*

Solicitors: *Batchelor, Fry, Coulson & Burder*, agents for *R L W Rons & Co*, Bexleyheath (for the husband); *Habershon, Watts, Powell & Robinson* (for the wife); *Thomas Boyd Whyte*, Bexleyheath (for the co-respondent).

Alice Bloomfield Barrister.

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Practice Direction

CHANCERY DIVISION

h *Practice – Chancery Division – Hearings by judges outside London – Court and chambers procedure.*

1. On and after 1st January 1972 causes and matters proceeding in the Chancery Division, and applications in such proceedings, may be heard by a judge sitting outside London, subject to and in accordance with the relevant provisions of the Rules of the Supreme Court and this practice direction.

j 2. Burgess V-C, the vice-chancellor of the Lancaster Palatine Court, has been requested by the Lord Chancellor to sit as a judge of the High Court for the hearing of proceedings assigned to the Chancery Division (including proceedings in the Companies Court) with certain specified exceptions. He will sit at Liverpool, Manchester and Preston and, time permitting, at Leeds and Newcastle upon Tyne. These towns may therefore be regarded for the purpose of RSC Ord 33, r 1, as places at which sittings of the High Court are authorised to be held for the trial of proceedings

within Burgess V-C's jurisdiction. In deciding whether to direct the trial of an action, or order the hearing of an originating summons, at any such place, it will be relevant to consider whether the proceedings are within Burgess V-C's jurisdiction and, particularly in the case of Leeds or Newcastle upon Tyne, whether he is likely to be available to take the case there. Subject to those considerations, it is to be expected that a cause or matter proceeding in the district registry of Leeds, Liverpool, Manchester, Newcastle upon Tyne or Preston will be ordered to be tried or heard at one of those places if both parties so wish.

3. Where a cause or matter within Burgess V-C's jurisdiction is proceeding in the district registry of Leeds, Liverpool, Manchester, Newcastle upon Tyne or Preston any application in the cause or matter for hearing by a judge should be made or adjourned to Burgess V-C and not to a judge in London, unless the parties otherwise agree or the court at or before the hearing otherwise directs on the ground that it is impracticable or inexpedient to make or adjourn the application to Burgess V-C.

4. If, pursuant to para 3, an application has been made to Burgess V-C or, as the case may be, to a judge in London, any subsequent application to a judge in the cause or matter should, unless the court at or before the hearing otherwise directs, be made to Burgess V-C or to a judge in London respectively.

5. The practice indicated in para 3 and 4 above should be followed, with the necessary modifications, in regard to the hearing of originating motions and petitions.

6. If parties to any cause or matter within the jurisdiction of Burgess V-C serve notices of motion on one another and one such notice is for hearing before Burgess V-C and the other is for hearing by a judge in London both notices shall be deemed to be for hearing before Burgess V-C, but no party on whom notice of motion has been served shall serve a cross-notice of motion for hearing elsewhere than at the place of hearing of the first motion.

7. In the case of a cause or matter proceeding at the Royal Courts of Justice or in any district registry other than those of Leeds, Liverpool, Manchester, Newcastle upon Tyne or Preston, the hearing of the proceedings must, unless special arrangements are made, be ordered to take place in London, Liverpool, Manchester or Preston. The master or district registrar must not fix an action for trial, or adjourn an originating summons for hearing, by a judge elsewhere unless the proposed place of trial is one at which sittings of the High Court are authorised by or on behalf of the Lord Chancellor to be held for the hearing of the particular case or cases of that class. This is unlikely to be possible except in special circumstances, for example, where it would be difficult for the witnesses to come to London. In such a case and subject to para 8, before the master or district registrar is asked to fix a local venue, enquiries should be made through the appropriate circuit administrator. It may occasionally be possible to arrange for a judge of another Division to take the case, or for Burgess V-C to sit outside his normal area or for another circuit judge to be requested to sit as a judge of the High Court for the purpose of trying the case. Exceptionally, a judge of the Chancery Division might agree to go out and hear the case. If the master or district registrar is satisfied that it is administratively possible for a case to be tried outside London, Liverpool, Manchester or Preston he must still determine judicially whether to order such a trial and must hear all parties on the question, and, if so requested, adjourn it to the judge.

8. Although Leeds and Newcastle upon Tyne may be regarded as authorised places for the purposes of RSC Ord 33, r 1, enquiries should be made of the local district registrar before a case proceeding elsewhere is fixed for trial at either of those places.

By the direction of the Vice-Chancellor and with the concurrence of the Lord Chancellor.

London Borough of Ealing v Race Relations Board

HOUSE OF LORDS

LORD DONOVAN^a, VISCOUNT DILHORNE, LORD SIMON OF GLAISDALE, LORD CROSS OF CHELSEA AND LORD KILBRANDON

b 2nd, 3rd, 4th NOVEMBER, 16th DECEMBER 1971

Race relations – Discrimination – National origins – Discrimination on ground of nationality – Exclusion of non-British subject from council's housing list – Whether discrimination on ground of national origins – Race Relations Act 1968, ss 1 (1), 5 (c).

c *Declaration – Jurisdiction to grant – Exclusion of jurisdiction by statute – Necessity for clear exclusion – Proceedings in pursuance of a determination of the Race Relations Board – Whether statutory procedure ousting jurisdiction to grant declaration to alleged discriminator – Race Relations Act 1968, s 19 (1), (2), (10).*

The council, which was the local housing authority, maintained a register of all applications for housing accommodation and a list of persons transferred from this register to the housing waiting list. The council adopted rules for the transfer from the register

d to the list. Rule 3 (1) stipulated that an applicant must be a British subject within the meaning of the British Nationality Act 1948. In 1966 and 1968 Z, who was then a Polish national, submitted a housing application to the council, which declined to put him on the waiting list because he was not a British subject as required by r 3 (1). A complaint was made to the Race Relations Board on behalf of Z. The board formed the opinion that the council had unlawfully discriminated against Z

e on the ground of his 'national origins' under ss 1 (1)^b and 5 (c)^c of the Race Relations Act 1968. In June 1969 the board notified the council of their opinion and sought to secure a settlement between the parties and an assurance that the council's action would not be repeated. The council, after rejecting two requests by the board, issued a summons claiming declarations against the board and Z that they were entitled to decline to place Z on the housing list on the grounds that he was not,

f at the material time, a British subject. The board contended that the court had no jurisdiction to grant the declarations sought on the grounds that proceedings under the 1968 Act other than in accordance with s 19 (1)^d of the Act were expressly forbidden by s 19 (10)^e, that the provisions of the Act laid down a complete and exclusive code for such proceedings, and alternatively that, if the court had jurisdiction, in the exercise of its discretion it should refuse to make the declarations.

g **Held** – (i) The court had jurisdiction to grant a declaration, for clear words were necessary to oust the jurisdiction of the court and there were none in the 1968 Act; since the proceedings with which s 19 of the 1968 Act was concerned were proceedings brought by the board, the prohibition in s 19 (2)^f on the bringing of 'proceedings

a Lord Donovan was present throughout the hearing of this appeal and the speech which he had prepared was in print before his death on 12th December 1971

h **b** Section 1 (1) is set out at p 109 j to p 110 a, post

c Section 5, so far as material, provides: 'It shall be unlawful for any person having power to dispose, or being otherwise concerned with the disposal, of housing accommodation, business premises or other land to discriminate . . . (c) against any person in need of any such accommodation, premises or other land by deliberately treating that other person differently from others in respect of any list of persons in need of it.'

j **a** Section 19 (1), so far as material, is set out at p 110 h, post

e Section 19 (10), so far as material, is set out at p 111 a, post

f Section 19 (2) provides: 'Notwithstanding anything to the contrary in any enactment or rule of law relating to the jurisdiction of county courts, proceedings under this section in England and Wales may be brought in a county court for the time being appointed to have jurisdiction to entertain such proceedings by an order made by the Lord Chancellor and shall not be brought in any other court.'

under this section' in any courts other than nominated county courts related only to proceedings brought by the board; furthermore the proceedings instituted by the council were not brought 'against' any person in respect of an act which was unlawful by virtue of Part I of the Act and accordingly the prohibition on such proceedings in s 19 (10) did not apply to the council (see p 108 b to d, p 109 e, p 111 b and c, p 113 g, p 117 a and p 120 j, post).

(ii) The case was a proper one for the court to exercise its discretion to grant a declaration since there was no dispute as to the facts and the legality of the council's action depended solely on the construction of the 1968 Act (see p 109 e, p 111 e, p 113 g, p 117 a and p 120 j, post).

(iii) (Lord Kilbrandon dissenting) The council were entitled to a declaration that by declining to place Z on the housing list on account of his not then being a British subject the council did not commit a breach of s 5 (c) of the 1968 Act; the expression 'national origins' in s 1 (1) of the Act indicated a person's connection by birth with a particular group of people who could be described as a 'nation' and did not mean the same thing as 'nationality' in the sense of citizenship of a particular state; by refusing to place Z on the housing list the council had discriminated against him on the ground of his nationality at the time when the applications were made and not on the ground of his 'national origins' (see p 109 a, b and e, p 112 a, b, h and j, p 113 b to e, p 116 b, h and j and p 117 f, h and j, post).

Decision of *Swanwick J* [1971] 1 All ER 424 reversed.

Notes

For discrimination on racial grounds, see Supplement to 7 Halsbury's Laws (3rd Edn) para 1280.

For proceedings by the Race Relations Board, see Supplement to 7 Halsbury's Laws (3rd Edn) para 1281, 5.

For the Race Relations Act 1968, ss 1, 5, 19, see Halsbury's Statutes (3rd Edn) 1968 vol, pp 1541, 1543, 1552.

Cases referred to in opinions

Francis v Viewsey and West Drayton Urban District Council [1957] 1 All ER 825, [1957] 2 QB 136, [1957] 2 WLR 627; *aff'd* CA [1957] 3 All ER 529, [1958] 1 QB 478, [1957] 3 WLR 919, 122 JP 31, 45 Digest (Repl) 346, 34.

Pyx Granite Co Ltd v Ministry of Housing and Local Government [1959] 3 All ER 1, [1960] AC 260, [1959] 3 WLR 346, 123 JP 429, Digest (Cont Vol A) 968, 254a.

Appeal

This was an appeal by the Mayor, Aldermen and Burgesses of the London Borough of Ealing ('the council') and a cross-appeal by the Race Relations Board ('the board') against a decision of *Swanwick J* dated 23rd October 1970, and reported [1971] 1 All ER 424, holding that he had jurisdiction to grant the declarations sought by the council against the board and Stanislaw Zesko that the council's conduct in refusing to place Mr Zesko on their list of applicants who were transferred to the housing waiting list maintained by the council as the local housing authority did not constitute unlawful discrimination within the meaning of the Race Relations Act 1968, but refusing to grant the declarations sought on the ground that the council's conduct did constitute unlawful discrimination under the Act. The facts are set out in the opinion of Lord Donovan.

J G Le Quesne QC and *K C L Smithies* for the council.

R A MacCrindle QC and *Anthony Lester* for the board.

Their Lordships took time for consideration.

16th December. The following opinions were delivered.

a **VISCOUNT DILHORNE.** The late Lord Donovan's opinion is now in print, and he was in favour of allowing the appeal.

b **LORD DONOVAN.** My Lords, the appellant council ('the council') is the housing authority for the borough of Ealing. As such it keeps a register of all applications for housing accommodation within the borough and a waiting list containing names transferred from that register. A points scheme adopted by the council, which takes into account among other things the time the applicant has been waiting, governs the allocation of council accommodation to those on the waiting list. Another rule, r 3 (1), of the council governing admission to the waiting list reads thus: 'An applicant must be a British Subject within the meaning of the British Nationality Act, 1948.' That Act defines a British subject as including both British subjects and Commonwealth citizens.

c In 1966 and again in 1968 a Mr Zesko, a Polish national of excellent antecedents and character, sent in an application to the council for housing accommodation describing himself therein as a Polish national. On each occasion because of the rule just quoted the council declined to put him on the waiting list.

d Section 1 (1) of the Race Relations Act 1968 ('the 1968 Act') enacts that a person discriminates against another for the purposes of the Act if—

'on the ground of colour, race or ethnic or national origins he treats that other, in any situation to which section 2, 3, 4 or 5 below applies, less favourably than he treats or would treat other persons . . .'

e Section 5 of the Act deals specifically with discrimination against a person in the matter of the disposal of housing accommodation and makes such discrimination unlawful.

f A complaint on behalf of Mr Zesko was lodged with the Race Relations Board now operating under the 1968 Act ('the board') that in the foregoing circumstances the council were in breach of s 5. In accordance with the Act the board investigated the complaint and formed the opinion that it was well-founded. So it proceeded, as required by the Act, to try and secure a settlement and an assurance against repetition of such alleged discrimination. Taking the view, however, that it had committed no unlawful act, the council, on 21st November 1969, issued in the High Court an originating summons claiming a number of declarations against the board, of which it is sufficient to quote no 5:

g ' . . . that the Council are and were at all material times entitled to decline to place Zesko upon their housing waiting list on the grounds that he was not at the material time a British Subject but was on the contrary a person of foreign or alien nationality.'

h It is the board's case that the High Court had no jurisdiction to grant any such declaration or indeed any of the other reliefs asked for in the originating summons; and they so contended when the summons was heard by Swanwick J¹ in October 1970. The contention is based primarily on certain of the provisions which govern the right of the board to bring civil proceedings in England and Wales and which are contained in s 19 of the 1968 Act.

j The striking feature of these provisions is that the board is confined to bringing proceedings in certain nominated county courts and in those alone. The judge is to be assisted by two assessors having special knowledge and experience of problems connected with race and community relations. The board may sue for an injunction or for damages or for both; and for a declaration that an act is unlawful under the provisions of the Act. A right of appeal is given to the Court of Appeal on questions of fact or law.

All this, says the board, amounts to a comprehensive and exclusive code of proceedings for problems of race and community relations. Under it the board itself

cannot go to the High Court and seek a declaration. Why, therefore, should its opponent be allowed to do so? It is to be observed in this connection, however, that the board's opponent can initiate no action of any kind in the nominated county court. He must sit down and wait until he is taken there by the board.

Other arguments were used by the board in support of its contention which are set out in the judgment of the learned judge². In my opinion, their persuasive force was small and they were adequately disposed of by him in his reserved judgment. He went on to say, quite rightly, that clear words are necessary to oust the jurisdiction of the High Court and there are none in the Act of 1968. Nor can any necessary implication to that effect be drawn from its language. His observations were prompted by Viscount Simonds's remarks in *Pyx Granite Co Ltd v Ministry of Housing and Local Government*³ that:

'It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is, as McNAMER, J., called it in *Francis v. Yiewsley & West Drayton U.D.C.*⁴ a "fundamental rule" from which I would not for my part sanction any departure.'

I certainly can see no justification for ousting the jurisdiction of the High Court in the manner desired by the board; and I proceed, therefore, to consider the substance of the originating summons.

The question which it raises is one of construction: namely, whether the refusal of the council to place Mr Zesko's name on their housing waiting list was discrimination against him on the ground of 'national origins' within the meaning of s 1 (1) of the 1968 Act. The council did not use the expression 'national origins' in this context. It simply applied its rule that every applicant wishing to be placed on its waiting list for housing accommodation must be a British subject within the meaning of the British Nationality Act 1948; and at the time Mr Zesko was a Pole. Had 'discrimination' been defined in s 1 (1) as including discrimination on the ground of nationality, the council's rule would clearly have fallen foul of it. So the question comes to this: do the words 'national origins' amount for present purposes to the same thing as 'nationality'?

The Act itself contains no definition of 'national origins'. It must, I think, mean something different from mere nationality, otherwise there would be no reason for not using that one word, as indeed the Act does in later provisions to which I shall have to refer. But looking at the matter from the point of view of a would-be discriminator on the grounds of 'national origins' what sort of matters would he take into account which were not simply present nationality?

One example which readily suggests itself is that of a naturalised person. The would-be discriminator may say, 'Yes, I know he has become a naturalised British subject, but he was born a German and I bear a grudge against all such persons'. Any consequent discrimination could then be said to be on the ground of national origins, i.e. the nationality received at birth. If this is what 'national origins' means, this difficulty arises for the board, namely, that the council plainly did not reject Mr Zesko's application because he had been born a Pole but because at the moment of his application he was not a British subject. Had he been, there is no doubt (in the light of subsequent events) that he would have been put on the waiting list, despite his Polish origin. I am conscious that it may be said that this is still discrimination on the ground of national origins, and that the fact that these have remained unchanged makes no difference; but of this I am not convinced. Four grounds of discrimination only are specified in s 1 (1). Discrimination on any other ground, e.g.

² [1971] 1 All ER 424, [1971] 1 QB 309

³ [1959] 3 All ER 1 at 6, [1960] AC 260 at 286

⁴ [1957] 2 QB 136 at 148, cf [1957] 1 All ER 825 at 831

a religion or politics, is not unlawful under the Act. When one finds that the council was indifferent to Mr Zesko's national origins but concerned only with his present nationality, and present nationality is not expressly made a ground of possible discrimination, I hesitate to assert that nevertheless it is.

b It is argued alternatively by the board that the phrase 'national origins' is wide enough by itself to embrace nationality and in many cases this may be so. But the Act of 1968 is dealing with discrimination on grounds existing at the time it occurs; and I find 'national origins' a very inapt phrase to embrace present nationality.

c There are certain provisions in the Act which expressly mention 'nationality'. Thus, s 8 (11) preserves the legality of selecting for employment a person of a 'particular nationality' or descent if the work requires attributes especially possessed by such person. Section 27 (9) preserves the legality of present or future rules restricting employment in the service of the Crown or of certain prescribed public bodies to persons of particular birth, citizenship, nationality, descent or residence. Both sides rely on these provisions. The board argues that 'national origins' is thus shown to include nationality otherwise the provisions would, to this extent at least, be otiose. The council replies that if the true construction of 'national origins' does not include present nationality, saving provisions like ss 8 (11) and 27 (9) cannot be extended so as to achieve that result; it being common for such clauses to err on the side of caution. I think there is force in the council's reply and I do not think the provisions in question shed a crucial light on the interpretation of 'national origins' in s 1 (1).

e If the council is to be stigmatised as being guilty of an unlawful act under the 1968 Act I think that conclusion ought to be reached with reasonable confidence. Giving the rival arguments the best consideration I can I must say that I do not feel that measure of confidence. Instead, I still feel much doubt about it; and in that state of mind I would allow this appeal and make the declaration suggested by my noble and learned friend, Viscount Dilhorne. It follows from what I have previously said that I would dismiss the cross-appeal.

f I should perhaps add that since these proceedings were begun Mr Zesko has become a naturalised British subject and been placed on the housing waiting list. This does not render the proceedings academic since he would have lost the benefit of a certain amount of waiting time, assuming that the contentions advanced on his behalf had been correct.

g **VISCOUNT DILHORNE.** My Lords, on 15th June 1965 the council adopted certain 'Conditions and Rules of Acceptance of Housing Applications'. One of the conditions was that to be accepted on the council's waiting list and to be assessed under the points scheme, the applicant 'must be a British subject within the meaning of the British Nationality Act, 1948'. Presumably it was in the council's opinion not right to allot council houses to aliens when so many British people were wanting houses.

h On 30th August 1966 a Mr Zesko applied to the council for a house. In his application form he stated that he and his wife were Polish and had been born in Poland. In fact his nationality was Russian for we were told that at the time of his birth Poland formed part of Russia and that in fact he was born in Siberia. His application was rejected on the ground that he was not a British subject. Mr Zesko had a fine war record, and, when he applied for naturalisation, he was granted it. He then renewed his application for a house and was put on the waiting list. The only effect j this appeal may have so far as he is concerned, is that if it is dismissed, the council will have to treat him as if he had been put on the waiting list when he first applied, in which event he will gain an advantage in the housing queue.

The Race Relations Act 1968 came into operation on 25th November 1968 (s 29 (3)). Section 1 (1) is in the following terms:

'For the purposes of this Act a person discriminates against another if on the

ground of colour, race or ethnic or national origins he treats that other, in any situation to which section 2, 3, 4 or 5 below applies, less favourably than he treats or would treat other persons, and in this Act references to discrimination are references to discrimination on any of these grounds.’ a

Discrimination is made unlawful in respect of the provision of goods, facilities or services by s 2, in relation to employment by s 3, in relation to membership of trade unions, employers’ and trade organisations by s 4 and in relation to housing accommodation by s 5. b

On 2nd June 1969 the board’s chief conciliation officer wrote to the council telling them that the board had considered the complaint made by the Anglo-Polish Conservative Society on behalf of Mr Zesko that the council had unlawfully discriminated against him by refusing to consider his application for housing as he was not a British subject. He said that the board had formed the opinion that the council had acted unlawfully and contrary to s 5 (c) of the Act and he sought in accordance with s 15 (3) (b) of the Act to seek a settlement of the differences between Mr Zesko and the council and an ‘assurance against any repetition of the unlawful act or the doing of further acts of a similar kind’. c

No such assurance was forthcoming as the council maintained that they had not acted unlawfully as alleged; and on 14th November 1969 the chief conciliation officer wrote saying that the board had decided to maintain their opinion that unlawful discrimination had occurred. He again asked formally whether the council was prepared to reach such a settlement and give such an assurance but he imagined that the answer would be in the negative and said: d

‘The Board would then have to determine whether or not to bring proceedings. However, they would defer their determination until after the High Court proceedings had been disposed of.’ e

High Court proceedings were instituted—in the light of the foregoing, it would seem with the agreement of the board—on 21st November 1969, by originating summons claiming five declarations. The action was heard by Swanwick J⁵. At the hearing counsel for the board contended that the court had no jurisdiction to grant the relief claimed and, alternatively, if it had jurisdiction, in the exercise of its discretion it should refuse to make any of the declarations claimed. Swanwick J rejected these contentions but held that there had been unlawful discrimination against Mr Zesko and dismissed the summons. From his decision the council have, with leave, appealed direct to this House, and the board have again contended that there is no jurisdiction to grant the relief claimed and, alternatively, that if there is jurisdiction, in the exercise of discretion relief should not be granted. It will be convenient to consider these two contentions first. f

Section 19 (1) of the Race Relations Act 1968 provides: g

‘Civil proceedings may be brought in England and Wales by the Race Relations Board, in pursuance of a determination of theirs under section 15 of, or Schedule 2 or 3 to, this Act and not otherwise, in respect of any act alleged to be unlawful by virtue of any provision of Part I of this Act . . .’ h

and that in such proceedings an injunction or damages or an injunction and damages or ‘a declaration that that act is unlawful by virtue of that provision or any other provision of the said Part I’ may be claimed. Section 19 (2) provides that proceedings under the section may be brought in a county court appointed to have jurisdiction to entertain such proceedings by the Lord Chancellor ‘and shall not be brought in any other court’. Section 19 (10) *inter alia* provides: j

a '... except as provided by [this Act] no proceedings, whether civil or criminal, shall lie against any person in respect of any act which is unlawful by virtue only of a provision of Part I of this Act.'

b The proceedings instituted by the council were not brought against any person in respect of any act which is unlawful by virtue of Part I, and s 19 (10) therefore does not apply to them. Section 19 (2) is expressed to apply to 'proceedings under this section'. Proceedings under the section are proceedings by the board and it is those proceedings which cannot be brought in any other court than one appointed by the Lord Chancellor. Section 19 (2) does not, therefore, prevent the institution of proceedings such as those in this case. Proceedings brought by the board under the section must be in pursuance of a determination of the board under s 15 or Sch 2 or 3 'and not otherwise' and 'in respect of any act alleged to be unlawful' by virtue c of the Act. Section 19 and ss 20-24 all deal with the enforcement of the Act by the board. I can find nothing in the Act which ousts the jurisdiction of the courts to grant a declaration. The council are not bringing any proceedings to which s 19 applies.

d I therefore reject this contention of the board. Whether any of the declarations sought should be made is a matter of discretion. A borough council, accused by the board of having acted unlawfully in the administration of its housing scheme, may well seek to have the allegation disposed of one way or the other at the earliest possible moment. If they do not do so, and have to wait to see whether the board decides to institute proceedings, they may be left in doubt about how to deal with applicants for houses. If the board is right, it is only if the board starts proceedings e that the council can clear itself of the imputation cast on its conduct. Where, as in this case, there is no dispute as to the facts and where the legality of the council's action depends and solely depends on the construction of the Act, the issue of an originating summons is a convenient procedure for determining the question of construction. If the council is entitled to any of the declarations it claims, I see no reason to refuse in the exercise of discretion to make a declaration. I therefore reject the board's second contention.

f Whether the council acted lawfully or unlawfully depends on the meaning to be given to the words 'national origins' in s 1 (1). Those words appear in s 1 (1) (repealed by the 1968 Act), s 5 (1) and s 6 (1) of the Race Relations Act 1965. Our attention was not drawn to their use in any other Act and in neither Race Relations Act is the meaning to be given to these words defined. They must have been intended in the 1968 Act to have the same meaning as they had in the 1965 Act and I propose first g to consider whether the 1965 Act throws any light on the meaning to be given to them.

The long title to that Act is in the following terms:

'An Act to prohibit discrimination on racial grounds in places of public resort; to prevent the enforcement or imposition on racial grounds of restrictions on the transfer of tenancies; to penalise incitement to racial hatred; and to amend section 5 of the Public Order Act 1936.'

h Section 1 (1) provides that it is unlawful for, inter alia, proprietors of places of public resort 'to practise discrimination on the ground of colour, race, or ethnic or national origins'. Section 5 (1) makes it unlawful to withhold a licence or consent to the disposal of a tenancy on the same grounds and s 6 (1) makes it an offence to do certain acts with intent to stir up hatred 'against any section of the public in Great Britain distinguished by colour, race, or ethnic or national origins'. The words quoted in these three sections show the meaning to be attached to the word 'racial' in the long title. j

The question to be decided in this appeal is whether discrimination in favour of British subjects within the meaning of the British Nationality Act 1948 and against aliens is discrimination on the ground of 'national origins'.

'Nationality', in the sense of citizenship of a certain state, must not be confused with 'nationality' as meaning membership of a certain nation in the sense of race. Thus, according to international law, Englishmen and Scotsmen are, despite their different nationality as regards race, all of British nationality as regards citizenship. Thus further, although all Polish individuals are of Polish nationality qua race, for many generations there were no Poles qua 'citizenship'⁶. Just as 'nationality' can be used in these two senses, so can the word 'national'. Bearing in mind the racial objects of the 1965 and 1968 Acts, and that the words 'national origins' with the other words with which it appears explain what is meant by the word 'racial' in the long title, I think that the word 'national' in 'national origins' means national in the sense of race and not citizenship.

The long title of the 1968 Act is in the following terms:

'An Act to make fresh provision with respect to discrimination on racial grounds, and to make provision with respect to relations between people of different racial origins.'

And again the use of the words 'colour, race or ethnic or national origins' in s 1 (1) show the content of the word 'racial'.

The word 'nationality' does not appear in the 1965 Act. In the 1968 Act it appears in two places. Section 8 (1) of that Act states:

'Section 3 above [the section dealing with employment] shall not render unlawful the selection of a person of a particular nationality or particular descent for employment requiring attributes especially possessed by persons of that nationality or descent.'

Section 27 (9) is in the following terms:

'Nothing in this Act shall—(a) invalidate any rules . . . restricting employment in the service of the Crown or by any public body prescribed for the purposes of this subsection by regulations made by the Treasury to persons of particular birth, citizenship, nationality, descent or residence . . .'

In both ss 8 and 27 'nationality' is used in the sense of citizenship of a state. It was argued for the board that these references to nationality would not be necessary unless nationality in the sense of citizenship of a state was comprehended in the words 'national origins', for, it was said, if that were not the case there would be no need to refer to it in these saving clauses. I am not convinced by this reasoning that one should on this account construe the words 'national origins' in both Acts, for the meaning must be the same in both, as including nationality. I think that it is likely that these references to nationality were made ex abundanti cautela, it being realised that the interpretation to be given to 'national origins' might lead to difficulties.

As a step towards determining whether there has been unlawful discrimination one has to consider the characteristics of the individual alleged to have been discriminated against and then to decide whether he was discriminated against on account of his colour, race or ethnic or national origins. Consideration of those matters involves consideration of his antecedents. Mr Zesko's race was Polish. His national origins were Polish. Was he discriminated against on that account? If that was the ground of the discrimination it was not removed by his naturalisation, and the fact that despite his race and his Polish origin he was after naturalisation accepted on the waiting list shows, in my view, that he was not discriminated against on account of his national origins. The ground for the discrimination was that he was not a British subject. It was his nationality at the time when he applied, not his national origins, that led to the refusal to put his name on the waiting list.

⁶ Oppenheim's International Law, 8th Edn, Vol 1, p 645

a 'The first and chief mode of acquiring nationality is by birth: indeed, the acquisition of nationality by another mode is exceptional, since the vast majority of mankind acquires nationality by birth and does not change it afterwards.'⁷

This is, no doubt, true and affords a foundation for the argument that discrimination against aliens is in the vast majority of cases discrimination consequent on their national origins. It was not in this case discrimination on the ground of national origins but on the ground of the nationality possessed at the time of the making of the application to go on the waiting list. An applicant's nationality may have been acquired at birth. It may be that his nationality is due to his national origins but the council, as I understand the position, concern themselves with what an applicant is and not with what his origins were.

b While I recognise that the question for decision is a difficult one, owing to the omission in the Acts of any indication of the meaning to be given to the words 'national origins', and one on which different views may be held, it must, I think, be recognised that 'nationality' and 'national origins' have not the same meaning, and that if it had been Parliament's intention, either in 1965 or in 1968, to make discrimination between British subjects and aliens unlawful, that could easily have been achieved by the addition of the words 'or nationality' after 'national origins'. The fact that Parliament did not do so and the fact that there is no clear indication in either Act that it intended to do so and the other reasons I have stated lead me to the conclusion that the council did not act unlawfully in breach of s 5 of the 1968 Act in refusing to enter Mr Zesko's name on the waiting list.

c Of the five declarations sought by the council, four do not appear to me apposite and the fourth declaration sought requires, in my view, slight amendment so that it should be declared that by declining on or about 4th February 1969 to place Mr Zesko on their housing waiting list on account of his not then being a British subject within the meaning of the British Nationality Act 1948 the council did not commit a breach of s 5 of the Race Relations Act 1968.

d For the reasons I have given, I think that this appeal should be allowed, that a declaration in the above terms should be made, that the other declarations sought should not be granted, and that the cross-appeal should be dismissed.

f **LORD SIMON OF GLAISDALE.** My Lords, three issues arise on these cross-appeals: first, has the court jurisdiction to entertain the application for a declaration by the original council? secondly, if so, should the court in the exercise of its discretion make a declaration? thirdly, if so, what should the declaration be, i.e. what is the proper construction of s 1 (1) of the Race Relations Act 1968? On the first and second issues I have had the advantage of reading the speeches prepared by my noble and learned friends, Lord Donovan and Viscount Dilhorne, and I agree with what they say. I also agree with their observations on the third issue; but, since I understand that your Lordships are not unanimous on what is not an easy point of construction, I venture to make some observations of my own.

h It is the duty of a court so to interpret an Act of Parliament as to give effect to its intention. The court sometimes asks itself what the draftsman must have intended. This is reasonable enough; the draftsman knows what is the intention of the legislative initiator (nowadays almost always an organ of the executive); he knows what canons of construction the courts will apply; and he will express himself in such a way as accordingly to give effect to the legislative intention. Parliament, of course, in enacting legislation assumes responsibility for the language of the draftsman. But the reality is that only a minority of legislators will attend the debates on the legislation. Failing special interest in the subject-matter of the legislation, what will demand their attention will be something on the face of proposed legislation which alerts them to a

questionable matter. Accordingly, such canons of construction as that words in a non-technical statute will primarily be interpreted according to their ordinary meaning or that a statute establishing a criminal offence will be expected to use plain and unequivocal language to delimit the ambit of the offence (i.e. that such a statute will be construed restrictively) are not only useful as part of that common code of juristic communication by which the draftsman signals legislative intention but are also constitutionally salutary in helping to ensure that legislators are not left in doubt what they are taking responsibility for. a

In some jurisdictions the courts, in order to ascertain the intention of the instrument calling for interpretation, can look at the legislative history or the 'preparatory works'. Though this may sometimes be useful, it is open to abuse and waste; an individual legislator may indicate his assent on an assumption that the legislation means so-and-so; and the courts may have no way of knowing how far his assumption is shared by his colleagues, even those present. Moreover, by extending the material of judicial scrutiny, the cost of litigation is inevitably increased. Finally, our own constitution does not know a pure legislature; the sovereign is the Queen in Parliament and the legislative history of a statute stretches back from the parliamentary proceedings—by successive drafts of a bill, heads of instruction to the draftsman, departmental papers, and minutes of executive committees—into the *arcana imperii*. (All this is not, of course, to say that an explanatory memorandum accompanying a complicated measure, such as accompanies almost every statutory instrument, might not often be useful both in apprising legislators of the details for which they are assuming responsibility and in assisting the courts in their task of interpretation.) b

In the absence of such material the courts have five principal avenues of approach to the ascertainment of the legislative intention: (1) examination of the social background, as specifically proved if not within common knowledge, in order to identify the social or juristic defect which is the likely subject of remedy; (2) a conspectus of the entire relevant body of the law for the same purpose; (3) particular regard to the long title of the statute to be interpreted (and, where available, the preamble), in which the general legislative objectives will be stated; (4) scrutiny of the actual words to be interpreted in the light of the established canons of interpretation; (5) examination of the other provisions of the statute in question (or of other statutes *in pari materia*) for the light which they throw on the particular words which are the subject of interpretation. Difficult questions can arise when these various avenues lead in different directions. Fortunately in the present case, in my view, they lead to an identical conclusion. c

First, then, the social background. There have been periods in our history which have been disgraced by acute xenophobia. Lombards, Scots, Irish (though sectarian influences were also present here), Eastern Europeans (though anti-semitism here played its part), Germans, have all at various times been objects of execration. But the 1960s were not such a period. Social strains then were caused by considerable immigration of peoples who, although often of British nationality or of citizenship of the United Kingdom and Colonies, were of alien culture and of deeper than native pigmentation, and by a recrudescence of anti-semitism. 'Wog', 'Nig-nog', 'Yid', 'Dago' were current terms of abuse. 'Chink', 'Hun', 'Russky', 'Portuguese', even 'Jerry', have a distinctly old-fashioned resonance; while 'Frog', 'Mounseer', 'Polack', 'the Potsdam Dutch and the goddam Dutch', are of purely historical significance. Uncle Tom rather than Uncle Matthew is the relevant literary stereotype. d

Secondly, for the general legal conspectus. The Race Relations Acts 1965 and 1968 do not provide a complete code against discrimination of socially divisive propaganda. The Acts do not deal at all with discrimination on the grounds of religion or political tenet. It is no offence under the Acts to stir up class hatred. It is, therefore, unquestionably with a limited sort of socially disruptive conduct that the Acts are concerned; and it is, on any reading, within a limited sphere that Parliament put its ameliorative measures into action. e

a Thirdly, for the long title of the 1968 Act. This states:

‘An Act to make fresh provision with respect to discrimination on racial grounds, and to make provision with respect to relations between people of different racial origins.’

b It is significant that there is no word here about ‘nationality’, whether used in its popular or in its legal sense. Moreover, ‘racial’ is not a term of art, either legal or, I surmise, scientific. I apprehend that anthropologists would dispute how far the word ‘race’ is biologically at all relevant to the species amusingly called *homo sapiens*.

Fourthly, for the words of s 1(1) itself. The crucial words are:

c ‘For the purposes of this Act a person discriminates against another if on the ground of colour, race or ethnic or national origins he treats that other . . . less favourably than he treats or would treat other persons . . .’

d This is rubbery and elusive language—understandably when the draftsman is dealing with so unprecise a concept as ‘race’ in its popular sense and endeavouring to leave no loophole for evasion. But if discrimination on the ground of ‘nationality’ were within the intendment of the subsection, the draftsman had available a term of legal precision; it could have been used expressly in the list of grounds, leaving no room for doubt; and there would be no conceivable reason for hiding the concept obscurely within the words ‘national origins’.

e Fifthly, for the concomitant statutory provisions. The 1968 Act repealed ss 1 to 4 of the Race Relations Act 1965 (and a few other immaterial provisions of that Act); but it left the rest of the 1965 Act standing, to be cited together with it. Among the sections of the 1965 Act left standing is s 6 (1) which provides that it is a criminal offence to do certain acts ‘with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race, or ethnic or national origins’. This is the very same terminology as is used in s 1(1) of the 1968 Act, which must bear the same meaning. In other words, it is also used to define a criminal offence.

f This, I think, disposes of an argument for the original board to the following effect: ‘National origins’ must include nationality by birth, which is indeed the most usual way of acquiring nationality. A person of foreign nationality by birth can only acquire British nationality subject to residential qualifications and at the discretion of the Secretary of State. A person of foreign nationality is therefore treated less favourably than other persons (i.e. natives) if he is required to surmount the obstacles to acquiring British nationality as a condition of receiving equal treatment with natives. Thus, a foreign national who is not accorded equal treatment with the native is discriminated against on the ground of his national origins. The short answer to this line of argument is that criminal offences are not to be created in this oblique, circuitous and obscure way. The use of the words ‘national origins’ in the penal section of the 1965 Act tends to suggest a restricted rather than an expansive meaning.

g As for the other provisions of the 1968 Act itself, the very word ‘nationality’ appears in ss 8 (11) and 27 (9) (a) of the Act. Both of these provisions are by way of exception from the generality of the Act. It was argued on behalf of the original board that this shows the generality (‘national origins’) must be wide enough to include what is excepted from it (‘nationality’). But this would mean extending the ambit of the criminal offences created by s 6 of the 1965 Act not only by an implication but by an implication dependent on an argument of considerable subtlety; it is not, in my view, the right way to approach the construction of a statute involving penal provisions; on the contrary, the courts will look for unambiguous expression; and, in the event of ambiguity, will prefer the narrower construction. Moreover, I think that considerable caution is needed in construing a general statutory provision by reference to its statutory exceptions. ‘Saving clauses’ are often included by way of reassurance, for avoidance of doubt or from abundance of caution. Section 27(9)(a) itself provides a

striking example: it provides that nothing in the Act should invalidate certain rules restricting certain classes of employment to 'persons of particular birth, citizenship, nationality, descent or residence'; and 'residence' at least is not conceivably within the ambit of s 1(1). Once the argument on construction of the general provision from a 'saving clause' fails, the use of the word 'nationality' elsewhere in the Act gives added significance to its omission from s 1(1). a

In my judgment, therefore, all the five relevant approaches to the construction of s 1(1) of the 1968 Act tend (some more, some less, strongly, but in cumulation decisively) to the conclusion that the subsection was not dealing with discrimination on the ground of present nationality. This, however, is a negative conclusion; and the argument is not complete without a satisfactory explanation of what Parliament could have had in mind other than nationality when enacting the words 'national origins'. In addition to the probable use of the words to forestall argument based on some alleged ambiguity in the word 'race', there are, in my view, at least two such specific situations. b

I have already indicated that these words are part of a passage of vague terminology in which the words seem to be used in a popular sense. 'Origin', in its ordinary sense, signifies a source, someone or something from which someone or something else has descended. 'Nation' and 'national', in their popular in contrast to their legal sense, are also vague terms. They do not necessarily imply statehood. For example, there were many submerged nations in the former Hapsburg empire. Scotland is not a nation in the eye of international law; but Scotsmen constitute a nation by reason of those most powerful elements in the creation of national spirit—tradition, folk memory, a sentiment of community. The Scots are a nation because of Bannockburn and Flodden, Culloiden and the pipes at Lucknow, because of Jenny Geddes and Flora Macdonald, because of frugal living and respect for learning, because of Robert Burns and Walter Scott. So, too, the English are a nation—because Norman, Angevin and Tudor monarchs forged them together, because their land is mostly sea-girt, because of the common law and of gifts for poetry and parliamentary government, because (despite the Wars of the Roses and Old Trafford and Headingley) Yorkshireman and Lancastrian feel more in common than in difference and are even prepared at a pinch to extend their sense of community to southron folk. By the Act of Union English and Scots lost their separate nationalities, but they retained their separate nationhoods; and their descendants have thereby retained their separate national origins. So, again, the Welsh are a nation—in the popular, though not in the legal, sense—by reason of Offa's Dyke, by recollection of battles long ago and pride in the present valour of their regiments, because of musical gifts and religious dissent, because of fortitude in the face of economic adversity, because of the satisfaction of all Wales that Lloyd George became an architect of the welfare state and prime minister of victory. To discriminate against Englishmen, Scots or Welsh, as such, would, in my opinion, be to discriminate against them on the ground of their 'national origins'. To have discriminated against Mr Zesko on the ground of his Polish descent would have been to have discriminated against him on the ground of his national origins. c

There is another situation which the phrase is apt to cover—namely, where a person of foreign nationality by birth has acquired British nationality or where a person of British nationality by birth is descended from someone of foreign nationality. There are those who are apt to say, 'The leopard cannot change his spots; once an Erehwonian always an Erehwonian'. To discriminate against a British subject on the grounds of his foreign nationality by birth or alien lineage would be to discriminate against him on the ground of his national origins. To have discriminated against Mr Zesko on the ground of Russian nationality by birth (if such was his case, which is not clear) would have been to have discriminated against him on the ground of his national origins. d

I would therefore allow the appeal to the extent of making the declaration proposed by my noble and learned friend, Viscount Dilhorne, and dismiss the cross-appeal. e

a **LORD CROSS OF CHELSEA.** My Lords, the facts of this case are set out in the speech of my noble and learned friend, Lord Donovan, which I have had the advantage of reading and I need not repeat them. I agree with him that the cross-appeal on the jurisdiction point fails and I cannot usefully add anything to what he has said on the topic. I also agree with him that the appeal should be allowed; but as your Lordships are not of one mind on the question of construction I will give my reasons for thinking that the council are right in my own words. The phrase 'national origins' appeared in the statute book for the first time in ss 1, 5 and 6 of the Race Relations Act 1965. These sections, so far as relevant to this appeal, run as follows:

c '1 (1) It shall be unlawful for any person, being the proprietor or manager of or employed for the purposes of any place of public resort to which this section applies, to practise discrimination on the ground of colour, race, or ethnic or national origins against persons seeking access to or facilities or services at that place . . .

d '5 (1) In any case where the licence or consent of the landlord or of any other person is required for the disposal to any person of premises comprised in a tenancy, that licence or consent shall be treated as unreasonably withheld if and so far as it is withheld on the ground of colour, race or ethnic or national origins . . .

e '6 (1) A person shall be guilty of an offence under this section if, with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race, or ethnic or national origins—(a) he publishes or distributes written matter which is threatening, abusive or insulting; or (b) he uses in any public place or at any public meeting words which are threatening, abusive or insulting, being matter or words likely to stir up hatred against that section on grounds of colour, race, or ethnic or national origins . . .'

There is no definition of 'national origins' in the Act and one must interpret the phrase as best one can. To me it suggests a connection subsisting at the time of birth between an individual and one or more groups of people who can be described as a 'nation'—whether or not they also constitute a sovereign state. The connection will normally arise because the parents or one of the parents of the individual in question are or is identified by descent with the nation in question; but it may also sometimes arise because the parents have made their home among the people in question. Suppose, for example, that a man of purely French descent marries a woman of purely German descent and that the couple have made their home in England for many years before the birth of the child in question. It could, I think, fairly be said that the child had three 'national origins'—French through his father; German through his mother, and English not because he happened to have been born here but because his parents had made their home here. Of course, in most cases a man has only a single 'national origin' which coincides with his nationality at birth in the legal sense and again in most cases his nationality remains unchanged throughout his life. But 'national origins' and 'nationality' in the legal sense are two quite different conceptions and they may well not coincide or continue to coincide. That is shown by this very case. Mr Zesko was born in 1913 when Poland—although a 'nation'—was not a sovereign state but part of the Russian Empire. So at birth his 'national origins' were Polish but his nationality was Russian. When Poland became an independent state after the first war he became a Polish citizen but now, although his 'national origins' have remained throughout Polish, he has become a citizen of the United Kingdom by naturalisation. It is not difficult to see why the legislature in enacting the Race Relations Act 1965 used this new phrase 'national origins' and not the word 'nationality' which had a well-established meaning in law. It was because 'nationality' in the strict sense was quite irrelevant to the problem with which they were faced. Most of the people against whom discrimination was being practised or hatred stirred up were in fact British subjects. The reason why the words 'ethnic or national

origins' were added to the words 'racial grounds' which alone appear in the long title was, I imagine, to prevent argument over the exact meaning of the word 'race'. For example, a publican who had no objection to West Indians might refuse to serve Pakistanis. He could hardly be said to be discriminating against them on grounds of colour and it might well be argued that Pakistanis do not constitute a single 'race'. On the other hand, it could hardly be argued that they did not all have the same 'national origin'. Then did the Act make it an offence for a publican or hotelkeeper to refuse to serve a customer or receive a guest on the ground of his 'nationality' in the legal sense? Of course, in practice no publican or hotelkeeper would dream of practising discrimination simply on that ground. An hotelkeeper, for example, might have come to dislike Germans or Japanese—perhaps because of his experiences as a prisoner of war—and he might refuse to accept as a guest in his hotel someone whom he recognised by his appearance, or speech or demeanour as belonging to the obnoxious race. But it is in the highest degree unlikely that his feelings would alter in any way if the potential guest told him that he had recently been naturalised as a British subject. His reaction would probably be 'once a Hun always a Hun' or 'once a Jap always a Jap'. But in order to test the validity of the board's argument it is, I think, useful to imagine an eccentric hotelkeeper who refused to give a room to anyone who could not show that he was a British subject—who, that is to say, would refuse to receive someone who although his 'national origin' was purely British had renounced his British citizenship but was ready to receive anyone who though his 'national origin' was purely foreign was a British subject either because he happened to have been born here while his parents were visiting this country or because he had become naturalised. I cannot see how it could be said that such an hotelkeeper was practising discrimination 'on the ground of national origins'.

If one turns to the Race Relations Act 1968, one finds that the meaning given to 'discrimination' in s 1 is the same as that given in the 1965 Act and, again, there is no definition of 'national origins'. The Act of 1968 covers a much wider field than the earlier Act, and it appears to have occurred to the draftsman of it that it might be construed as applying to discrimination on ground of nationality in the legal sense save insofar as the contrary was expressed. So one finds various saving clauses on which counsel for the board naturally placed considerable reliance. But I find it impossible to hold that these saving clauses—inserted as I think *ex abundanti cautela*—have the effect of inserting by implication the words 'or nationality' after the words 'national origins' in s 1(1) of the 1968 Act—especially as the two Acts must be read together (see s 29 (2)) and the 1965 Act, for the reasons which I have tried to give, did not, as I see it, forbid discrimination on the ground of nationality.

The rule in question in this case was not a device to evade the race relations legislation. It was made before the 1965 Act was passed and it is not suggested that the council do not apply it honestly in accordance with its terms. As soon as Mr Zesko became naturalised he was placed on the waiting list. It may well be that in fact of those persons of foreign national origins who have resided for more than five years in the area as many have become naturalised as remain aliens. It is true that one of the effects of the rule is that a foreign national who has lived in Ealing for five years but is either unwilling to apply to be naturalised or has been refused naturalisation is in a less favourable position than persons with the same residence qualification who have always been British subjects or have become naturalised. But as I see it, the council are not discriminating against such foreign nationals 'on grounds of their national origins'. I agree with the form of declaration proposed by my noble and learned friend, Viscount Dilhorne.

LORD KILBRANDON. My Lords, the council 'discriminated' against Mr Zesko, as that word is used in s 1 (1) of the Race Relations Act 1968, inasmuch as they treated him, in a situation to which s 5 of the Act applies, less favourably than they

a treated other persons. They refused to transfer his name from the housing register, which they keep in pursuance of s 22 of the London Government Act 1963, to the waiting list of those requiring housing in the borough, and this they did because of a rule which they have made that such transfers will only be made where the applicant is a British subject, which Mr Zesko was not. Such a transfer is an essential preliminary to the allocation of a council house. This was a discrimination, under s 5 of the Act,
 b by a person having power to dispose of housing accommodation; whether it was also a discrimination, under s 2, by a person concerned with the provision to the public of services of a local authority it is not necessary to discuss.

The short question in the case, which I have found to be very difficult to answer, is whether that discrimination was unlawful as having been made on the ground of Mr Zesko's 'national origins'. The council say that they discriminated on the ground of his nationality, and they say that that is not ground struck at by the Act.

c That one should be left groping for, or even speculating about, the meaning of a key phrase used in a recent Act of Parliament designed to remedy social grievances by assuring large groups of citizens of the protection of the law, and at the same time imposing criminal sanctions, is an unhappy feature of our present rules for the interpretation of statutes. The discrimination complained of has been in operation in
 d Ealing at least since 1965; we were told that while it is not particularly common, it is by no means unknown elsewhere. The existence of it must have been familiar to the framers of the 1968 legislation. Yet that legislation is silent on the question. It must be perfectly well known, in some quarter or other, whether Parliament intended that discrimination on the ground of nationality should be distinguished from discrimination on the ground of national origins. Yet such sources are denied to those charged with the duty of saying what the Act means. Apart from the actual words of the
 e statute, we are indeed permitted to consider 'what was the mischief and defect for which the common law (or existing law) did not provide'. But this is at best an unsatisfactorily subjective test, since each judge must depend on his own notion of the mischief, derived from his own private interpretation of the social and political scene, whether recent or remote. The instant case provides such an unusually apt example of a commonly voiced complaint that a repetition may be forgiven.

f The council's argument gains powerful general support from the wording, framework and limitations of the Act itself. The long title speaks only of discrimination on racial grounds, and of relations between people of different racial origins. These phrases are not particularly apt to include concepts of nationality as that word is used in international law. Turning to s 1, we see that no provision is made for the prevention of discrimination in the extremely sensitive fields of religion and politics;
 g a refusal (at least by a private landlord) to house Roman Catholics or Communists as classes would not offend against the Act, although a local authority landlord might perhaps be under other restraints. The forbidden grounds are 'colour, race, or ethnic or national origins'. These characteristics seem to have something in common: they have not been acquired, and they are not held, by people of their own choice. They are in the nature of inherited features which cannot be changed, as
 h religion, politics, and nationality can be changed, more or less at will, although subject, in the case of the last, to fairly strict rules laid down by the receiving state. These considerations seem to indicate a deliberate exclusion of nationality from the unlawful grounds, apart from the strong argument that so familiar a popular as also juridical concept could hardly have been omitted from the area of protection by
 i accident.

On the other hand, the practical consequences of excluding discrimination on the ground of nationality from the scope of national origins are striking. The phrase 'on the grounds of colour, race, or ethnic or national origins' first appeared in s 1 (now repealed) of the Race Relations Act 1965, which dealt in s 2 with discrimination against persons seeking access to places of public resort such as hotels, public houses, cinemas and public transport. If 'national origins' is not wide enough to include 'nationality'

then exclusion of persons by a notice which read, for example, 'No Poles admitted', would have been of debatable legality, according as the discrimination were interpreted as being against Polish nationals or against persons of Polish origin. 'No foreigners' would have been safer, since the word 'foreigner' properly describes a foreign national rather than a British subject of foreign origin; while, as counsel for the council conceded, a notice 'British subjects only' outside a public house would have been unexceptionable, since it would have admitted persons of foreign national origins who had become British subjects by naturalisation, and it would be of no consequence that it discriminated against others on the ground of nationality. a

While s 2 of the 1965 Act has been repealed, s 6, which deals with public order, has not; the results of the interpretation proposed by the council would, as the learned judge points out⁸, be no less capricious in the realm of the criminal law. Whereas by s 3(1) discrimination on the grounds stated against persons seeking employment is made unlawful, sub-s (2) saves the provisions of any enactment relating to the employment or qualification for employment of persons. Since such enactments refer to nationality, not national origins, it was argued that here the legislature was making a special provision for nationality, and that this demonstrated that no general provision had been made in s 1. In my opinion, however, it is equally probable that Parliament, realising that nationality was comprised in the phrase 'natural origins', was making certain that existing statutory disqualifications on the ground of nationality should not be affected by the prohibition contained in this Act. b

Similar conclusions may be drawn from the terms of s 6(2), which deals with advertisements indicating that Commonwealth citizens are required for employment overseas, and s 8(11) which excepts from the provisions of s 3 the selection of a person of a particular nationality. The question is, whether the word 'nationality' is used because it was, exceptionally, necessary to reach a class not otherwise included in s 1(1), or was it used in order to except persons from a class in which they would otherwise have been included? On the whole I prefer the latter alternative. c

Section 27 deals with, inter alia, Crown employment and in sub-s (9) is found the phrase 'persons of particular birth, citizenship, nationality, descent or residence'. It appears that in this passage it has been found necessary to include characteristics, i.e. descent and residence, which are admittedly outside the s 1 classes. Does this not show that nationality is outside them also? While feeling the force of this argument, I think it probable that the reason for the use of these words is that the subsection is saving 'rules (whether made before or after the passing of this Act)', relating to employments carefully delimited, and it seems reasonable that the subsection is designed to cater for an existing pattern of rule-making, and that no firm conclusion can be arrived at from it. d

The arguments in favour of either interpretation are finely balanced. I would not accept the view that there is some presumption here in favour of freedom from liability; the race relations code does, of course, contain some criminal sanctions, and it restricts liberty, but, on the other hand, it is conceived as a measure of social reform and relief of distress. Not much help is to be got from presumptions either for freedom or in favour of benevolent interpretation. I have come to the conclusion that on a consideration of the Acts as a whole the interpretation contended for by the board leads to a result less capricious and more consistent with reality than that proposed by the council, although, as I have said, the language used, and the limitations on the assistance permissible, do not encourage confidence in the expressing of an opinion. e

On the procedural point, I agree with your Lordships and have nothing to add. Accordingly, I would dismiss this appeal. f

Appeal allowed; cross-appeal dismissed. Declaration that the council did not commit a breach

- a* of s 5 of the Race Relations Act 1968 in declining on or about 4th February 1969 to place Mr Zesko on their housing waiting list on account of his not then being a British subject within the meaning of the British Nationality Act 1948.

Solicitors: Sharpe, Pritchard & Co (for the council); Lawford & Co (for the board).

b

S A Hatteca Esq Barrister.

P & M Kaye Ltd v Hosier & Dickinson Ltd

c

HOUSE OF LORDS

LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD WILBERFORCE, LORD PEARSON AND LORD DIPLOCK

26th, 27th, 28th OCTOBER, 16th DECEMBER 1971

- d* Building contract – Architect's certificate – Final certificate – Conclusiveness – Conclusive evidence 'in any proceedings arising out of this Contract' – Conclusive evidence that works 'have been properly carried out and completed in accordance with the terms of this Contract' – Action commenced by contractors against employers prior to final certificate – Counterclaim put in after final certificate – Counterclaim for consequential loss in respect of defects discovered after employers going into occupation and before issue of final certificate – Whether counterclaim barred – RIBA Standard Form of Contract (1963 Edn, July 1969 Revision), cl 30 (7).
- e*

By an agreement made in June 1966 between the contractors and the employers, the contractors undertook to build a warehouse and offices. The contract was in the standard form of the RIBA and included an arbitration clause (cl 35) which provided that any dispute arising as to the construction of the contract or as to any matter or thing arising thereunder or in connection therewith was to be referred to an arbitrator. Work on the warehouse was substantially complete by June 1967 although, with the consent of the contractors, the employers had taken possession in the previous April. Interim certificates were issued by the architect in April and July following which the employers paid sums on account, leaving a balance unpaid of £14,861. They complained that the floor of the warehouse was faulty. The contractors relaid

- g* the floor, completing the work in August. In September the contractors started proceedings to recover the £14,861 and took out a summons under RSC Ord 14. The employers put in an affidavit of defence which alleged that the flooring was still faulty and that the previous defects had resulted in a loss of profits amounting to some £13,500. In October, at the hearing of the summons, a consent order was made

- h* giving the employers leave to defend on condition that they paid a further £5,000 and the action was transferred to an official referee. The £5,000 was duly paid but it was agreed after further negotiations that the action should be left in abeyance. The alleged defects in the floor were never remedied. According to the contractors this was because the employers were so busy using the warehouse that it was never convenient to do the work. In September 1968 the contractors wrote to the architect

- j* stating in effect that there was nothing substantially wrong with the work done and claiming payment. Following further correspondence, quantity surveyors measured the work and calculated the amount payable on the whole contract as £68,393, leaving a balance, after deducting the previous certificates, of £2,360. On 23rd September 1969 the architect issued the final certificate for the balance of £2,360. Clause 30 (7) of the contract provided that 'Unless a written request to concur in the appointment of an arbitrator shall have been given . . . by either party before

the Final Certificate has been issued . . . the said certificate shall be conclusive evidence in any proceedings arising out of this Contract . . . that the Works have been properly carried out and completed in accordance with the terms of this Contract . . . ' On 26th September the employers asked the contractors to concur in the appointment of an arbitrator. The contractors pointed out that it was too late, and in October 1969 they issued a second writ for the amount due on the final certificate. The 1967 action on the interim certificate was still on the file and the employers put in a defence and counterclaim in each action claiming £13,500 loss of profits because of the defective floor. The two actions were consolidated and the official referee directed the following preliminary issue to be tried: whether in view of the terms of cl 30 (7) and the issue of the architect's final certificate the employers were 'estopped from relying on their Defence and Counterclaim'. The employers appealed from a decision of the Court of Appeal^a that their counterclaim for bad work was barred in both actions. They contended that it had been impliedly agreed between the parties to vary the contract by the exclusion of cl 30 (7), or that the contractors had waived their right to rely on it, or were estopped from relying on it. They further contended that the meaning of the words in cl 30 (7) 'the said certificate shall be conclusive evidence in any proceedings arising out of this Contract' should be understood as being limited to proceedings begun after the issue of the final certificate and that, if proceedings in a court were pending, a final certificate would not be conclusive evidence. Although in the Court of Appeal it had been accepted that in the event of a decision on the preliminary issue in favour of the contractors the litigation would be concluded in their favour, during the hearing of the appeal an entirely new argument was sought to be introduced on behalf of the employers to the effect that, although cl 30 (7) made the final certificate conclusive as to the state of affairs existing at its date, it had no effect as regards a pre-existing and vested right to damages including particularly consequential damages arising in respect of breaches of contract before its date.

Held (Lord Diplock dissenting) – The employers' appeal should be dismissed for the following reasons—

(i) the new argument advanced by the employers on appeal to the House should not be admitted; it raised a doubtful and difficult question of construction on a point of fundamental importance to building contracts; the question was one therefore which it would be undesirable to decide without any assistance from the court of first instance or the Court of Appeal and on a preliminary issue without any findings of fact to provide a firm basis for considering how the provisions of the contract should be interpreted and applied; moreover hardship would be imposed on the parties if their expectation of a decisive answer on the preliminary question had to be frustrated and further costs incurred before an effective decision could be reached (see p 124 g, p 128 f, p 131 c to f and p 137 e and f, post).

(ii) on the true construction of cl 30 (7) the words 'conclusive evidence in any proceedings arising out of this Contract' were wide enough to cover proceedings begun before as well as after the date of the final certificate; to limit the words to proceedings commenced after the date of the final certificate would involve writing a limitation into cl 30 (7) which was not there (see p 124 c, p 128 a and b, p 131 g and p 136 c, post);

(iii) cl 30 (7) did not have the effect of ousting the jurisdiction of the court; by the terms of the contract the question whether the work done and the materials used conformed to the contract requirements was to be determined by the criterion of whether they were to the satisfaction of the architect; since on these questions it was the architect's standard that was relevant, there was no objection to a clause which provided that, as regards these matters, the architect's certificate was to be

^a [1971] 1 All ER 301

a conclusive evidence; the court retained ultimate control in seeing that the architect acted properly, honestly, and in accordance with the contract, but the method of proof chosen by the parties was legitimate and, by its terms, binding (see p 124 c, p 128 c, p 131 j to p 132 a and c to e and p 136 d and f, post). *Doleman & Sons v Ossett Corp* [1912] 3 KB 257 distinguished;

b (iv) on the facts of the case it was impossible to find any agreement between the parties to vary the contract by the exclusion of cl 30 (7) or any waiver by the contractors of their right to rely on that sub-clause or any basis for saying that they were estopped from relying on it; although the parties had elected to proceed in the courts and had not asserted their right to have the dispute referred to arbitration, thereby waiving their right to insist on arbitration in respect of that dispute, there had been no election or representation with regard to cl 30 (7) (see p 124 c, p 128 c and d, p 132 e and f and p 135 h and j, post).

c Per Lord Diplock. The new contention raised by the employers in argument on appeal was a sound one and ought to be admitted since it raised a pure point of construction of words which formed part of a single paragraph of the clause which was the subject of the dispute and it would be intellectually baffling to attempt to construe the remainder of cl 30 (7) on the assumption that one of the most important phrases in it meant something different from what it clearly did mean. The provision in cl 30 (7) that the final certificate should be conclusive evidence 'that the Works have been properly carried out and completed in accordance with the terms of this Contract' dealt, not with the activities of the contractors, but with the state of the works at the time of the issue of the certificate as a result of the activities of the contractors. The issue of the final certificate was not to be taken as conclusive evidence that at no time previously had there been defects in the works which required remedying; it was merely conclusive evidence that any remedial measures which had been necessitated by reason of defects in the works had been executed by the time of its issue. The final certificate was irrelevant to any claims for consequential damage in respect of defects which had been found after the employers had taken possession and before the issue of the final certificate. Accordingly the employers should not be debarred from pursuing their claims for consequential loss (see p 138 b to e, p 140 h to p 141 a and f and p 143 c, d, f and g, post).

f Decision of Court of Appeal sub nom *Hosier & Dickinson Ltd v P & M Kaye Ltd* [1971] 1 All ER 301 affirmed.

Notes

g For conclusiveness of a final certificate, see 3 Halsbury's Laws (3rd Edn) 464-467, paras 892-896, and for cases on the subject, see 7 Digest (Repl) 369-371, 122-129.

Cases referred to in opinions

Doleman & Sons v Ossett Corp [1912] 3 KB 257, 81 LJKB 1092, 107 LT 581, 76 JP 457, 7 Digest (Repl) 451, 439

h *Kerr v John Mottram Ltd* [1940] 2 All ER 629, [1940] Ch 657, 109 LJCh 243, 163 LT 222, 9 Digest (Repl) 621, 4142.

Westminster City Council v J Jarvis & Sons Ltd [1970] 1 All ER 943, [1970] 1 WLR 637, 134 JP 452, Digest (Cont Vol C) 59, 83a.

Appeal

i This was an appeal by the employers, P & M Kaye Ltd, against an order of the Court of Appeal (Lord Denning MR, Fenton Atkinson and Cairns LJJ) dated 5th November 1970 and reported [1971] 1 All ER 301 allowing the appeal of the contractors, Hosier & Dickinson Ltd, from the judgment of his Honour Norman Richards QC, official referee, who, on the trial of a preliminary issue in two actions brought by the contractors for sums due to them for work carried out under a building contract, held that the employers' counterclaim for loss of profits due to defective

work and materials was not barred by the terms of the contract. The facts are set out in the opinion of Lord Morris of Borth-y-Gest.

K F Goodfellow QC, Robert Alexander and R J Coleman for the employers.
F P Neill QC and R P Ground for the contractors.

Their Lordships took time for consideration.

16th December. The following opinions were delivered.

LORD REID. My Lords, an important matter requiring an exercise of your Lordships' discretion has arisen in the course of the argument in this appeal. The central point in the case is the proper construction of cl 30 (7) of the RIBA form of building contract. For the reasons given by your Lordships I am of opinion that all the contentions and arguments put forward for the employers in the Court of Appeal¹ and repeated here must fail. But in the course of counsel's argument a completely new construction of the clause emerged which, if correct, would be conclusive in the employers' favour. There is no hint of it in the employers' printed case. We allowed the argument to be developed and to be answered by contractors' counsel, but under reservation of the question whether in the circumstances it was right to permit the point to be taken.

It is entirely within your Lordships' discretion whether or not to allow a new point to be taken at that very late stage. I think that the first question to be considered is whether, apart from any question of costs, the contractors might suffer any prejudice or might have been in a better position to meet it if it had been taken earlier. As the question is purely one of construction I doubt whether this could be said in the present case.

But there is another at least equally formidable objection. This is a form of contract which is very widely used and any decision as to the meaning of any of its clauses must have far-reaching effects. When a point is taken at the proper time we have the advantage of having before us the considered opinion of the learned judges in the Court of Appeal¹ and of hearing well prepared arguments of counsel. If I were satisfied that there could be no valid answer to the new point I would be prepared to forego those advantages and decide the case on the new point with a suitable order for costs against the employers. I am, however, not so satisfied. This is an extremely complicated form of contract and it may well be that fuller investigation would bring out arguments which would cause me to depart from my *prima facie* view. I recognise that rejecting the new point may seem an injustice to the employers but on the whole circumstances of this case it would not, in my view, be proper to have further delay for farther investigation. I must therefore state my judgment that this new point should not be allowed to be taken or entertained by your Lordships.

It must follow that I would dismiss this appeal.

LORD MORRIS OF BORTH-Y-GEST. My Lords, in two conjoined actions, remitted for trial before an official referee, two preliminary issues were formulated for determination. It seems to have been accepted by the parties that if the issues were determined favourably to the contractors the litigation would be concluded. When in the Court of Appeal¹ the issues were so determined it was not suggested that there could be any result other than that judgment for the contractors should be entered. It was so entered.

An agreement was made on 24th June 1966 under which the contractors agreed to carry out building work for the employers. The agreement contained the articles

a of agreement, private edition (with quantities) of the Royal Institute of British Architects. Two certificates for payment (no 6 dated 5th April 1967 and no 7 dated 6th July 1967) were issued by the architect in sums totalling £32,525. Although certain sums were paid on account, a balance of £14,861 remained unpaid. The employers said that floors had been defectively constructed and that they had suffered loss for which they had a counterclaim amounting at least to the unpaid balance.

b The contractors, on 19th September 1967, sued for that balance and asked for summary judgment. The employers on oath asserted their claims. On terms that a sum of £5,000 should be paid to the contractors (for payment to nominated subcontractors) leave to defend was given and it was ordered that the action should be transferred to an official referee. That was on 27th October 1967. The parties then agreed that it would be better to await the outcome of negotiations between the architect and the contractors before the action was referred to the official referee.

c Thereafter there was correspondence between the parties and between their advisers on various dates throughout the year 1968 and in the year 1969 as to what rectification if any of defective work was necessary and as to when any such work could or should be done and as to what remedial work had been done.

In the agreement there was an arbitration clause (cl 35 (1)) in the following terms:

d 'Provided always that in case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress or after the completion or abandonment of the Works, as to the construction of this Contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by this Contract to the discretion of the Architect or the withholding by the Architect of any certificate to which the Contractor may claim to be entitled or the measurement and valuation mentioned in clause 30 (5) (a) of these Conditions or the rights and liabilities of the parties under clauses 25, 26, 32 or 33 of these conditions), then such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties, or, failing agreement within 14 days after either party has given to the other a written request to concur in the appointment of an Arbitrator, a person to be appointed on the request of either party by the President or a Vice-President for the time being of the Royal Institute of British Architects.'

e

f

Clause 30 (7) of the agreement was in the following terms:

g 'Unless a written request to concur in the appointment of an arbitrator shall have been given under clause 35 of these Conditions by either party before the Final Certificate has been issued or by the Contractor within 14 days after such issue, the said certificate shall be conclusive evidence in any proceedings arising out of this Contract (whether by arbitration under clause 35 of these Conditions or otherwise) that the Works have been properly carried out and completed in accordance with the terms of this Contract and that any necessary effect has been given to all the terms of this Contract which require an adjustment to be made to the Contract Sum...'

h

j There followed certain exceptions not now relevant. It is to be noted that the provisions in the agreement relating to the issue of certificates by the architect are wholly distinct from the provision relating to the reference of disputes to an arbitrator.

On 21st August 1969 the architect issued a final certificate. It was in the sum of £2,360 6s 6d. There was additionally a balance of £9,861 still owing in respect of previous certificates. The certificate was sent to, and it was asserted that final payment was due from, a company, Transloyd Ltd. That was because of an erroneous belief that that company was to be treated as the successor of the employers. When

the employers' advisers wrote to say that, although in 1968 the shares in the employer company had been sold to Transloyd (Holdings) Ltd, the employer company remained in existence the contractors' advisers wrote (on 4th September 1969) calling attention to the fact that by cl 30 (7) the final certificate was conclusive evidence that the works had been properly carried out and completed in accordance with the contract; demand was made for £12,221 6s 6d (being the total of £2,360 6s 6d and £9,861).

On 23rd September 1969 the architect issued a revised certificate which certified that final payment was due from the employers (rather than from Transloyd Ltd) but which otherwise conformed with the certificate (now accepted as having been abortive) of 21st August. The employers had not in the intervening days after their attention was called to cl 30 (7) made any suggestion in regard to an arbitration.

The employers by letter written on their behalf dated 26th September 1969 then requested the contractors to concur in the appointment of an arbitrator as to matters in dispute and pointed out that such request was made within 14 days of the issue of the certificate (in correct form) dated 23rd September. Their mention of 14 days was undoubtedly made having regard to the provisions of cl 30 (7) but the attribute possessed by a final certificate of being 'conclusive evidence' (in the terms of the sub-clause) would *prima facie* appear only to be lacking (a) if either party had made a written request (under cl 35) to concur in the appointment of an arbitrator before the issue of a final certificate or (b) if the contractors made such a request within 14 days after such issue. The contractors said that the final certificate was conclusive and the sum of £12,221 6s 6d was demanded. At least impliedly they declined to concur in the appointment of an arbitrator.

The next step was that the contractors issued a writ on 30th October 1969. They claimed the sum of £2,360 6s 6d and the amount certified by the final certificate and in reliance on cl 30 (6) of the agreement they claimed that that sum became a debt payable 14 days after presentation of the certificate to the employers. The position at that date was, therefore, that there was the earlier action in which the proceedings had been left in suspense, there was the final certificate issued by the architect, there was a request by the employers for arbitration and there was the issue of a further writ.

The employers did not ask the court to stay the second action. The next step was that pleadings were delivered in both actions. In each action the employers delivered (on 24th November 1969) a defence and counterclaim. In each action the claims were admitted subject to set-off based on counterclaims. Shortly stated it was alleged that in breach of express and implied terms of the contract the work had been badly done with the result that there had been direct and consequential financial loss and that further remedial work would be necessary and further loss would be incurred.

Then in each action there was served (on 16th January 1970) a reply and defence to counterclaim. Clause 30 (7) was pleaded as was the issue of the final certificate and the fact that the employers had not made any written request under cl 30 (7) and it was pleaded that if there were any defects in the work (which was denied) the employers were 'estopped from relying on the same'. In each action there was an application for an order for the trial of a preliminary issue. All that was then ordered was that the actions should be transferred to an official referee. The official referee later made an order for the trial of preliminary issues and the two actions were consolidated. The preliminary issues were whether, on what the contractors had pleaded, the employers were 'estopped from relying' on their defences and counterclaims.

The employers were allowed to deliver a rejoinder. Its content serves to illustrate the fact that what the parties regarded as the contest was whether cl 30 (7) operated at all. The employers in their rejoinder pleaded (a) that cl 30 (7) was to be excluded because the parties had agreed to vary their contract by excluding cl 30 (7)

a and (b) that the contractors had waived their right to rely on it and (c) that the contractors were estopped from relying on it. The whole focus of the case was on the question whether the employers could in some way eliminate cl 30 (7) and the case proceeded, as it appears to me, on the basis that if they could not, then the litigation was concluded in the contractors' favour.

b That this was so is amply evidenced by the judgment of the learned official referee. It shows that what was being considered was the meaning of the words (in their context in cl 30 (7)) 'in any proceedings arising out of this contract'. The employers argued that those words should be understood as being limited to proceedings begun after the issue of a final certificate. So they contended that if proceedings in a court were pending a final certificate would not be conclusive evidence. The learned official referee was persuaded by the contention, and the operative sentence of his judgment is as follows:

c "The words "conclusive evidence in any proceedings" must in my judgment be construed as referring to proceedings initiated after the final certificate and which raise matters of dispute which do not already form part of the matters in dispute in current legal proceedings issued before the final certificate.'

d That view involved reading in some words to cl 30 (7).

It is to be observed that the agreement to refer disputes or differences to arbitration is in wide terms. It relates to disputes either during the progress of the works or after their completion. Furthermore the agreement is in very definite terms. Disputes 'shall' be referred to arbitration. If, however, one party commenced litigation in the courts it would be for the court in the exercise of its discretion to decide whether or not to order a stay (see the judgment of Fletcher Moulton LJ in *Doleman & Sons v Ossett Corpⁿ2*). Clause 30 (7) does not in any way limit or restrict cl 35. It deals with the question of the conclusiveness of a final certificate as evidence.

e As by the terms of the agreement it was provided that disputes were to be referred to arbitration it was natural that cl 30 (7) should deal with the situation where an arbitration was in train. A final certificate was then not to be conclusive evidence in the terms set out in cl 30 (7). So if there was a written request to concur in the appointment of an arbitrator before a final certificate had been issued such final certificate would not be conclusive evidence. The contractors agree that the same result would follow if arbitration proceedings (though agreed on orally) were actually in progress or had been agreed on. In practice if arbitration proceedings were in progress or were pending there would almost certainly have been some previous written request to concur in the appointment of an arbitrator.

g But what is the position if there has been no reference to arbitration and no initiation of such a reference by the giving of a written request to concur in the appointment of an arbitrator? In that event unless some words are to be written into cl 30 (7) the position would be that a final certificate would be conclusive evidence (in the terms of cl 30 (7)) in any proceedings whether they be arbitration proceedings 'or otherwise'. The words 'or otherwise' must denote court proceedings. The only exception to this would be that the contractor (but only he) could deny to a final certificate the attribute of being conclusive evidence by writing within 14 days to request arbitration.

h It was powerfully argued that it is strange that if arbitration proceedings have been begun a later final certificate will not have the attribute of being conclusive evidence in the terms of cl 30 (7) whereas if court proceedings have been begun (which the court might have stayed in favour of arbitration proceedings) a later final certificate will have the attribute referred to. Hence it was argued that to the words 'conclusive evidence in any proceedings' (in cl 30 (7)) there should be read in such words as 'begun after such certificate has become conclusive'. While it is to be noted that the contractors accept that a minor process of reading in words to cl 30 (7) may

be necessary to cover the possible though perhaps unlikely case of arbitration proceedings having been begun after an oral agreement and without any actual 'written' request, I have come to the conclusion, in agreement with the Court of Appeal³, that the contention of the employers cannot be upheld. It would involve a considerable alteration on what was agreed. It would involve adding an exception to 'any proceedings' which went quite beyond what the parties provided for. It is understandable that as the parties had contracted to refer disputes to arbitration they would not give to a final certificate issued while arbitration proceedings were proceeding or pending the attribute of being 'conclusive evidence'. But they have not agreed that a final certificate issued while court proceedings are pending should not have the attribute. Nor do I see any reason why the parties should not have agreed as to the conclusiveness as a matter of evidence in any proceedings of some particular document. No ouster of the jurisdiction of the court is thereby involved.

The further contentions of the employers cannot, in my view, be upheld. I see no ground at all for the suggestion that the parties agreed to vary their contract by excluding cl 30 (7). Nor, on my view, is there warrant for saying that the contractors waived their right to rely on cl 30 (7) or that the employers refrained from claiming arbitration proceedings because they were induced to believe that the contractors did not rely on cl 30 (7). As Cairns LJ pointed out⁴, the contractors had no need to rely on cl 30 (7) when they commenced proceedings in 1967. There was no occasion for them to refer to or rely on cl 30 (7) unless and until the architect issued a final certificate.

I think, therefore, that the Court of Appeal³ came to a correct conclusion. It must be added, however, that as the arguments developed there emerged one that was entirely new and alternative. It was to the effect that if, contrary to the arguments presented, the final certificate was conclusive evidence it was only conclusive evidence in the terms of the words of cl 30 (7) and that those words ought not to be construed as excluding or defeating the claims in respect of defective work and, more particularly, the claims for consequential loss covered by the pleadings of the employers. This argument was one that would enlarge and wholly transform the area of the contentions so that they would extend far beyond those which the learned official referee and the Court of Appeal³ were invited to consider. The argument if fully developed would raise matters of consequence involving a detailed consideration of the agreement as a whole. If the points raised are to be pronounced on that should be in some case where they have been fully ventilated and where they have been examined in the judgments under appeal.

For the reasons which I have given I would dismiss the appeal.

LORD WILBERFORCE. My Lords, the relevant clauses in the building contract dated 24th June 1966 between the appellants (as 'employers') and the respondents (as 'contractors') are the following (the form used was the RIBA private edn, 1963, with quantities):

'30... (7)—Unless a written request to concur in the appointment of an arbitrator shall have been given under Clause 35 of these Conditions by either party before the Final Certificate has been issued or by the Contractor within 14 days after such issue, the said certificate *shall be conclusive evidence in any proceedings arising out of this Contract* (whether by arbitration under Clause 35 of these Conditions or otherwise) that the Works have been properly carried out and completed in accordance with the terms of this Contract and that any necessary effect has been given to all the terms of this Contract which require an adjustment to be made to the Contract sum... [here follow certain exceptions].

³ [1971] 1 All ER 301, [1970] 1 WLR 1611

⁴ [1971] 1 All ER at 306, [1970] 1 WLR at 1617

a '35. (1)—Provided always that in case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress or after the completion or abandonment of the Works, as to the construction of this Contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by this Contract to the discretion of the Architect or the withholding by the Architect of any certificate to which the Contractor may claim to be entitled or the measurement and valuation mentioned in Clause 30 (5) (a) of these Conditions or the rights and liabilities of the parties under Clauses 25, 26, 32 or 33 of these Conditions), then such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties or, failing agreement within 14 days after either party has given to the other a written request to concur in the appointment of an Arbitrator, a person to be appointed on the request of either party by the President or a Vice-President for the time being of the Royal Institute of British Architects.'

If the present dispute is to be understood it is necessary to relate these clauses to the history of events and (I fear in some detail) to the pleadings in the consolidated action.

d The contract was for the erection of a warehouse and offices. The contract sum was £45,660, increased by extras etc to £60,393. The dates for possession and completion were 'to be agreed' and the contract contained a clause providing for liquidated and ascertained damages at the rate of £100 per week. Work on the warehouse was substantially completed by June 1967; interim certificates were issued by the architect, in particular no 6 on 5th April 1967, and no 7 on 6th July 1967, for sums totalling £32,525. The employers paid about £17,000 on account, leaving a balance unpaid of £14,861. They complained that the floor of the warehouse was faulty, and the contractors relaid it, completing this work by 8th August 1967.

e On 19th September 1967 the contractors issued a writ and statement of claim for £14,861 and took out a summons under RSC Ord 14. The employers put in an affidavit seeking leave to defend in which they claimed (i) that the warehouse floor was still faulty and (ii) that the previous defects had resulted in a loss of profit amounting to £13,464.

f On the hearing of the Ord 14 summons on 27th October 1967 an order was made by consent that the employers should have leave to defend on payment to the contractors of £5,000 before 11th December 1967. The action was then to be transferred to the official referee. It appears that the £5,000 was paid but the action was left in abeyance; correspondence was exchanged about the alleged defects, the contractors offering to do certain work, but the employers continuing to use the warehouse and not finding it convenient to have further work done. On 11th September 1968 the contractors wrote to the architect a letter which contained the following passage:

g 'Finally, we would add that despite the cracking in certain areas of the granolithic floor the surface shows no signs whatsoever of deterioration despite the obvious heavy use it is receiving. It is our considered opinion that further work to the floor is completely unnecessary due to the foregoing and should be no reason for the [employers] to withhold payment of such vast sum of money which they are now so doing.'

h In other words, they were contending that there was nothing substantially wrong with the work done or the materials used, and claiming their money. Correspondence continued; the quantity surveyors measured the work at a total figure of £68,393 and, on 6th August 1969, the contractors wrote to the architect requesting him to issue the final certificate. This he did on 25th August 1969 for £68,393, less previous certificates £66,033, making a balance of £2,360 due on the final certificate.

Some difficulty arose because of changes in the control of his employers and finally a revised final certificate was issued on 23rd September 1969 for the same sum. a

On 26th September 1969 the employers asked the contractors to concur in the appointment of an arbitrator, but, as reference to cl 35 of the contract, already quoted, will show, this request was too late; it could only be validly made by the employers before the final certificate. On 30th October 1969 the contractors issued a second writ claiming £2,360. In November 1969 the employers delivered a defence and counterclaim in both actions. They pleaded two express terms of the contract (cll 1 (1) and 6 (1)) relating to the carrying out and completion of the works and to the materials, goods and workmanship to be used and two implied terms as to quality and fitness. They alleged breaches of these terms leading to shrinkage and cracks in the warehouse floor! They gave particulars of special damage, including loss of profit, amounting to £13,464 and claimed that there was further remedial work to be done. b
c

On 16th January 1970 the contractors delivered a reply and defence to counterclaim in each action. This referred to cl 30 (7) of the contract (above), to the issue of the final certificates and to the absence of any reference to arbitration. It continued that by reason of these matters 'if there were any defects as alleged or at all, which is denied, the [employers] are estopped from relying on the same'. The actions were then consolidated and transferred to the official referee. By his leave, on 1st May 1970, the employers delivered a rejoinder. By this they alleged that the parties— d

'agreed to vary the said contract by the exclusion therefrom of cl 30 (7) and/or [the contractors] waived their right to rely upon and/or are estopped from relying upon the said cl 30 (7).'

e

Particulars under eight headings were given of the alleged agreement, waiver and estoppel. In the alternative it was said that, by reason of the matters pleaded, cl 30 (7) could not be relied on in the first action.

It has been necessary to go into these procedural details in order to understand the nature of the issue now for decision. The preliminary issue, directed by the official referee to be tried, is expressed as follows: f

'Whether upon the facts pleaded [in specified paragraphs] the [employers] are estopped from relying on their Defence and Counterclaim.'

From the pleadings as summarised above it is clear that, on the one hand the contractors were saying that the final certificate(s) were final and conclusive, and that, on the other hand, the employers were contending that they did not have this effect because cl 30 (7) of the contract was made ineffective by agreement, or waiver, or estoppel. These were the issues debated before the official referee, on which he decided in the employers' favour. The essential ground of his judgment was that once the parties had taken proceedings in the courts, such proceedings must prevail, and that cl 30 (7), in particular the words 'conclusive evidence in any proceedings', did not apply to proceedings initiated before the final certificate. g
h

On appeal to the Court of Appeal⁵ the same issue was argued, and decided this time in favour of the contractors. The words 'in any proceedings' should be given their general unlimited sense. The court also dealt with the pleas of implied agreement, waiver and estoppel. In the employers' printed case before this House signed by very experienced counsel these same issues were raised, and set out in some detail. The two questions stated as arising for decision are (1) whether cl 30 (7) applied to court proceedings begun before the issue of the final certificate, (2) whether, if so, the contractors are entitled to rely on the final certificate as conclusive. The reasons suggested for a negative answer are that the contractors have waived their rights or because the parties had by conduct varied the agreement. i

a In the argument at the Bar, counsel for the employers sought to introduce an entirely fresh argument. This was that, as a matter of construction, cl 30 (7) only made the final certificate conclusive as to the state of affairs existing at its date, and had no effect as to other matters arising during the currency of the contract. Its effect was, at most, to establish conclusively that as *at its date* the works had been properly carried out; it had no effect as regards a pre-existing and vested right to damages including, particularly, consequential damages arising as regards breaches of contract before its date.

b My Lords, I am always reluctant to exclude a relevant argument with some apparent substance, particularly one of law, however late this argument may appear. It is never attractive or satisfactory to deny a party the right to put a legal submission; failure to do so previously can normally be sanctioned by an order as to costs. But I have come to the conclusion that this new argument ought not now to be admitted.

c It raises a fundamental point as to the nature of building contracts, and the parties' rights under them, which goes far beyond this particular dispute and this particular clause. No hint of it appears in the pleadings, or correspondence, or the printed cases, or, so far as I know, in any textbook. A decision on it will have far-reaching effects on the many contracts made on this form, and may involve the interpretation, certainly the consideration, of numerous clauses in this complicated document, particularly those relating to practical completion, sectional completion, defects liability, liquidated damages. It raises the question whether, under a contract such as this, consequential damages can be claimed, whether this normally existing right is replaced by other remedies, and whether after final certificate, and subject to any right to arbitrate, all claims are excluded. It will involve consideration, at least, of certain observations made in this House in *Westminster City Council v J Jarvis & Sons Ltd*⁶. Your Lordships would have to decide these questions without the assistance of any consideration by the official referee, or by the Court of Appeal⁷. The present case, in my opinion, is one in which the strict course ought to be adopted of deciding a specific question on the specific issues selected by the parties as decisive one way or the other of the actions: these are the issues I have already set out. I say nothing as to the merits or otherwise of the fresh point, except that on such discussion as we have heard there are evidently arguments either way. We should not pronounce on them here.

f Of the issues which are open for decision, the most difficult, in my opinion, is whether the words 'conclusive evidence in any proceedings arising out of this Contract' should be limited to proceedings commenced after the date of the final certificate or whether they also cover proceedings previously begun. As a matter of language it can hardly be doubted which alternative is to be preferred: to accept the former involves writing in a limitation which is not there. But there are more substantial issues involved, which relate, broadly, to the interaction between an architect's certificate and the power and duty of the courts to decide disputes. Can the parties, it may be asked, by a contractual stipulation, exclude the courts from their constitutional responsibility? If one considers the closely analogous field of arbitration, one may contrast the willingness of the courts to stay court proceedings when there has been a submission to arbitration, while still retaining ultimate control, with their unwillingness, once court proceedings have started, to allow the question before the court to be decided by subsequent arbitration—see *Doleman & Sons v Ossett Corp*⁸, not cited before the Court of Appeal⁷ but referred to by Cairns LJ in his judgment⁹. The present case resembles, it is said, the situation in that case.

j My Lords, I am impressed, as was Lord Denning MR¹⁰, with this argument, but

6 [1970] 1 All ER 943, [1970] 1 WLR 637

7 [1971] 1 All ER 301, [1970] 1 WLR 1611

8 [1912] 3 KB 257

9 [1971] 1 All ER at 306, [1970] 1 WLR at 1617

10 [1971] 1 All ER at 305, [1970] 1 WLR at 1616

on the whole I have come to a conclusion against it. To describe cl 30 (7), as sought to be invoked here, as an ouster of the court's jurisdiction, seems to me to beg the question and in fact to misdescribe the effect attributed to it. The court proceedings, as can be seen from the pleadings, raise the question whether the work done and the materials used were such as should have been done and used under the contract. An essential question must be, what standard is to be set? If the proper standard to which that work and those materials ought to conform were one to be fixed by the court (for example, by reference to what is reasonable), I could see good reasons for not allowing this matter to be decided conclusively outside the court by another person. But that is not what the contract provides. Throughout the contract, the architect is the person to pronounce on these matters. This appears right from the inception: in cl 1 (1) where it is said that the works are to be carried out and completed (it may be noted that this language is repeated in cl 30 (7)) to the reasonable satisfaction of the architect; and as regards materials it is for the architect to be satisfied that they are in accordance with the contract bills. This being so, what objection can there be to a clause which provides that, as regards these matters, as to which it is the architect's standard that is relevant, the architect's final certificate is to be conclusive evidence? The court has to find the facts. It has to do so in accordance with the contract. The clause provides a means—the means—of establishing the facts. The court retains ultimate control in seeing that the architect acts properly and honestly and in accordance with the contract. The method of proof, chosen by the parties, is legitimate, and by its terms binding, and I can see no reason for denying the contractual effect of the evidence to proceedings previously commenced, or, as I would prefer to put it, for reading in a limitation to subsequent proceedings. Allowing to *Doleman & Sons v Ossett Corpn*¹¹ its full force (and I note that four very eminent judges were equally divided even there) the present case is altogether different.

There remain the arguments as to implied agreement, waiver and estoppel. The employers, in my opinion, failed to make good their arguments. I am content to accept the reasons for this given by Cairns LJ in the Court of Appeal¹². Had the matter gone to arbitration the position would no doubt have been different; this is because cl 35 of the contract confers very wide powers on arbitrators to open up and review certificates which a court would not have. But they did not go to arbitration and giving full recognition to the fact that, initially, this may have been by consent, I see no reason for implying from that consent a variation, or exclusion, of cl 30 (7) insofar as it made the final certificate(s) conclusive.

I would dismiss the appeal.

LORD PEARSON. My Lords, ultimately the crucial question in this appeal is whether a point of construction, which emerged for the first time in the course of the argument on this appeal, should be entertained and decided or not. An exercise of discretion is involved. Therefore it is, in my opinion, necessary to consider both the general scheme of the contract relating to the making good of defects and the history of the case so far as it can be gathered from the available documents.

The appellants, who will be referred to as 'the employers', and the respondents, who will be referred to as 'the contractors', were the parties to a contract dated 24th June 1966 for the building of a warehouse and offices. The contract by cl 15 provided that when in the opinion of the architect the works were practically completed, he should issue a certificate to that effect, and then the defects liability period, being a six months' period, would begin. Making good of defects appearing in the defects liability period could be required by the architect (i) by delivery of a schedule of defects to the contractors, not later than 14 days after the expiration of the defects liability period, (ii) by separate instructions, provided that such instructions should

¹¹ [1912] 3 KB 257

¹² [1971] 1 All ER at 306, [1970] 1 WLR at 1617

a not be issued after delivery of a schedule of defects or after 14 days from the expiration of the defects liability period. The contractors were obliged to make good the defects within a reasonable time after their receipt of the schedule of defects or the instructions. When in the opinion of the architect any defects required to be made good had been made good, he would issue a certificate to that effect. Clause 16 provided that if at any time before practical completion of the works the employers
b with the consent of the contractors took possession of a part of the works, practical completion of that part should be deemed to have occurred, and the defects liability period in respect of that part should be deemed to have commenced on the date when possession was taken. Clause 22 provided for liquidated damages for delay in completing the works, and cl 23 and 33 provided for extension of time in certain events. Clause 30 provided for interim certificates and interim payments subject to retention of a portion of the sums certified, and for one moiety of the sums retained
c to be paid after issue of the certificate of practical completion and for the other moiety to be paid on the expiration of the defects liability period or on the issue of the certificate of making good defects, whichever should be the later. Certain documents were to be sent by the contractors to the architect for the purposes of his measurement and valuation of the works. Clause 30 (6) provided:

d 'So soon as is practicable but before the expiration of 3 months from the end of the Defects Liability Period . . . or from completion of making good defects under clause 15 . . . or from receipt by the Architect of the documents . . . whichever is the latest, the Architect shall issue the Final Certificate.'

The final certificate was to show (a) the sum of the amounts paid to the contractors
e under interim certificates and the amount of the retention money (presumably also by this time paid to the contractors) and (b) the contract sum adjusted in accordance with the conditions of the contract, and the resulting debt owing by the employers to the contractors or by the contractors to the employers. Clause 30 (7) provided:

f 'Unless a written request to concur in the appointment of an arbitrator shall have been given under clause 35 of these conditions by either party before the Final Certificate has been issued or by the Contractors within 14 days after such issue, the said certificate shall be conclusive evidence in any proceedings arising out of this Contract (whether by arbitration under clause 35 of these Conditions or otherwise) that the Works have been properly carried out and completed in accordance with the terms of this Contract and that any necessary effect has
g been given to all the terms of this Contract which require an adjustment to be made to the Contract Sum . . . '

There were certain exceptions not material to this case. Clause 30 (8) provided:

h 'Save as aforesaid no certificate of the Architect shall of itself be conclusive evidence that any works materials or goods to which it relates are in accordance with this Contract.'

Clause 35 provided that any dispute or difference arising under or in connection with the contract should be referred to the arbitration and final decision of a person to be agreed between the parties, or failing agreement within 14 days after either party had given to the others a written request to concur in the appointment of an arbitrator, a person to be appointed on the request of either party by the president or vice-
j president for the time being of the Royal Institute of British Architects.

The work under the contract was carried out by the contractors and their sub-contractors. Although the specified date for completion was a date in September 1967, the employers with the consent of the contractors took possession of the warehouse on 10th April 1967. Consequently under cl 16 of the contract practical completion of the warehouse was deemed to have occurred and the defects liability period

in respect of the warehouse was deemed to have commenced on 10th April 1967. On 25th April 1967 the architect wrote to the contractors stating that the flooring in the warehouse was defective and would have to be taken up and replaced. The contractors started the relaying of the floor on 1st June and finished it by 8th August 1967. That was a making good of defects in the defects liability period and in pursuance of a requirement from the architect. On 31st August 1967 the employers wrote to the architect, informing him that the relaid floor was cracking and asking for action to be taken. On 15th September 1967 the architect wrote to the contractors, saying that the left hand side of the warehouse floor was in a condition which required its removal and replacement but adding:

'In view of the serious implications involved in the taking-up and re-laying of the floor, as regards a further claim from the client not being able to use the premises, I think that it would be prudent for all parties to meet, together with their respective solicitors, before any remedial works are put in hand.'

That letter from the architect was written within the defects liability period and it notified a serious defect but it was not requiring any work of making good to be done.

On 19th September 1967 the contractors commenced an action against the employers, claiming a balance of £14,861 still owing under interim certificates. On 3rd October 1967 the contractors took out a summons asking for summary judgment under RSC Ord 14, and filed an affidavit in support of the summons. The employers filed affidavits in opposition to the summons, saying in effect that by reason of the defective floor and the past relaying of it and the expected second relaying of it they had been and would be deprived of the use of the warehouse or parts of it with consequent loss of profit and had incurred expense in removal of goods and transportation costs. They said that they had a counterclaim of greater amount than the contractors' claim and they relied on the counterclaim as a set-off. On the hearing of the summons for judgment the master made an order by consent of the parties that on payment of £5,000 to the contractors' solicitors the employers should have leave to defend as to the whole of the contractors' claim and that the action be transferred to one of the official referees. Later it was agreed between the parties' solicitors that transfer to the official referee should be deferred.

The correspondence, which has been referred to in this appeal, shows that the contractors and their relevant sub-contractors were willing to do further remedial work, but they were complaining of being prevented from doing such work—in the first place by lack of specific instructions from the architect and afterwards for a long period because the employers who were using the warehouse could not or would not afford an opportunity for the remedial work on the floor to be carried out. In a letter of 13th February 1968, the contractors sent to the architect a letter from the relevant sub-contractors in which the writer stated:

'I have myself inspected the floor on Thursday last, and found that heavy lorries were using this floor. It seems to me that it would be inconvenient for Mr. Kaye to release any part of the floor for remedial work to be carried out. As we all know there are quite a lot of cracks in this Granolithic floor area, but the surface is still in tack and very hard, which we would quite confidently *guarantee for the next ten years*. With my experience in the past I have seen cracking of a similar nature, but no further defects to the surface have occurred. This is why we are prepared to give a covenant on this floor if it is inconvenient for us to carry out this remedial work.'

Months later, on 11th September 1968, the contractors wrote to the architect complaining of not being allowed promised access to the warehouse for remedial work, and stating:

'Finally, we would add that despite the cracking in certain areas of the granolithic floor the surface shows no signs whatever of deterioration despite the

a obvious heavy use it is receiving. It is our considered opinion that further work to the floor is completely unnecessary due to the foregoing and should be no reason for the [employers] to withhold payment of such vast sum of money which they are now so doing.'

Nearly a year later, on 21st August 1969, no remedial work having been done, there was issued by the architect what may be called an abortive final certificate wrongly
b addressed to a company which had taken over the employers by buying most of their shares. There were new solicitors acting for the employers. They objected to the issue of the certificate. Their attention was drawn to cl 30 (7) of the contract in a letter from the contractors' solicitors dated 4th September 1969. On 23rd September 1969 a revised final certificate was issued by the architect, and it was duly addressed to the employers. In a letter of 26th September 1969 the employers' new solicitors
c purported to request the contractors to concur in the appointment of an arbitrator, and they pointed out that this request was made within 14 days of the issue of the certificate. Evidently they had misread cl 30 (7), which enables only the contractors to make the request after the date of the certificate.

On 30th October 1969 the contractors commenced a second action against the employers claiming £2,360 6s 6d being the amount due under the final certificate.
d On 24th November 1969 the employers served their defences and counterclaims in substantially the same terms in the two actions. As in their affidavits in the RSC Ord 14 proceedings, to which reference has been made, they counterclaimed what may be called consequential damages resulting from the defects in the warehouse floor and they relied on this counterclaim as a set-off against the contractors' claims in the two actions. On 16th January 1970 the contractors served in each action a reply
e and defence to counterclaim, and in addition to joinder of issue they pleaded that by reason of cl 30 (7) and the final certificate 'if there were defects as alleged, or at all, which is denied, the [employers] are estopped from relying on the same'. After certain interlocutory proceedings, the official referee on 15th April 1970 ordered that the two actions be consolidated and that the following question be tried as a preliminary issue, namely:

f 'Whether upon the facts pleaded in Paragraphs 4 and 5 of the [contractors'] reply and defence . . . the [employers] are estopped from relying on their Defence and Counterclaim.'

The employers were given leave to serve a rejoinder. In their rejoinder they pleaded
g that the contractors and the employers had agreed to vary the contract by the exclusion therefrom of cl 30 (7), and/or the contractors had waived their right to rely on and/or were estopped from relying on cl 30 (7). Particulars were given.

Dealing first and shortly with the matters raised in the rejoinder, I do not think it is possible to find anywhere in the history of this case any agreement between the parties to vary the contract by the exclusion of cl 30 (7) or any waiver by the contractors of their right to rely on that sub-clause or any basis for saying that they are
h estopped from relying on it. It is true that both parties elected to proceed in the courts and did not assert their right to have the dispute referred to arbitration. Thereby they waived their right to insist on arbitration in respect of that dispute. But there was no election or representation with regard to cl 30 (7). The principal argument for the employers on this part of the case was that when the dispute had
j been submitted to the courts it was no longer possible for either party to serve a notice requesting arbitration as contemplated by the sub-cl (7), and therefore sub-cl (7) could not be operated as intended and must be taken to have been impliedly excluded or waived. But the subclause could still be operated: the notice could be served, even though it might not in fact lead to arbitration. The evident intention of the first part of the sub-clause was to provide a procedure whereby a subsisting dispute would not hold up indefinitely the issue of a final certificate. There would

be a request for arbitration, and then the final certificate could issue and establish the amount of the debt but not afford conclusive evidence of the matters referred to in the subclause. That is what would have happened if the employers had made their request for arbitration on (say) 22nd September 1969, before the final certificate, instead of on 26th September 1969, after the final certificate.

Next, there is a point of construction on which the official referee decided the preliminary question in favour of the employers. He said:

‘The words “conclusive evidence in any proceedings” must in my judgment be construed as referring to proceedings initiated after the final certificate and which raise matters of dispute which do not already form part of the matters in dispute in current legal proceedings issued before the final certificate.’

This construction has some attractions as giving a reasonable meaning to the subclause, but I must agree with Lord Denning MR¹³ in rejecting it on the ground that the words ‘any proceedings’ are so all-embracing that they should not be limited in the way suggested.

Next, there is the argument, based on the case of *Doleman & Sons v Ossett Corpn*¹⁴, that when once the court is seised of a dispute, the jurisdiction of the court to decide that dispute cannot be ousted by an arbitral decision of some other body or person. But I think the present case is distinguishable. The architect’s function is not primarily or essentially an arbitral function. The works have to be carried out to his satisfaction, and accordingly he must give or withhold his expression of satisfaction. He may notify defects and require them to be made good. He has to issue certificates showing how much money is owing. Incidentally his certificates and instructions may resolve some controversial points, and he has to act fairly, but he is not primarily or characteristically adjudicating on disputes. If in a contract such as this the parties agree that the architect’s final certificate shall be conclusive evidence of certain matters, I do not think there is any invasion of the court’s jurisdiction or any affront to its dignity. The court’s function in a civil case is to adjudicate between the parties, and if they have agreed that a certain certificate shall be conclusive evidence the court can admit the evidence and treat it as conclusive.

There remains for consideration the question of construction, which had not been raised at any earlier stage of these proceedings but was suggested to the employers’ counsel when he was opening this appeal. In the wording of cl 30 (7), ‘the said certificate shall be conclusive evidence . . . that the Works have been properly carried out and completed in accordance with the terms of this Contract’, there is an ambiguity. What I will call ‘meaning no 1’ is that the whole series of building operations from beginning to end must be deemed to have been duly carried out and completed, so that any claim in respect of alleged past defects and their consequences is excluded. What I will call ‘meaning no 2’ is that everything that had to be done by way of building operations has now been done and properly done, all defects having been made good, so that the present state of the building is satisfactory but there is no exclusion of claims in respect of alleged past defects and their consequences. In all the earlier stages of these proceedings it was assumed that meaning no 1 was correct. The order for the preliminary question to be tried was made on the understanding that a decision of that question in favour of the contractors would eliminate the employers’ counterclaim and set-off and so enable the contractors to recover the balances which have been outstanding for several years. Counsel have agreed that that was the understanding. The same understanding was implied in the arguments presented to the Court of Appeal¹⁵ and in the judgment of the Court of Appeal¹⁵ and in the printed cases of the parties in this appeal.

¹³ [1971] 1 All ER at 305, [1970] 1 WLR at 1615, 1616

¹⁴ [1912] 3 KB 257

¹⁵ [1971] 1 All ER 301, [1970] 1 WLR 1611

a There are certain points in favour of meaning no 1. First, the certificate is conclusive evidence not only that the works have been properly completed but also that they have been properly carried out, and therefore the certificate might not unreasonably be regarded as conveying approval and absolution not only in respect of the final result but also in respect of the series of operations leading up to the final result. Secondly, there has usually already been, at least three months before the final certificate, a certificate of completion of making good defects, and that is, or would ordinarily be, an expression of satisfaction with the present state of the building. What, then, is added in this respect by the final certificate? Perhaps it is only the substitution of conclusive evidence for prima facie evidence, but more probably it has a wider effect of putting an end to disputes about the building operations. Thirdly, there is, I think, an expression of opinion in favour of meaning no 1 in *Westminster City Council v J Jarvis & Sons Ltd*¹⁶, although it was not an essential part of the reasoning. My noble and learned friend, Lord Wilberforce, said of the employers' construction in that case¹⁷:

d 'It fits in reasonably well with those provisions in the contract which distinguish between such completion as enables the contract to proceed, and such final and verified completion as enables certificates to be given, final payment to be made and the party cleared of all obligations under the contract.'

On the other hand, there is much to be said in favour of meaning no 2, especially as it avoids a fictitious certification of all things having been properly done in the past when in fact some things were defectively done.

e But, in my opinion, the choice between meaning no 1 and meaning no 2 involves a doubtful and difficult question of construction, which it would be undesirable for your Lordships to decide without any assistance from the court of first instance or the Court of Appeal and on a preliminary issue without any findings of fact to provide a firm basis for considering how the provisions of the contract should be interpreted and applied. Moreover, hardship would be imposed on the parties if their expectation of a decisive answer on the preliminary question had to be frustrated and further costs had to be incurred before an effective decision could be reached. In my opinion, this question of construction should not be entertained in this appeal, but should be kept open for decision in some future case if it should arise.

f I would dismiss the appeal.

LORD DIPLOCK. My Lords, the relevant facts have been fully stated in the speeches of Lord Wilberforce and Lord Pearson. I need not repeat them, save to draw attention to the fact that during the defects liability period in respect of the warehouse the architect found it necessary to issue to the contractor instructions to make good faults due to materials or workmanship not in accordance with the contract.

h It is unfortunate that when cl 30 (7) was under consideration before the official referee and in the Court of Appeal¹⁸ attention was focused on the words 'in any proceedings arising out of this Contract (whether by arbitration under clause 35 of these Conditions or otherwise)'. It was assumed without any argument that if these words included an action brought before the date of issue of the final certificate, the certificate would dispose of the employers' defence and counterclaim in the two actions brought against them by the contractors, one in 1967 for money due under two interim certificates and the other in 1969 for money due under the final certificate itself.

j The correctness of this assumption depends on the meaning to be attached to the words in cl 30 (7) which define the facts of which the final certificate is to be conclusive

¹⁶ [1970] 1 All ER 943, [1970] 1 WLR 637

¹⁷ [1970] 1 All ER at 952, [1970] 1 WLR at 650

¹⁸ [1971] 1 All ER 301, [1970] 1 WLR 1611

evidence. They are: 'that the Works have been properly carried out and completed in accordance with the terms of this contract'. It was only in the course of the argument before your Lordships' House that the contention was first raised that these words referred only to the state of the works at the date of the certificate and that they did not amount to a statement, known in the instant case to be false in fact, that at no time during the construction of the works or during the defects liability period defective work had been done by the contractor in breach of contract, which had caused consequential damage to the employer before the defects were made good.

For reasons which I will state briefly hereafter, I think that this contention is a sound one. Your Lordships no doubt have a discretion to refuse to entertain it because of the late stage at which it was raised. It does not even figure in the employers' case in this House. I understand the disinclination that the majority of your Lordships feel to decide it in the instant appeal unaided by any expression of opinion on it by the official referee or by the Court of Appeal¹⁹. But it is the pure point of construction of words which form part of a single paragraph of one clause contained in a well-known and widely used form of contract. The paragraph must be construed as a whole in the context of the remaining paragraphs of cl 30 and in the light of the business purpose intended to be achieved by it as ascertained from a consideration of the provisions of the contract as a whole. I should find it intellectually baffling to attempt to construe the remainder of cl 30 (7) on the assumption that one of the most important phrases in it meant something different from what I am satisfied it does mean. For the remaining words of the paragraph would have to be treated as appearing in a different context from that in which, in my opinion, they do appear. Their meaning might be affected by the precise meaning which I should have to assume to be ascribed to the actual words of the phrase in question. Moreover, the application of the common law principle laid down in *Doleman & Sons v Ossett Corpn*²⁰ as to ouster of the jurisdiction of the courts, whether as an aid to construction of the clause itself or as avoiding the conclusiveness of the final certificate in pending litigation would, in my view, depend on the precise extent of the matters as to which the final certificate was to be conclusive. My Lords, I see no other course open to me than to endeavour to ascertain what the words which were actually used in the contract mean—even though this means ascribing to some of them a meaning which was never canvassed in the courts below.

The RIBA building contract in which cl 30 appears places on the contractor the primary obligation to 'carry out and complete' the specified works 'in every respect to the reasonable satisfaction of the Architect' (cl 1 (1)). The contractor's obligation continues throughout two distinct consecutive periods. The first period, which I will call 'the construction period', starts when he is given possession of the site under cl 21 (1). It continues until he has completed the works to the satisfaction of the architect so far as the absence of any patent defects in materials or workmanship are concerned. It ends with the issue by the architect of a certificate of practical completion under cl 15 (1). This is the date of completion for the purpose of determining whether or not the contractor is in breach of his obligation to complete the works by the date so designated in the contract. The contractor then surrenders possession of the works to the employer, and the defects liability period starts. Where, as in the instant case, the employer takes possession of a part of the works before practical completion of the whole, the construction period for that part ends and the defects liability period for it begins.

The second period is the defects liability period. Its minimum duration is specified in the contract. If latent defects are discovered during this minimum period it is extended until the contractor has made them good and the architect has so certified. During this second period the contractor's obligation is to make good to the satisfaction of the architect any latent defects that may become apparent. After the end

¹⁹ [1971] 1 All ER 301, [1970] 1 WLR 1611

²⁰ [1912] 3 KB 257

a of this second period the contractor is not liable to remedy any further defects; but the contract sum may be adjusted by reason of any defects which would not have been apparent on reasonable inspection or examination before the issue of the final certificate.

b During the construction period it may, and generally will, occur that from time to time some part of the works done by the contractor does not initially conform with the terms of the contract either because it is not in accordance with the contract drawings or the contract bills or because the quality of the workmanship or materials is below the standard required by cl 6(1). The contract places on the contractor the obligation to comply with any instructions of the architect to remedy any temporary disconformity with the requirements of the contract. If it is remedied no loss is sustained by the employer unless the time taken to remedy it results in practical completion being delayed beyond the date of completion designated in the contract.

c In this event the only loss caused is that the employer is kept out of the use of his building beyond the date on which it was agreed that it should be ready for use. For such delay liquidated damages at an agreed rate are payable under cl 22 of the contract.

d On a legalistic analysis it might be argued that temporary disconformity of any part of the works with the requirements of the contract even though remedied before the end of the agreed construction period constituted a breach of contract for which nominal damages would be recoverable. I do not think that makes business sense. Provided that the contractor puts it right timeously I do not think that the parties intended that any temporary disconformity should of itself amount to a breach of contract by the contractor.

e But during the second period, the defects liability period as designated or extended, the position is different. The contract contemplates that after the time of practical completion the employer shall have the use of the works for the purpose for which they were built. If the contractor gives possession to the employer of works which do not comply with the terms of the contract because of latent defects of workmanship or materials—the circumstances contemplated by cl 15 (2) and (3)—the employer may sustain consequential damage which cannot be recompensed by the contractors

f simply making good the defects. Nor does the breach involve any delay in completion within the meaning of cl 22, so as to give rise to any right to liquidated damages. The employer may have been deprived of the profitable use of the works or the defects may have resulted in damage to the employer's plant or goods in the works. Such consequential damage is not susceptible of anticipatory quantification. It may be much less or much greater than the damage which the employer would have

g sustained by delay in obtaining the use of the works if the date of practical completion had been deferred to the date when the latent defects subsequently discovered in the defects liability period had been put right.

h At common law a party to a contract is entitled to recover from the other party consequential damage of this kind resulting from that other party's breach of the contract, unless by the terms of the contract itself he has agreed that such damage shall not be recoverable. In the absence of express words in the contract a court should hesitate to hold that a party had surrendered any of his common law rights to damages for its breach, although it is not impossible for this to be a *necessary* implication from other provisions of the contract.

i I can read no such *necessary* implication into cl 15 or any other clause of the RIBA contract. Clause 15 imposes on the contractor a liability to mitigate the damage caused by his breach by making good the defects of construction at his own expense. It confers on him a corresponding right to do so. It is a necessary implication from this that the employer cannot, as he otherwise could, recover as damages from the contractor the difference between the value of the works if they had been constructed in conformity with the contract and their value in their defective condition, without first giving to the contractor the opportunity of making good the defects. The obverse

of this coin is that the contractor is under an obligation to remedy the defects in accordance with the architect's instructions. If he does not do so, the employer can recover as damages the cost of remedying the defects, even though this cost is greater than the diminution in value of the works as a result of the unremedied defects.

But there are no express words in cl 15 which deal with consequential damage at all, notwithstanding that the clause is dealing with breaches of contract, i.e. 'materials or workmanship not in accordance with this Contract', discovered in circumstances in which it could be foreseen they would be likely to cause some consequential damage beyond that which is capable of mitigation by remedying the defects. I can see nothing in the provisions of cl 15 to which I have referred to give rise to any necessary implication that the employer was surrendering his right at common law to recover damages for any consequential loss sustained by him as a result of latent defects discovered during the defects liability period.

This being, as it seems to me, the business structure of the contract as respects the two periods into which the contractor's obligations fall, I come to examine the relevant provisions of cl 30 (i.e. sub-cl (6), (7) and (8)) which deal with the final certificate. Subclause (6) deals with its issue and its legal effect as creating a debt. Subclauses (7) and (8) deal with its evidential consequences.

Subclause (6) imposes on the architect a duty to issue the final certificate not later than three months after certain conditions are fulfilled. It cannot be issued until after the defects liability period has expired, but the subclause expressly contemplates that the final certificate must be issued notwithstanding that defects may have appeared during the defects liability period, as happened in the instant case. It provides that in that event the final certificate shall not be issued until completion of the remedial works by the contractor—a date which is itself fixed by a certificate of completion of making good the defects issued by the architect under cl 15 (4).

The final certificate, on its face, merely certifies two sums of money and the difference between them, which is the balance due to the contractor or the employer. Its issue creates a debt for the balance due to one of these parties by the other. It says nothing at all about the state of the works. The architect will have previously signified his satisfaction with their state at the end of the construction period (subject however to latent defects) by issuing his certificate of practical completion, and will have also previously signified his satisfaction with their condition at the end of the second period either by refraining from issuing a schedule of defects within 14 days after the expiration of the defects liability period under cl 15 (2) or by issuing a certificate of completion of remedial works under cl 15 (4). Both of these previous certificates and any failure to issue a schedule of defects the employer will have had an opportunity to dispute by referring to arbitration under cl 35 the question whether they were properly issued or withheld. In any such arbitration the arbitrator would have power to withdraw or open up, review and revise any disputed certificate, instruction or decision of the architect.

Clause 30 (7) nevertheless provides that the final certificate shall be 'conclusive evidence' not only of a matter to which it does refer, i.e. the adjustment of the contract sum, but also a matter to which it does not refer at all, i.e. 'that the Works have been properly carried out and completed in accordance with the terms of this Contract.' In their natural meaning, it seems to me that these words are dealing not primarily with the activities of the contractor but with the state of the works as a result of the activities of the contractor, and are dealing with their state at the time of issue of the certificate. They mean no more than that the works are in accordance with the contract drawings and contract bills, subject to any variations authorised by the architect under cl 11, and that the workmanship and materials are of the quality required by the contract. They do not mean that at no time previously to the issue of the final certificate were there defects in the works which required remedying and had been remedied, for sub-cl (6) expressly contemplates that the final certificate must be issued notwithstanding this; and the parties should not lightly be held to

a have intended the final certificate to be conclusive evidence of the truth of anything that the certifier knew to be a lie.

This being, as I think, the natural meaning of the words directly under consideration, I turn to see whether it requires to be qualified because of the remaining provisions of sub-cl (7). It is to be observed that the final certificate is to have no evidential value as to any of the matters referred to in the latter part of the paragraph unless—

b ‘a written request to concur in the appointment of an arbitrator shall have been given under clause 35 of these Conditions by either party before the Final Certificate has been issued or by the Contractor within 14 days after such issue . . .’

This is obviously an elliptical phrase. ‘A written request to concur in the appointment of an arbitrator’ forms no part of the procedure in referring a dispute to arbitration under cl 35 if the parties agree on an arbitrator themselves. It would be quite irrational to make the evidential effect of a final certificate dependent on whether or not in an arbitration pending at the time of the issue of the final certificate the arbitrator had been appointed as a result of a written notice to concur instead of by agreement without such notice. Both parties, indeed, concede that it is a necessary implication that an agreement to refer a dispute to arbitration by an agreed arbitrator must have been intended to have the same consequences on the evidential effect of the final certificate as a written notice to concur in the appointment of the arbitrator. Furthermore, the phrase says nothing expressly about the nature of the dispute which must have been referred to arbitration. Yet disputes can arise under the contract which have nothing to do with the state of the works at any stage before or after the end of the construction period or the defects liability period. For instance, there may be a dispute arising under cl 7 which deals with the right of the employer to indemnify for infringements of patents, or cl 19 which deals with the obligation of the contractor to insure. It would be quite irrational for the parties to make the evidential effect of a final certificate dependent on the existence or non-existence of a pending arbitration in a dispute which had nothing to do with any of the matters of which the final certificate was to be conclusive evidence. It seems to me to be also a necessary implication that a prior reference to arbitration was intended to deprive the final certificate of its conclusive character only in those cases where the dispute referred to arbitration was one concerning the subject matter of which the final certificate was made conclusive evidence.

My Lords, if cl 30 (7) is so construed, the system of certification provided for in the contract culminating in the final certificate makes business sense. The primary obligation of the contractor is to carry out and complete the work to the reasonable satisfaction of the architect. Prima facie the standard to be attained is a subjective one set by the architect, subject only to the qualification that it must be reasonable.

In the course of the progress of the works during the construction period until practical completion the architect signifies his satisfaction by the issue of interim certificates. By issuing his certificate of practical completion he signifies his satisfaction with the state of the works at the end of the construction period; but this is subject to any latent defects which may become apparent to him during the defects liability period. If none becomes apparent, he signifies his satisfaction with the state of the works at the end of the defects liability period by refraining from issuing a schedule of defects within the next 14 days. If latent defects do become apparent during the defects liability period and are either the subject of a schedule of defects or of written instructions by the architect to make good, he signifies his satisfaction that they have been made good by issuing a certificate to that effect under cl 15 (4).

But the contract also provides that the parties may dispute the reasonableness of the architect’s satisfaction as to any of these matters. The only method of doing so provided by the contract is by arbitration under cl 35. It is expressly provided by cl 30 (8) that none of these previous certificates of the architect shall be conclusive

evidence as to the condition of the works, materials or goods to which it relates; and, by cl 35 (3) that any of them may be treated by the arbitrator as if it had never been issued. a

My Lords, in a contract of this character, there is good business sense in agreeing on a time limit, shorter than that laid down by general statutes of limitation, within which any claims must be brought either for breaches of contract generally or, alternatively, for breaches of contract of a particular kind. If it was intended to do the former it would be very simple to state this in an express provision. There are many precedents to be found in business contracts, but there is no such provision in the contract. Even cl 35 itself imposes no time limit within which disputes must be referred to arbitration. b

Disputes under the contract may be of two kinds: disputes, on the one hand, as to whether the architect acted reasonably in signifying his satisfaction of the way in which the works had been carried out or completed or in ordering adjustments to be made to the contract sum, and disputes, on the other hand, as to matters in respect of which the architect has no functions to perform. In a contract by which the parties have agreed to accept 'the reasonable satisfaction of the Architect' as the *prima facie* criterion as to whether particular obligations under the contract have been performed, there is good business sense in distinguishing breaches of these obligations from other obligations arising under the contract, and in providing a time limit after which neither party can dispute the reasonableness of any satisfaction he has expressed as to the performance of any such obligation. In my opinion, this is what is done by cl 30 (6) and (7). c

The date of issue of the final certificate is so fixed by cl 30 (6) that the parties will have already had an opportunity of referring to arbitration under cl 35 any dispute about the reasonableness of the satisfaction signified by the architect as to the condition of the works at the time that any previous certificate was issued by him, or about the reasonableness of any decision by him as to any adjustments to the contract sum which is necessary in accordance with the terms of the contract. If either party has availed himself of this opportunity, the final certificate has no evidential effect. But if neither party has done so before the issue of the final certificate (or in the case of the contractor within 14 days thereafter), both parties are deprived of any further right to dispute that the architect's satisfaction was not reasonable or that the obligation of which performance to his reasonable satisfaction was the criterion had not been performed; or that the adjustment to the contract sum was not properly made. d

This, in my judgment, is the effect of the provision in cl 30 (7) which makes the final certificate conclusive evidence that the works have been properly carried out and completed in all respects in accordance with the conditions of this contract. I can see no grounds in language or in reason for limiting its evidential effect to proceedings started after the date of the certificate. It is relevant evidence only if a fact to be proved in the proceedings is that the works have been properly carried out and completed to the reasonable satisfaction of the architect. There is no principle of law which prevents parties to litigation from agreeing in advance what shall be treated as conclusive evidence of a relevant fact—at any rate if such agreement is not a mere sham to induce the court to decide a hypothetical question on a hypothesis of fact known by both parties to be false (*Kerr v John Mottram Ltd*¹). e

The way in which cl 30 (7) works in practice is well-illustrated by the two actions which have been consolidated and are the subject of the instant appeal. The first action was brought during the defects liability period for the part of the works of which possession had been taken under the provisions for sectional completion to be found in cl 16. Two claims were advanced by the employers. The first was as to the liability of the contractors for consequential damage resulting from latent defects which had appeared during the defects liability period in respect of which remedial f

¹ [1940] 2 All ER 629, [1940] Ch 657

a measures had already been undertaken by the contractors on the instructions of the architect. Under the contract the architect had the duty of satisfying himself whether there were defects but he had no functions in respect of any claim for consequential damage. His opinion whether such a claim was justified or not was irrelevant. The second claim was for unliquidated damages representing the cost of further remedial measures had already been undertaken by the contractors to make the works comply with the terms of the contract. As I have pointed out earlier, this kind of claim was
b premature, even if it were well-founded, since under the contract the contractor had the right, as well as the duty, to undertake any further remedial works himself in accordance with the instructions, and to the reasonable satisfaction of, the architect. By the date at which the reply and defence to counterclaim had been delivered, the final certificate had been issued under cl 30 (6). Accordingly, the architect must
c have been satisfied either that no further remedial measures were needed at the date of the first action to bring the works into conformity with the terms of the contract at the end of the defects liability period, or that such further measures as were needed had been satisfactorily completed. Of the fact that his satisfaction was reasonable, the final certificate was conclusive evidence. By the time of the hearing of the preliminary issue the employers had lost their opportunity to dispute this and, accordingly, of proving their claim, which had been prematurely advanced, for the cost of
d any remedial measures. The final certificate, however, was irrelevant to the claim for consequential damage. It could have no effect on it.

In the second action, brought after the date of the final certificate, identical claims were made in the defence and counterclaim, except that the date at which it claimed that further remedial measures were still necessary to make the works conform with the requirements of the contract was after the expiry of the period during which
e the contractor would have had the right, as well as the duty, to execute them himself. But the same principle applies. The final certificate is conclusive evidence that all necessary remedial works had been executed by the time of its issue. It, too, is irrelevant to the claim for consequential damage in respect of defects which had been found during the defects liability period.

f It follows that the employers are, in my view, entitled to rely on their defence and counterclaim in each of the consolidated actions to the extent that it claims the consequential damage for the disturbance occasioned to their business while defects which appeared during the defects liability period were being made good by the contractor. This damage is quantified at £13,464 15s 7d. But they are not entitled to rely on the allegation contained in the particulars of special damage that still
g further remedial works will have to be carried out or to claim any damages in respect of this unquantified loss.

I would for my part allow the appeal, decide the two preliminary issues in favour of the contractors, set aside the judgment of the Court of Appeal² and order that the actions be remitted to the official referee for hearing on the employers' defence and counterclaim so far as it relates to consequential damage.

h *Appeal dismissed.*

Solicitors: *Mansons* (for the employers); *Letts & Co* (for the contractors).

S A Hatteea Esq Barrister.

2 [1971] 1 All ER 301, [1970] 1 WLR 1611

Practice Directions

CROWN COURT

Crown Court – Practice – Solicitor – Right of audience.

In exercise of the power conferred on him by s 12 of the Courts Act 1971 the Lord Chancellor hereby gives the following direction:

1. Solicitors may appear in, conduct, defend and address the court in proceedings mentioned in para 2 of this direction at any sitting of the Crown Court at Caernarvon, Barnstaple, Bodmin, Doncaster or (subject to para 3 hereof) Lincoln.

2. The proceedings in which solicitors may exercise the right of audience conferred by para 1 of this direction are: (a) appeals from magistrates' courts; (b) proceedings on committal of a person for sentence or to be dealt with; (c) proceedings in respect of the offences included in class 4 in the directions given by the Lord Chief Justice with concurrence of the Lord Chancellor under ss 4 (5) and 5 (4) of the Courts Act 1971¹; and (d) proceedings under the original or appellate civil jurisdiction of the Crown Court.

3. The right of audience conferred by para 1 of this direction in respect of sittings of the Crown Court at Lincoln shall extend only to proceedings falling within para 2 hereof: (a) on appeal from, or on committal by, a magistrates' court in the County of the Parts of Holland, or (b) which would, but for the passing of the Courts Act 1971, have fallen to be heard by the court of quarter sessions for that county in the exercise of its original or appellate civil jurisdiction.

4. This direction shall come into force on 1st January 1972.

HAILSHAM OF ST MARYLEBONE C

7th December 1971

FAMILY DIVISION

Probate – Practice – Non-contentious probate – Foreign divorces – Recognition.

The Recognition of Divorces and Legal Separations Act 1971 comes into force on 1st January 1972.

As from that date the following practice will apply in unopposed probate applications: (a) A decree of divorce granted on or after 1st January 1972 by a court in Scotland, Northern Ireland, the Channel Islands or the Isle of Man will be recognised in the same way as a decree granted in England and Wales, irrespective of the domicile of the deceased. (b) A decree of divorce, whenever granted, by a court in an overseas country as defined in the Act will be recognised if the oath shows that at the date of commencement of the proceedings resulting in the decree: (i) the parties were domiciled in that country; (ii) either spouse was habitually resident in that country; or (iii) either spouse was a national of that country; or exceptionally if one of these facts is recorded in the decree itself (see s 5 of the Act).

In all other cases, including a case in which it is alleged that a divorce was obtained by extra-judicial proceedings, a full statement of the facts should be submitted to a registrar for decision. The registrar, after consideration of the facts, will decide whether further evidence of facts or law is necessary.

COMPTON MILLER
Senior Registrar

10th December 1971

¹ See *Practice Note* [1971] 3 All ER 829, [1971] 1 WLR 1535

a Jones v Secretary of State for Social Services
Hudson v Secretary of State for
Social Services
[conjoined appeals]

b HOUSE OF LORDS

LORD REID, LORD MORRIS OF BORTH-Y-GEST, VISCOUNT DILHORNE, LORD WILBERFORCE, LORD PEARSON, LORD DIPLOCK AND LORD SIMON OF GLAISDALE

6th, 7th, 11th, 12th, 13th, 14th, 18th, 19th, 20th, 21ST OCTOBER, 16th DECEMBER 1971

Industrial injury – Medical appeal tribunal – Jurisdiction – Claim for disablement benefit – Scope of jurisdiction – Previous finding by statutory authority (local appeal tribunal) in

c *claim for injury benefit – Finding that workman suffered injuries including heart condition caused by accident – Decision of statutory authority on claim ‘final’ – Subsequent claim by workman for disablement benefit – Whether medical appeal tribunal bound to accept finding that heart condition caused by accident – National Insurance (Industrial Injuries) Act 1965, ss 5 (1), 37, 50 (1).*

d *Judgment – Judicial decision as authority – Stare decisis – House of Lords – Freedom of House of Lords to depart from their previous decisions when right to do so – Circumstances in which appropriate to reconsider previous decision – Not generally appropriate in cases involving question of statutory construction.*

The appellant, a fitter, lifted a heavy piece of metal during the course of his work. He felt a pain in his back and appeared pale and ill. He was subsequently admitted

e to hospital where, after examination, he was diagnosed as having myocardial infarction. He claimed injury benefit under s 7 (1)^a of the National Insurance (Industrial Injuries) Act 1946 on the ground that he had suffered ‘personal injury caused . . . by accident arising out of and in the course of his employment’. His claim was rejected by the insurance officer on the ground that there was no injury caused by accident within the meaning of s 7 (1). He appealed. The local appeal tribunal made a full

f investigation and heard medical evidence. They allowed the claim stating that the symptoms ‘noted shortly after the accident were in fact those of Infarction though not then recognised as such, also that the work he was engaged on at the time was exceptionally heavy for him as a fitter’. In due course the appellant claimed disablement benefit in respect of the accident and, as required by s 36 (1) (c)^b of the 1946 Act, his claim went to a medical board. They rejected the finding of the local appeal

g tribunal, holding that the appellant had suffered two separate disabilities, strained chest and myocardial infarction, and that the former was, but the latter was not, caused by the work which he had been doing when he became ill. This decision was confirmed by the medical appeal tribunal and on appeal the National Insurance Commissioner upheld it as not being erroneous in point of law. On appeal against the refusal of an application for certiorari to quash the decision of the commissioner

h the Court of Appeal^c distinguished the decision of the House of Lords in *Re Dowling*^d on the ground that in that case there was a single injury which itself constituted the accident, whereas in the present case the statutory authority (i.e. the local appeal tribunal) had found two injuries either of which would have justified the issue of injury benefit; accordingly it was open to the medical authorities (i.e. the medical board and medical appeal tribunal) to conclude that only one of those injuries was, for the purpose of disablement benefit, the result of the accident, without thereby

j *contradicting the conclusion of the statutory authority that injury benefit was payable,*

a Section 7 (1) is set out at p 174 j to p 175 b, post. See now s 5 (1) of the National Insurance (Industrial Injuries) Act 1965

b Section 36 (1), so far as material, is set out at p 175 h, post. See now s 37 of the 1965 Act

c [1970] 1 All ER 97

d *Minister of Social Security v Amalgamated Engineering Union (Re Dowling)* [1967] 1 All ER 210

or destroying the basis of their own jurisdiction. On appeal to the House of Lords, the respondent sought to argue that if *Dowling's case*^e could not be distinguished it should be reconsidered and overruled. a

Held (Viscount Dilhorne and Lord Wilberforce dissenting) – The appeal would be allowed and the application for certiorari granted for the following reasons—

(i) (per Lord Reid, Lord Morris of Borth-y-Gest and Lord Pearson) on the true construction of the 1946 Act, a decision by the statutory authorities, in determining a claim for injury benefit, that the claimant had suffered an injury arising out of an accident suffered in the course of his employment was, by virtue of s 36 (3)^f, 'final' and consequently it was not open to the medical authorities, in subsequently determining for the purposes of a claim to disablement benefit whether the relevant accident had resulted in a loss of faculty, etc, to come to the conclusion that the claimant had not in fact suffered the injury in question as a result of the accident; that was so whether or not there were other injuries found by the statutory authorities and accepted by the medical authorities as having occurred to the claimant as a result of the accident; accordingly, in the present case, the medical authorities had no jurisdiction to come to the conclusion that the appellant's myocardial infarction was not caused by the work which he had been doing at the time when he became ill; it followed that *Dowling's case*^e was rightly decided (see p 149 j, p 150 c and f, p 151 b, p 154 e, g and j to p 155 a, p 156 b and c, p 157 h, p 158 b and c, p 177 f, g and j to p 178 a, c and e to g, and p 179 d and e, post). b
c
d

(ii) (Viscount Dilhorne and Lord Wilberforce concurring) the present appeal was not distinguishable from *Dowling's case*^e; the application of that decision could not be limited to cases where an accident had resulted in a single injury not susceptible of further diagnosis into more than one injury; nor could it be limited to injury occurring as the result, not of some fortuitous incident, but in the course of the ordinary work that the claimant was employed to do; the principle established in *Dowling's case*^e was that a previous decision by the statutory authorities that one or more injuries suffered by the claimant was a result of the accident, was final and binding on the medical authorities (see p 148 f and g, p 155 b, p 169 b, p 172 d, p 178 j, p 181 c to e, p 188 j to p 189 a, p 194 b, p 195 h and p 196 c, post); e
f

(iii) (per Lord Reid, Lord Morris of Borth-y-Gest, Lord Pearson and Lord Simon of Glaisdale) *Dowling's case*^e should not be overruled; the power of the House of Lords to depart from one of its previous decisions should only be sparingly exercised, for the advantage of finality should not be thrown away too readily; a difference of view on a matter of statutory construction, largely a matter of impression, would rarely by itself provide a suitable occasion for departing from a previous decision; in the present case no broad issue of justice or public policy was involved nor any question of legal principle; furthermore it had not been shown that the construction adopted in *Dowling's case*^e was causing administrative difficulties or individual injustice (see p 149 f and g, p 150 f, p 154 a, p 155 b, p 174 a to f, and p 196 d to p 197 j, post); g

(iv) (per Lord Diplock) although a majority were of opinion that the ratio decidendi of *Dowling's case*^e was wrong, only a minority of three were prepared to overrule it and, since a minority had no power to do this, it must be accepted that the principle established by *Dowling's case*^e governed the present appeal (see p 189 f, post); h

Minister of Social Security v Amalgamated Engineering Union (Re Dowling) [1967] 1 All ER 210 followed.

Decision of the Court of Appeal sub nom *R v National Insurance Commissioner, ex parte Hudson and Jones* [1970] 1 All ER 97 reversed.

Notes

For disablement benefit, see 27 Halsbury's Laws (3rd Edn) 824, 825, paras 1451, 1452, and for the determination of industrial injuries claims and questions, see *ibid* pp 853-866, paras 1495-1513.

^e *Minister of Social Security v Amalgamated Engineering Union (Re Dowling)* [1967] 1 All ER 210

^f Section 36 (3) is set out at p 176 d, post. See now s 50 (1) of the 1965 Act

- a For the National Insurance Act 1965, ss 5, 37, 51, see 23 Halsbury's Statutes (3rd Edn) 490, 526, 534.

Cases referred to in opinions

- Clover Clayton & Co Ltd v Hughes* [1910] AC 242, [1908-10] All ER Rep 220, 79 LJKB 470, 102 LT 340, 34 Digest (Repl) 370, 2792.
- Fenton v Thorley & Co Ltd* [1903] AC 443, 72 LJKB 787, 89 LT 314, 34 Digest (Repl) 359, 2727.
- b *Hoystead v Taxation Comr* [1926] AC 155, [1925] All ER Rep 56, 95 LJPC 79, 134 LT 354, 21 Digest (Repl) 249, 330.
- Inland Revenue Comrs v Brooks* [1915] AC 478, 84 LJKB 404, 112 LT 523, 7 Tax Cas 236, 28 (1) Digest (Reissue) 499, 1803.
- Linkletter v Walker* (1965) 381 US 618.
- c *Merryweather v Nixan* (1799) 8 Term Rep 186, 101 ER 1337, 45 Digest (Repl) 288, 102.
- Minister of Social Security v Amalgamated Engineering Union (Re Dowling)* [1967] 1 All ER 210, [1967] 1 AC 725, [1967] 2 WLR 516, Digest (Cont Vol C) 704, 4585a.
- Note* [1966] 3 All ER 77, sub nom *Practice Statement* [1966] 1 WLR 1234, Digest (Cont Vol B) 473, 646a.
- Priestley v Fowler* (1837) 3 M & M 1, [1835-42] All ER Rep 449, 7 LJEx 42, 150 ER 1030, 34 Digest (Repl) 266, 1887.
- d *R v Industrial Injuries Comr, ex parte Cable* [1968] 1 All ER 9, [1968] 1 QB 729, [1968] 2 WLR 1, Digest (Cont Vol C) 703, 3357a.
- Shelley's Case, Wolfe v Shelley* (1581) 1 Co Rep 93, 76 ER 199, 38 Digest (Repl) 838, 506.

Appeals

- These were conjoined appeals by David Lloyd Jones and Donald Kenneth Raymond Hudson against the order of the Court of Appeal (Lord Denning MR, Edmund Davies and Fenton Atkinson LJJ) dated 13th November 1970 and reported [1970] 1 All ER 97 dismissing their appeals against decisions of the Divisional Court (Lord Parker CJ, Ashworth and Willis JJ) dated 11th and 13th December 1968 and reported [1969] 2 All ER 631 and 638, refusing to grant the appellants orders of certiorari to bring up and quash decisions of national insurance commissioners dated respectively, 27th
- f December 1967 and 12th July 1967, whereby the commissioners refused to grant the appellants leave to appeal from decisions of medical appeal tribunals dated respectively 14th April 1965 and 27th September 1966 assessing the appellants' entitlement to disablement benefit under the National Insurance (Industrial Injuries) Acts 1946 and 1965. The facts are set out in the opinion of Lord Morris of Borth-y-Gest.
- g *Peter Pain QC* and *S J Waldman* for the appellant Jones.
M Finer QC and *A A M Irvine* for the appellant Hudson.
R J Parker QC and *Gordon Slynn* for the respondent, the Secretary of State for Social Services.

Their Lordships took time for consideration.

- h 16th December. The following opinions were delivered.

LORD REID. My Lords, these conjoined appeals arise out of two claims for disablement benefit made under the National Insurance (Industrial Injuries) Acts. The appellant Jones's case arises under the Act of 1946, the appellant Hudson's case under the Act of 1965; but there is no substantial difference between the relevant provisions of the two Acts. The Acts provide three kinds of benefit—*j* injury benefit, disablement benefit and death benefit. We are not concerned with the last and the provisions with regard to it throw little or no light on the matters raised in this appeal. Injury benefit is available when the man is unfit for work with a maximum duration of six months. Disablement benefit is available after injury benefit has ceased or immediately if there is no claim for injury benefit.

The appellant Jones was a fitter. On 27th February 1964 he was lifting a heavy piece of metal. He felt a pain in his back and seemed pale and ill. He saw his doctor and was admitted to hospital the next day. The first diagnosis was strain and injury to his back but when he was sent to another hospital they immediately on 17th March diagnosed myocardial infarction. He claimed injury benefit but the insurance officer rejected the claim on the ground that there was no injury by accident within the meaning of the Act. He then appealed to the local appeal tribunal. They made a full investigation and heard medical evidence. They allowed his claim saying that they were—

‘Satisfied that appellant had no previous history of cardiac infarction and that the symptoms noted shortly after the accident were in fact those of Infarction though not then recognised as such, also that the work he was engaged on at the time was exceptionally heavy for him as a fitter.’

Then in due course the appellant Jones claimed disablement benefit. His claim went, as required by the Act, to a medical board. They rejected the finding of the local tribunal. They held that when they saw the appellant there were two separate disabilities, strained chest and myocardial infarction, and that the former was but the latter was not caused by the work which he was doing when he became ill. The finding of the local tribunal appears to me to mean that they held that these two conditions were connected both having been caused by the man’s work. The case then went to the medical appeal tribunal. Their finding was:

‘Upon hearing the [appellant’s] representative, reading the various documents précised and (aloud) the notes of evidence from the local appeal Tribunal, the Tribunal found no reason to disagree with the Medical Board’s findings and decision. The Tribunal are not satisfied that upon the balance of probabilities the relevant accident played any part, either by cause or contribution, in the infarction.’

The commissioner held this finding not to be erroneous in law and so he dismissed the appellant Jones’s appeal.

A similar disagreement between the medical and other tribunals was fully considered by this House in *Minister of Social Security v Amalgamated Engineering Union (Re Dowling)*¹. In the courts below these cases have been distinguished but the distinction in the appellant Jones’s case appears to me to be put on inadequate grounds. In *Dowling’s* case¹ the medical authorities totally rejected the earlier decision of the statutory authorities. In this case they rejected the view that all the man’s disabilities were connected and arose from the same cause and they also rejected the main finding of the statutory authority that the heart condition was caused by the man’s work.

The present appeals were first heard some months ago by a committee of five Lords of Appeal. The respondent then sought to argue that the decision of this House in *Dowling’s* case¹ should be reconsidered under the new practice initiated five years ago by intimation in this House of a unanimous resolution of the Lords of Appeal in Ordinary in these terms²:

‘Their lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

‘Their lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice

¹ [1967] 1 All ER 210, [1967] 1 AC 725

² See Note [1966] 3 All ER 77, [1966] 1 WLR 1234

- a and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.
- In this connexion they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.
- b 'This announcement is not intended to affect the use of precedent elsewhere than in this House.'

It was then thought proper that these appeals should be re-argued before a committee of seven of your Lordships and we have heard full argument of all issues raised in these appeals.

- c My understanding of the position when this resolution was adopted was and is that there were a comparatively small number of reported decisions of this House which were generally thought to be impeding the proper development of the law or to have led to results which were unjust or contrary to public policy and that such decisions should be reconsidered as opportunities arose. But this practice was not to be used to weaken existing certainty in the law. The old view was that any departure from rigid adherence to precedent would weaken that certainty. I did not
- d and do not accept that view. It is notorious that where an existing decision is disapproved but cannot be overruled courts tend to distinguish it on inadequate grounds. I do not think that they act wrongly in so doing; they are adopting the less bad of the only alternatives open to them. But this is bound to lead to uncertainty for no one can say in advance whether in a particular case the court will or will not feel bound to follow the old unsatisfactory decision. On balance it seems to me that
- e overruling such a decision will promote and not impair the certainty of the law.

- But that certainty will be impaired unless this practice is used sparingly. I would not seek to categorise cases in which it should or cases in which it should not be used. As time passes experience will supply some guide. But I would venture the opinion that the typical case for reconsidering an old decision is where some broad issue is involved, and that it should only be in rare cases that we should reconsider
- f questions of construction of statutes or other documents. In very many cases it cannot be said positively that one construction is right and the other wrong. Construction so often depends on weighing one consideration against another. Much may depend on one's approach. If more attention is paid to meticulous examination of the language used in the statute the result may be different from that reached by paying more attention to the apparent object of the statute so as to adopt that meaning
- g of the words under consideration which best accord with it.

- Holding these views, I am firmly of opinion *Dowling's case*³ ought not to be reconsidered. No broad issue of justice or public policy is involved nor is any question of legal principle. The issue is simply the proper construction of complicated provisions in a statute. There must be a large number of decisions of this House of this character. Possibly some of your Lordships may think the decision in *Dowling's case*³ more wrong than most of them. But a decision to reconsider *Dowling's case*³ would I think encourage those who would like to see others of such decisions reversed, to think that litigation for that purpose might be worthwhile and would have a rather far-reaching tendency to impair existing certainty. Moreover, if the decision in *Dowling's case*³ is causing administrative difficulties in the respondent's department—as to which I have no knowledge—then the respondent is in a position to seek
- j amendment of the Act.

As a result of the somewhat prolonged rehearing, I have perhaps a better appreciation of the case against *Dowling's decision*³ than I had when I concurred in it. But on balance I still think that it was right. I do not think it necessary to go over the whole ground again. I shall only state in outline the two main points.

3 [1967] 1 All ER 210, [1967] 1 AC 725

The first is the meaning of what is now s 50 (1) of the Act of 1965: 'Except as provided by this Part of this Act, any decision of a claim or question in accordance with this Part of this Act shall be final.' One must I think construe this in light of normal cases and not of exceptional or improbable cases which received much attention in argument. Normally an injured man first claims injury benefit. In the vast majority of cases there is no difficulty and the insurance officer can and does act speedily. But if there is difficulty he is in a position to, and does, make full investigation and, if necessary, obtain medical reports. If he decides against the claimant the case can go to the local appeal tribunal and they can and do hear evidence including medical evidence. Then they reach a decision to which, in my view, s 50 (2) applies. There was much argument about the meaning of the word 'question'. I think it has a wide meaning: indeed s 50 (2) (g) shows this. Then the man will frequently claim disablement benefit. Here for the first time a medical board comes in for the purpose of deciding what, if any, is the extent of his disablement resulting from 'the relevant accident'. It seems to me improbable that Parliament should have intended duplication of enquiry. 'Final' is a word with many meanings. I recognise the strength of the respondent's arguments but, on the whole, I think that on this point *Dowling's case*⁴ was right.

The other point in *Dowling's case*⁴ was slightly different. In most cases accident and injury are easily distinguishable. But in cases such as we are considering the only 'accident' is the occurrence of an internal injury such as hernia and some heart condition. It was argued that 'accident' may simply mean incident so that where the man undergoes some unusual strain which brings on the internal lesion or injury an unusual strain could be regarded as the accident. That seems to me to be rather far-fetched but even so it would not cover a case where continuous heavy work brought about the injury—there would be no incident to which one could point as the cause of the injury. In such cases the occurrence of the injury is the only incident which could be regarded as an 'accident'.

The question which a medical board has to answer is (s 37 (a) of the 1965 Act) 'whether the relevant accident has resulted in a loss of faculty'. In my view, it must accept the finding of the statutory authority as to what was the relevant accident. I agree with what was said in *Dowling's case*⁴ on that matter. But even if I thought now that *Dowling's case*⁴ was wrongly decided I would still be of opinion that on grounds of public policy it ought not to be reconsidered.

It was strenuously argued in *Dowling's case*⁴ that the scheme and policy of this legislation is that medical questions should be decided by medical tribunals. That is no longer maintained by the respondent because it is clear that, in dealing with injury and death benefit, the statutory lay tribunals have to consider and determine just as difficult medical questions as those which the respondent maintains are reserved for medical tribunals in disablement cases. They do it as courts of law do it: they receive medical evidence or reports and adjudicate on them. No one suggests that they are not adequately equipped to do that. It appears to me that the main purpose of bringing medical boards and tribunals in to deal with disablement cases is to deal expeditiously with the highly technical matter of assessing percentage of disability.

They are not equipped to deal with more general questions involving matters not purely medical although sometimes they may have to. Before the medical board the claimant is not represented, he is only medically examined. Before the medical appeal tribunals there could be argument but it appears that there seldom is. These cases and a number of other reported decisions to which reference was made in argument illustrate the difficulty. It has happened in several cases that a man with no previous record of heart trouble has suddenly become ill under strain at work and quite soon afterwards myocardial infarction or some similar condition has been diagnosed. Of course it could be a mere coincidence that a man suffers

a strain at work and that soon after he has heart trouble for the first time in his life although the two are quite unconnected. But the odds against that must be very high. And if you get a series of such coincidences the odds become astronomical if the two are never connected. But there is no means of submitting this powerful argument to medical boards or tribunals and no indication that it has ever been considered by them. I am very far from being convinced that it can have been the intention of Parliament or that it would be to the advantage of claimants to give to these medical authorities the power to overrule considered decisions of the statutory authorities.

b The appellant Hudson's case is much more difficult. The facts are peculiar and must be almost unprecedented. Whichever way it is decided I doubt whether it can be of much value as a precedent. I do not think it necessary to say more than that I concur in the view that there is no sufficient reason for distinguishing the appellant Hudson's case from the appellant Jones's case. I would therefore allow both appeals.

c **LORD MORRIS OF BORTH-Y-GEST.** My Lords, prior to the coming into operation of the National Insurance (Industrial Injuries) Act 1946, there was a liability in an employer to pay compensation to a workman who was caused personal injury by accident arising out of and in the course of the employment. The Act of 1946 provided, in substitution for the Workmen's Compensation Acts, a system of compulsory contributory insurance. Under the Workman's Compensation Act 1897, and also under the Act of 1906, the liability of an employer to pay compensation arose in respect of the employments to which the Acts applied if 'personal injury by accident arising out of and in the course of the employment' was caused to a workman. Under the Act of 1946 the risk insured against is the same. There are various kinds of benefit but they only become payable 'where an insured person suffers personal injury caused on or after the appointed day by accident arising out of and in the course of his employment'. I quote from s 7 of the Act. The employment must, of course, be insurable employment. So that ever since the last century the conception of personal injury caused by accident has been a familiar one. The perplexities and disputations which used to be in orbit around the words 'arising out of and in the course of' have been considerably dispelled because (in the absence of evidence to the contrary) an accident which arises in the course of employment is now deemed also to have arisen out of such employment (see s 7 (4)).

What, then, is personal injury caused by accident? The Act contains no definition of accident. Nor is there a definition of 'personal injury caused by accident'. If a man's work requires him to lift something heavy his day-to-day operations may be entirely uneventful. If, however, one day in the course of his work some heart affliction befalls him has he suffered 'personal injury caused by accident'? On one view of the matter there would have been no accident. In lifting what he had to lift the man would only have been doing what he intended to do and wanted to do and was employed to do. It would not be as though something had struck him or as though he had stumbled or fallen down. Yet it is most probable that the decision would be that the man had suffered personal injury caused by accident. In reaching a decision guidance would be provided by a study of cases such as *Fenton v Thorley & Co Ltd*⁵ and *Clover Clayton & Co Ltd v Hughes*⁶.

Part II of the Act of 1946 describes the benefits which an insured person will have a right to receive or which in the event of his death others will have a right to receive. Part III of the Act lays down how questions and claims are to be determined. Basic to the whole scheme of the Act are the words at the beginning of s 7 (1). The various kinds of benefit can only become payable if it is first decided that the insured person suffered 'personal injury caused by accident arising out of and in the course of his employment, being insurable employment'. Unless that is affirmatively held there

5 [1903] AC 443

6 [1910] AC 242, [1908-10] All ER Rep 220

can be no benefit. If it is so decided then under some circumstances there may be injury benefit; in some circumstances there may be disablement benefit; in some circumstances there may be death benefit. a

Different persons decide different questions. I do not propose to set out the details of the statutory provisions. They were all reviewed in the recent decision in *Minister of Social Security v Amalgamated Engineering Union (Re Dowling)*⁷. It is, however, clear that apart from 'special questions' (some of which are 'disablement questions') 'any claim for benefit and any question arising in connection with a claim for or award of benefit' must be determined by an insurance officer, a local appeal tribunal or the commissioner. b

If a question arises whether a person employed in insurable employment has suffered personal injury caused by accident arising out of and in the course of his employment that question is to be determined by an insurance officer subject, where so provided, to appeal to the local appeal tribunal and further appeal to the commissioner. So (subject to appeal) it is for an insurance officer to decide (inter alia) whether there has been 'personal injury caused by accident'. In the sort of situation which is illustrated by *Fenton v Thorley*⁸ an insurance officer may have to consider the available evidence as to what actually happened and may necessarily have to consider medical evidence. In an infinite variety of other situations difficult problems may arise. But before anyone can get any benefit an insurance officer (or on appeal a tribunal or the commissioner) must decide that there has been personal injury caused by accident. Under the scheme of the Act a medical board is not charged to reach decision as to that matter. The decision of the insurance officer may identify and may necessarily identify the nature of the personal injury or injuries caused by accident. Decision as to whether there was 'personal injury caused by accident' may involve findings in some detail as to what happened. There will sometimes but not always be some incident which could be designated as the accident and some physical hurt which could be designated as the physical injury. There may in some cases be a decision that two or more injuries were caused by accident. There may in some cases be a decision which identifies the personal injury caused by accident but which shows that the stated injuries were not the only injuries. But as the occasions or situations which will give rise to a right to benefit will in the nature of things be diverse it is not to be expected that there will be uniformity in the pattern of decisions. c d e f

Part III of the Act deals with the determination of questions and claims. A clear distinction is drawn between 'questions' and 'claims'. Under s 36 (1) certain defined questions are to be determined by the Minister and other defined questions by a medical board (or medical appeal tribunal) but beyond this 'any claim for benefit and any question arising in connection with a claim for or award of benefit' must be determined by an insurance officer or on appeal from him (see s 36 (2)). So apart from defined special questions all other questions and all claims are to be decided (subject to appeal as provided by the Act) by an insurance officer. What then, apart from a special question, is a 'question' as opposed to a 'claim'? It will be a question whether an insured person has suffered 'personal injury caused on or after the appointed day by accident arising out of and in the course of his employment'. That will be in all cases the question of central consequence. There may be other 'questions' which arise 'in connection with a claim'. These, in my view, will be such as in the circumstances of a particular case it will be necessary and essential for an insurance officer to decide either as a preliminary to or as a part of his decision that an insured person has suffered personal injury caused by accident. Subject to appeal or as provided by the Act 'any decision of a claim or question' is final. Much discussion has taken place in regard to the meaning in the structure of the Act of the word 'final'. The attribute or quality of finality is given not only to a decision on a g h i

7 [1967] 1 All ER 210, [1967] 1 AC 725

8 [1903] AC 443

a claim but also to a decision on a question. Section 7 (1) shows that it is only after certain questions have been decided that any claims can arise. If there has been personal injury caused by accident arising out of and in the course of employment 'then' certain claims may arise. There may be injury benefit if certain conditions are satisfied (see s 7 (1) (a)). It will be for the insurance officer, if he has decided the first question, to go on to decide whether a claim for injury benefit is sustainable.

b If there has been personal injury caused by accident arising out of and in the course of employment (this question being for an insurance officer to decide) then disablement benefit may later be payable if there is a loss of physical or mental faculty. This must be suffered 'as the result of the injury' (see s 7 (1) (b)) and 'as the result of the relevant accident' (see s 12 (1)). The fact that both these expressions are used merely illustrates that the base and foundation of any claim is that an insured person will have suffered personal injury caused by accident. The relevant accident (see s 88)

c is the accident in respect of which benefit is claimed or payable. So if disablement benefit is claimed it must be claimed in respect of the accident that has been the subject of a decision of an insurance officer. If an insurance officer decided that personal injury caused by accident had not been suffered then disablement benefit could not be payable. If he decided that it had been suffered then a disablement

d question might arise, i.e. a question whether the accident had resulted in a loss of faculty and a further question as to the extent of disablement that resulted from a loss of faculty. Those questions would be for determination by a medical board or medical appeal tribunal. But those questions can only arise after a decision on the basic question (i.e. that denoted by the opening words of s 7 (1)) has been made. That decision cannot be assailed by or ignored by a medical board. A medical board must accept it and act on it. This was laid down in *Dowling's case*⁹.

e

There were two routes by which conclusion was reached in this House in that case. There was the approach in the majority decision which now, subject to argument on this point, is binding, and which was based on the statutory provision making a decision final; there was the approach that, apart from the express statutory provision as to finality, the remit to a medical board was for a determination as to the result

f of a 'relevant accident' so that no enquiry whether there was a relevant accident or as to what was the relevant accident was ever within the competence of or within the terms of reference of a medical board. I doubt whether there is much practical difference between the two approaches. If it is sought to interpret the word 'final' as being limited to finality in respect of a claim then the result follows that on a claim for disablement benefit there must as to one part of the claim be a determination by an insurance officer (or a local appeal tribunal or the commissioner) and as

g to another (and much more limited) part a determination by a medical board or medical appeal tribunal. The finality (in connection with or in relation to a claim for disablement benefit) of a decision which an insurance officer (or an appeal authority) must make before any claim for disablement benefit can succeed must therefore be recognised.

h It was contended on behalf of the respondent that the word 'final' in s 36 (3) must denote finality within a sphere or compartment. I agree. A decision is final if it is a decision as to a matter within the jurisdiction of a particular authority. Neither an insurance officer, on the one hand, nor a medical board, on the other hand, can decide any claim or question other than one which under the statutory provisions is assigned to his or its sphere or compartment of duty. Neither must encroach on

j the other. Each appellant in the cases now being considered complains that a medical board has trespassed outside its statutorily defined sphere or compartment. Accordingly, I consider that the present appeals depend for their determination on a careful examination of the facts in order to see the stages of decisions in regard to claims or questions and to see whether they were reached within the powers and duties prescribed by statute.

⁹ [1967] 1 All ER 210, [1967] 1 AC 725

If there is in the result any practical difference between the two approaches in *Dowling's case*¹⁰, I am clearly of the view that no justification has been established for not following the decision (i.e. the decision of the majority). It is said that the case of *Inland Revenue Comrs v Brooks*¹¹ was not cited in the arguments in *Dowling's case*¹⁰. While it has been helpful and desirable in the present appeal to refer to *Brooks's case*¹¹ an examination of it shows that that decision depended entirely on the construction of the Act then in question, the Finance (1909-10) Act 1910, which was an Act creating super-tax, and of the Acts incorporated with it. In reference to income tax it had been enacted by s 57 (10) of the Taxes Management Act 1880 that appeals once determined by the General Commissioners should be final. Did such a determination take effect on an initial estimation for the purpose of assessing another and new tax (even if such new tax was an additional duty of income tax)? It was held not. As Earl Loreburn said¹²:

'When, therefore, another tax is imposed by another statute, whether it be a duty of income tax or not, and a different tribunal is directed to estimate the same figure as part of a greater whole, I do not read the section as imposing upon the new tribunal a duty to accept the determination of the old.'

The case concerned what Lord Sumner called¹³ 'the dry interpretation of the section'. I do not find in that decision any particular guidance which directs the process of consideration and interpretation of the enactment now being examined.

The Act in some places uses the word 'final' and in other places the word 'conclusive'. Whatever differences there may be in other statutes and in other contexts between the word 'final' and the word 'conclusive' I cannot think that for the purposes of the present appeals there is any significance to be drawn from the circumstances that the two words are used in the Act. In s 36 (3) decisions are made final except as provided. The Act provides for certain appeals. So clearly the word 'final' is not used as denoting that there is to be no appeal from a decision. It may be that the word 'conclusive' rather than 'final' is used in s 72 because the word 'conclusive' is apposite in reference to a situation where a decision is being given in evidence for the purpose of other proceedings. Similarly, if a declaration is made under s 49 and is then being used for the purposes of a claim the use of the word 'conclusive' may be apposite. But if a decision of a claim or question is made by the person or authority to whom the statute delegates the duty of making decision in regard to such claim or question then the decision is final in the sense that it cannot be disregarded or flouted by some other person or authority not charged with the duty of reaching decision in regard to such claim or question.

This point may be illustrated. There will be some cases where there is no specific occurrence which can be described as an accident. A man may suffer a heart condition while at work. A difficult question may arise. Has he suffered personal injury caused by accident? Skilled medical evidence may be needed. There may be differences of medical opinion. There may be much evidence of a non-medical nature. There may be conflict of evidence as to the events or circumstances in regard to the work which was being done by the man or in regard to his conduct. An insurance officer may have to reach decision. If in the result it is decided (either by the insurance officer or on appeal) that there was no injury caused by accident then no claim for disablement benefit would follow. If in the result it is decided that there was injury by accident there may be a claim for disablement benefit and a medical board may then have to decide whether the accident has resulted in a loss of faculty. The medical board cannot say, 'There never was an accident'. It may be that they will disagree with the medical evidence that was given before an insurance officer or on appeal from him. It may be that as a consequence they will think

10 [1967] 1 All ER 210, [1967] 1 AC 725

11 [1915] AC 478

12 [1915] AC at 483

13 [1915] AC at 493

a that there never was an accident and that accordingly there never was a question which should have been submitted for their determination. But they must only act, as also must every other statutory authority created by the legislation, within their own sphere or compartment.

b It follows from what I have said that I see no reason to doubt the validity of the decision in *Dowling's case*¹⁴. In any event, it would, in my view, be wholly inappropriate not to treat it as binding authority. It was essentially a decision which involved questions of construction of the statutory provisions. If any proposals for change are now suggested it should be for Parliament to consider and to decide whether they are either necessary or desirable. I pass, then, to consider the two cases which are before us. The application of the statutory scheme may helpfully be illustrated by reference to these actual cases.

c On 27th February 1964 the appellant Jones was doing his work at the quarry where he was employed. He was loading some cast iron scraps on to a wagon. That was a task that he was required to do. Something happened. He felt a pain in his back. The pain got worse. He was sent home and was seen by his doctor who thought that he was suffering from a strain in the back and shoulder. The next day he got up in order to see his doctor. He had pain in the front of his chest. He was sent home d to bed where he remained for some days. On 9th March 1964 he was admitted to his local hospital. He was there for one night and was X-rayed. He was then transferred to another hospital and coronary infarction was diagnosed. He remained in hospital for over two months. Later medical certificates used the expressions 'Myocarditis', 'Strain of Back (Inj) and myocarditis', 'Myocardial Sprain' and 'Myocardial Strain'.

e A claim for injury benefit was made. So the insurance officer had to consider the matter. While recognising that the insured person had been treated for 'Myocardial Infarction' as an in-patient in hospital for over two months, he thought that there was a doubt whether the incapacity was 'due to any accident or whether in fact there was any accident'. Accordingly, he had to reach conclusion. Medical opinions were sought both of the appellant's doctor and from the hospital. The former wrote (on 9th July 1964) as follows:

f '[The appellant] was visited on 27/2/64 when he appeared to be suffering from a strain in back and shoulder on the left side. Next day he was pyrexial and this went on to dyspnoea, cough and a vague pain in the chest. His pyrexia subsiding in a day or so. There were rhonchi in the chest and he was treated with antibiotics. As he failed to respond and indeed seemed to be getting worse, he was transferred to the local hospital where an X-ray revealed cardiac enlargement suggestive of pericardial effusion. On the 9/3/64 he was transferred to g Llandudno where the diagnosis of coronary infarction was made—"recent extensive antero-septal infarct". I feel that [the appellant] has had a true silent coronary occlusion and that this took place on 27/2/64, the subsequent events being due to the gradual cardiac failure. These events seem to have been initiated by his manual efforts on that day ...'

h The consultant physician connected with the hospital wrote (on 10th July 1964) as follows:

i '[The appellant] was transferred from the Hospital at Blaenau Ffestiniog on 9.3.64. His main complaints were of shortness of breath and rise of temperature, with chest pain. The chest pain started five days before admission, when he had sudden onset of pain over the left lateral and lower part of the chest; dyspnoea was also present. On admission he was orthopnoeic; pulse 104, B.P. 130/100. Rhonchi were present over both lungs; heart sounds were faint. Jugular venous pressure was raised. Electrocardiogram showed auricular fibrillation and recent extensive antero-septal myocardial infarct. It would appear that the

myocardial infarct had been dated five days prior to admission, there being no previous history to suggest that he, in fact, had had cardiac pain in the past.

Other enquiries were made. They related to the question whether the work being done by the appellant on 27th February was out of proportion to his normal work and whether it was heavy work.

In my view, it is clear that the insurance officer was considering whether the appellant had suffered personal injury caused by accident; the very essence of his enquiry concerned the question whether the appellant's myocardial infarction was caused by accident on 27th February. There was no doubt that the appellant had suffered myocardial infarction but did it result from his work? If it did, as the appellant's doctor thought, then there was personal injury caused by accident. If it did not then there was no accident and no claim of any sort (under the Act of 1946) could be made.

The insurance officer took some time to reach decision. No complaint can be made of this. Evidence had to be obtained and enquiries made and the issue was one of importance. The decision came (on 24th August) nearly six months after 27th February. It was that: 'There was not an industrial accident because the appellant did not suffer personal injury by accident.' So industrial injury benefit was not payable.

The appellant appealed to a local appeal tribunal. From the records it is shown why the insurance officer had come to his conclusion. His submission was contained in the papers which were before the tribunal. He recorded that he recognised that although medical certificates had shown incapacity as being due to 'strained back' it had appeared from the medical evidence 'that incapacity since 27.2.64' had been due to myocardial infarction—a heart condition. That condition, he recorded, had however been the subject of a number of decisions by the commissioner in which medical evidence had been accepted to the effect that physical effort, however strenuous, does not play any part in causing coronary occlusion by thrombosis but that if the physical effort is, for the person concerned, something quite out of the ordinary and if occlusion occurs at the time or shortly after (at most not more than 24 hours after) the physical effort then it may play a part in precipitating the onset. As the insurance officer had thought that the work done by the appellant did not for him involve physical effort out of the ordinary, on which matter he thought that the whole case rested, he had decided that there was no personal injury suffered by accident.

The local appeal tribunal sat with a medical assessor. They reached decision on 6th November 1964. There were certain questions of fact which were material to their decision. In particular was the question as to the nature of the work that the appellant had been doing on 27th February, for it is plain that the insurance officer would have decided the other way if he had thought that the appellant's work on 27th February had for him involved physical effort out of the ordinary. The appeal tribunal allowed the appeal. It follows that they decided that the appellant did, on 27th February, suffer the personal injury of cardiac infarction by accident. The grounds of their decision were specific and clear:

'Satisfied that appellant had no previous history of cardiac infarction and that the symptoms noted shortly after the accident were in fact those of Infarction though not then recognised as such, also that the work he was engaged on at the time was exceptionally heavy for him as a fitter.'

It is difficult to imagine any more positive decision. The insurance officer did not seek to appeal from it. For the period during which, as a result of the injury, the appellant was incapable of work (see s 7 (1) (a)) injury benefit became payable to him.

The way seemed entirely clear to present a claim for disablement benefit. As it had been established that the appellant had suffered personal injury by accident, disablement benefit became 'payable' to him (see s 7 (1) (b)) if (at a time not within the injury

a benefit period) he suffered as the result of the injury from loss of physical or mental faculty. Section 12 (in the form in which it was at the relevant time) deals further with entitlement to disablement benefit. The insured person must as a result of the relevant accident (which means the accident in respect of which the benefit is claimed or 'payable') be suffering from loss of physical or mental faculty to the extent laid down by the section. If he is, then the extent of disablement must be assessed in accordance with the general principles laid down in s 12 (2). The disabilities whose
b extent are to be assessed are the disabilities incurred as a result of the relevant loss of faculty which by definition (see s 88) means the loss of faculty resulting from the relevant injury which by definition means the injury in respect of which the disablement benefit is claimed. It is clear from what I have set out above that the appellant had a finding in his favour from the local appeal tribunal that in the course of his work he
c had sustained myocardial infarction. That was the relevant injury. That was the relevant accident. That was the relevant injury in respect of which he claimed. That was the relevant accident in respect of which he claimed. Two disablement questions then arose: (1) Had the relevant accident resulted in a loss of faculty? (2) If so, what was the extent of the resulting disablement and at what degree should it be assessed and what period should be taken into account?

d In dealing with those questions it seems to me that the medical board made an entirely unwarranted approach. Being invited to enquire, and being limited to enquire, whether the relevant accident (which was the accident in respect of which he claimed and which was the accident as found by the only body charged with the duty of deciding what the accident was) had resulted in a loss of faculty, they proceeded to enquire into a matter which was not within their sphere or compartment. Being
e told that the accident and also the injury consisted in sustaining myocardial infarction and being asked to say whether loss of faculty resulted, they said that myocardial infarction was unconnected with the accident. They were asked as medical men to say whether there was a loss of faculty from the myocardial infarction. They might have found that the trouble was all healed so that there was no loss of faculty. They did not find that. It was for them to consider the then effects of the injury by accident.
f What they said was that there was myocardial infarction but that it was unconnected with the accident. On the facts in this case that was a contradiction in terms. Myocardial infarction could not be unconnected with the relevant accident (and relevant injury) which had been found to be that of sustaining myocardial infarction. It may be that as medical men they disagreed with the medical evidence which had been considered by the local appeal tribunal. It may be that they thought that had there been an appeal from the local appeal tribunal the appeal might have succeeded.
g But it was not for them to constitute themselves as in effect an appeal body from the local appeal tribunal. All they did was to say that there was a loss of faculty which would handicap the appellant because there was some pain in the chest resulting from his having strained his chest. Their error of approach was fundamental. They should have recorded a conclusion whether the myocardial infarction had resulted in a loss of faculty and should then have proceeded to assess the extent of the resulting
h disablement and its degree and duration. Such extent had to be assessed, pursuant to the provisions of s 12 (2), by reference to the disabilities incurred by the appellant as a result of the relevant loss of faculty—which in this case meant, by definition, the loss resulting from the injury of myocardial infarction which was the injury in respect of which disablement benefit both was claimed and was under the express terms of s 7 (1) (b) payable. In assessing that extent all disabilities to which the appellant might
j be expected to be subject had first to be considered (see s 12 (2) (a)) and those disabilities were to be treated as incurred as a result of the myocardial infarction unless the appellant would in any case have been subject to those disabilities as the result of a congenital defect or of some injury or disease received or contracted before he sustained myocardial infarction (the relevant accident) or would not have been subject to those disabilities but for some injury or disease received or contracted after and not

directly attributable to sustaining myocardial infarction (see s 12 (2) (b)). It will be seen that none of the provisions of s 12 (2) justifies the course followed by the medical board.

On appeal to the medical appeal tribunal the fundamental error of approach of the medical board was not corrected but was repeated and adopted. The medical appeal tribunal were 'not satisfied that upon the balance of probabilities the relevant accident played any part, either by cause or contribution, in the infarction'. Again, on appeal to the commissioner the error of approach was not corrected. The contention of counsel for the appellant was that as the local appeal tribunal had quite plainly decided that the myocardial infarction was a personal injury caused by accident the occurrence of the myocardial infarction was the relevant accident. That contention was rejected. For the reasons which I have given I consider that it should have been accepted. I consider, therefore, in agreement with the judgment of Edmund Davies LJ, that in the appellant Jones's case¹⁵ an order of certiorari to quash the decision of the commissioner should have been made and I would allow the appeal accordingly.

I pass to consider the appellant Hudson's case. This case is governed by the National Insurance (Industrial Injuries) Act 1965, but as that is a consolidation Act I need not refer to its separate sections and I need not repeat what I have set out above. On 19th January 1965 the appellant Hudson was installing by hand a heavy piece of electronic machinery. He felt a sudden pain in the right loin and went to the first aid station. The same evening (some seven hours later) he sustained a sudden pain in the chest. He was admitted to hospital on 20th January. His doctor signed a medical certificate, that he was incapable of work by reason of 'Chest pain. N.Y.D.'—the letters signifying 'not yet diagnosed'. He did not at that time claim injury benefit but he claimed sickness benefit which benefit he in fact received for the period between 19th January to 17th April. He remained in hospital from 20th January to 12th February. He was certified as fit to resume work on 17th April. There were various medical certificates from time to time: early ones described his incapacity for work as due to 'myocardial infarct' and later ones as due to 'coronary thrombosis'. On 20th September 1965 he made an application for a declaration that his accident was an industrial accident (see s 49 of the Act of 1946). On his form of application he said that the injury that he had suffered was 'Hernia'. On 4th October the insurance officer decided that the accident sustained on 19th January was an industrial accident and a declaration to that effect was recorded. Then on 3rd November the appellant Hudson claimed disablement benefit. He stated on his form of claim that the way in which he was disabled as a result of the accident was that he 'suffered Hernia'. He went before a medical board by whom he was examined and to whom he stated that while lifting electronic equipment on 19th January he strained himself on the right side and that the same evening he had a heart attack. The board found, on 20th December 1965, that the appellant Hudson had a right inguinal hernia and 'myocardial infarction January 65'. They, however, recorded the latter as an 'unconnected condition'. They found that there was a loss of faculty and assessed disability by reference to the hernia. The board were evidently concerned about the heart condition. They recorded that they had discussed the case 'as his heart attack occurred the day of the rupture when he had been subjected to considerable strain which might also be the cause of the heart lesion'. They proceeded to state 'but this is made unconnected as no claim has been made'. I think that this clearly means that they thought that it was quite likely that the heart lesion was the result of the strain but that they had put down the myocardial infarction as being an 'unconnected condition' merely because the appellant Hudson himself had in his claim only asserted that his disablement as a result of accident was that he had suffered hernia. I agree with Lord Parker CJ when he said on this point that¹⁶—

¹⁵ [1970] 1 All ER 97, [1970] 1 QB 477.

¹⁶ [1969] 2 All ER 631 at 636, [1970] 1 QB at 485.

- a 'the medical board never decided the point at all, they merely said that it was unconnected as it had not been made the subject of a claim, in other words they had not decided the matter on the merits one way or the other.'

Appeal was then sought (by letter dated 14th June 1966) from the decision of the medical board. One ground of appeal was based on the failure of the medical board to take the heart condition into account. Then a claim on behalf of the appellant was made (by a letter of 13th July) that for the period of incapacity, from 19th January to 17th April 1965, he should receive injury benefit. As noted above he had only received sickness benefit. Certain letters containing reports from medical men were submitted in support. In one of these, that of Dr Somerville, the view was expressed that there was a direct causal relationship between the development of the coronary thrombosis and the physical effort of the appellant earlier on 19th January 1965.

- c The further view was expressed that because of a condition of arteriosclerosis it was possible or likely that the appellant would have developed coronary thrombosis some time in the future but that conversely if, on the day in question, he had not been engaged in the type of work severe enough to produce an inguinal hernia the thrombosis would almost certainly not have occurred on that day and possibly might never have occurred.

- d The claim for injury benefit was accordingly considered by the local insurance officer who had before him the medical reports then submitted as well as the declaration of liability and the findings of the medical board. The local insurance officer did not give any separate or specific decision but he decided to award injury benefit for the period from 19th January 1965 to 17th April 1965, and payment was authorised. Injury benefit could of course only have been awarded if there was personal injury

- e caused by accident and if the appellant was 'as the result of the injury' incapable of work. On what basis, then, was the insurance officer awarding injury benefit? If the medical board had, as Lord Parker CJ held¹⁷ (as I think rightly), dealt only with the hernia and had come to no conclusion in regard to the heart condition then it was fully open to the local insurance officer to decide that the heart condition was part of the injury by accident sustained by the appellant. Injury benefit being only payable

- f if as a result of the injury there was incapacity for work it could not have been awarded for the whole period (to 17th April 1965) on the basis of the hernia alone if the hernia by itself did not incapacitate for the whole of that time. It appears that the award of the local insurance officer was made on the basis of the heart condition. That was the conclusion of Lord Parker CJ, who said¹⁸ that the decision of the local insurance officer was that the appellant was totally incapacitated in the period from 19th January

- g to 17th April 1965 by reason of the heart condition. That that was the basis of the decision of the insurance officer is confirmed by the fact that in a subsequent application to the commissioner, to which I must later refer, the view presented to the commissioner on behalf of the Ministry was that it was a reasonable inference that the award of the insurance officer was made in respect of myocardial infarction.

- h The sequence of the events in the appellant Hudson's case did not follow the normal pattern. Some of the complications might have been avoided if the medical reports which were submitted to the insurance officer had been earlier obtained and if there had been a claim for injury benefit before there was a claim for industrial benefit and before the submission (in a restricted form) to a medical board. But the appellant should not suffer, provided that his claims are valid, merely because the course of the proceedings was out of the ordinary making a close examination necessary.

- j The next stage was that the appeal of the claimant came on before the medical appeal tribunal. The appeal tribunal may not have been fully made aware of the position. In one of the documents is set out what the Minister wished the tribunal to consider:

17 [1969] 2 All ER 631, [1970] 1 QB 477

18 [1969] 2 All ER at 632, [1970] 1 QB at 480

'The Minister asks the Tribunal to consider whether "myocardial infarction" is fully relevant to the accident and if so to make an appropriate assessment from 20.4.65.'

But that was not at that juncture the question which they should have been asked. They should have been told that after the matter had been before the medical board who had had only a restricted claim before them there had been the decision of the local appeal officer on the question which was within his sphere, i.e. the question as to what was the injury by accident. As set out above his award of injury benefit was on the basis that myocardial infarction was part of the injury by accident. Doubtless because of the way in which they had been invited to consider the matter the appeal tribunal stated in their decision that the substantial question was whether the heart condition was attributable to the accident. That was an error. Their task was not to determine what was the relevant accident but to consider whether the relevant accident resulted in a loss of faculty with resultant disability. They expressed the view that 'exertion being by itself no precipitating factor in myocardial infarction' they found nothing in the case 'to associate that condition with the relevant accident'. The assessment of disability was therefore confirmed on the basis of the hernia alone. Their decision ran counter to that of the insurance officer who had decided that myocardial infarction was a part of the relevant injury and relevant accident. So the error of approach as shown in the appellant Jones's case was here also revealed. It was not corrected in the decision of the commissioner who, in refusing leave to appeal, held that though the first decision of the insurance officer made the finding in regard to hernia final for all purposes the second decision of the insurance officer was not binding on the medical authorities. I think that this was erroneous. It may have been based on the view of the commissioner that the medical board had 'decided' that the myocardial infarction was in fact an unconnected condition whereas, as I have set out above, the medical board did not decide that matter one way or the other.

For the reasons that I have given I consider that in this case also there was error of law in the determination of the commissioner with the result that the appeal should be allowed.

VISCOUNT DILHORNE. My Lords, to succeed in these appeals the appellants have to show that the commissioners, who rejected their appeals from medical appeal tribunals, erred in law. Whether or not they did so depends, in the appellant Jones's case, on the construction to be placed on and the effect of provisions of the National Insurance (Industrial Injuries) Act 1946, as amended by the National Insurance (Industrial Injuries) Act 1953, and, in the case of the appellant Hudson, of the National Insurance (Industrial Injuries) Act 1965; and in relation to both appeals the decision of this House in *Minister of Social Security v Amalgamated Engineering Union (Re Dowling)*¹⁹ has to be considered. The respondent challenges the correctness of that decision and contends that it should not be followed. He also submits that if that, their primary contention, fails, the Divisional Court²⁰ and the Court of Appeal¹ were right in distinguishing that decision from the cases now under appeal.

The 1946 Act repealed the Workmen's Compensation Acts and instituted a system of insurance in their place. That Act was amended by the 1953 Act and both those Acts have now been replaced by the 1965 Act, a consolidation Act. Although in the process of consolidation the order of some of the sections has been changed, some subsections converted into sections and some changes of language made, the main structure of the scheme instituted by the 1946 Act remains unchanged and the effect of the provisions of the 1946 Act as amended by the 1953 Act remains unaltered and is the same as that of the corresponding provisions of the 1965 Act so far as these appeals

¹⁹ [1967] 1 All ER 210, [1967] 1 AC 725

²⁰ [1969] 2 All ER 631 and 638, [1970] 1 QB 477

¹ [1970] 1 All ER 97, [1970] 1 QB 477

a are concerned. I propose, therefore, to consider the terms of the 1946 Act as amended by the 1953 Act.

By the 1946 Act provision was made for the payment of three kinds of benefit, injury benefit, disablement benefit and death benefit. None of these benefits is payable unless the insured person suffered injury caused by accident arising out of and in the course of his employment (s 7 (1); 1965 s 5 (1)). Where a person suffers an injury caused by such an accident, even though he does not claim any benefit or has failed to establish a claim to benefit, he may be entitled to a declaration that the accident was an industrial accident (s 49; 1965 s 48).

Injury benefit is only payable if the injury causes incapacity for work and during the incapacity. It cannot, however, be paid for more than 156 days (excluding Sundays) commencing with the day of the accident even though the incapacity lasts beyond that period. Disablement benefit is only payable if, as a result of the injury, the insured person has suffered a loss of physical or mental faculty causing a disability which, when assessed in accordance with the Act, amounts to one per cent or more. It may be payable throughout a person's life if the disability lasts so long and payment of it does not depend on whether a person has been rendered incapable of work. If it has made him unemployable and he is likely to remain incapable of work permanently, he can receive 'unemployability supplement' in addition to his disablement benefit (s 13 (1); 1965 s 13 (1)). An insured person cannot, however, be in receipt of injury benefit and disablement benefit at the same time. He may be entitled to disablement benefit although not entitled to injury benefit but he cannot, if he is receiving injury benefit, obtain payment of disablement benefit until payment of injury benefit has ceased. Death benefit is payable in certain circumstances to a widow or widower (ss 19, 20; 1965 ss 19, 20) to a person who has a family which includes a child or children of the deceased (s 21; 1965 s 21), to the deceased's parents (s 22; 1965 s 22), to relatives (s 23; 1965 s 23) and to women having the care of the deceased's children (s 24; 1965 s 24).

These are the basic features of the insurance scheme. A separate claim has to be made for the benefit sought and all claims for benefit have to be submitted in the first place to an insurance officer, but different procedures have to be followed in relation to a claim for disablement benefit from those followed where the claim is for injury benefit. Claims for injury benefit and questions arising in connection therewith are, if they are not 'special questions', dealt with by an insurance officer. He can allow such a claim in whole or in part, or reject it or refer it to a local appeal tribunal for decision, but he can only do so if he is of the opinion that no 'special question' arises. If he thinks that one does, he must refer it to the person or body prescribed by the Act for determination.

Claims for disablement benefit involve the determination of 'special questions', namely, whether the relevant accident has resulted in a loss of faculty, and whether the ensuing disability is to be assessed at one per cent or more. They, and the question what period is to be taken into account by the assessment, have to be determined by a medical board or medical appeal tribunal constituted under the Act (s 36 (1) (c); 1965 s 37). They cannot be decided by an insurance officer or local appeal tribunal or by the industrial injuries commissioner.

All other questions arising in relation to a claim for disablement benefit have to be decided by an insurance officer or, if referred by him to a local appeal tribunal, by that tribunal in the first instance. An appeal lies from a decision of an insurance officer to a local appeal tribunal and from a local appeal tribunal to the commissioner (hereafter for convenience, referred to as 'the statutory authorities'). The appeal to the commissioner is not limited to a point of law.

An appeal lies from a decision of a medical board to a medical appeal tribunal, and from a medical appeal tribunal to the commissioner only on a point of law. For convenience I will hereafter refer to a medical board and a medical appeal tribunal as 'the medical authorities', although they are, of course, just as much creatures of statute as the statutory authorities, and despite the fact that medical questions which

arise on claims for injury benefit are decided not by them but by the statutory authorities. The Act makes provision for the review of decisions of medical and statutory authorities and there is a wider power of review of the decisions of the latter than of the former (ss 40 (1), 50 (1); 1965 ss 40 (1), 49 (1)). Whether there was an accident and whether it caused personal injury are questions which have to be decided by the statutory authorities both when the claim is for disablement benefit and when it is for injury benefit.

It was argued for the appellants that a decision by the statutory authorities on a claim for injury benefit that the accident had caused a particular injury was binding on the medical authorities in relation to a claim for disablement benefit. If they found that there was a loss of faculty causing one per cent or more disability due to an injury suffered by the claimant, they were bound, it was said, to hold that that injury was caused by the accident, if prior to their consideration of the matter the statutory authorities had held that it was, even though in their opinion that was clearly not the case. Equally, if the statutory authorities decided, before the medical authorities considered the matter, that the accident had not caused the alleged injury, disablement benefit could not be awarded even though the medical authorities were firmly of opinion that there was such a loss of faculty due to the injury and that the injury was caused by the accident.

Counsel for the appellant Hudson conceded that the converse must equally be true, that if the medical authorities decided that an injury was or was not due to the accident in the course of determining whether there was any loss of faculty due to the relevant accident, and did so before the statutory authorities had to consider that question in relation to a claim for injury benefit, the decision of the medical authorities in relation to a claim for disablement benefit would be binding on the statutory authorities in relation to the claim for injury benefit. So, if the medical authorities held that the accident had not caused the injury, the statutory authorities would be precluded from awarding injury benefit even if they were satisfied that the accident had caused the injury and had caused incapacity for work.

I think it inherently improbable that Parliament, when devising the system for the administration of the scheme, intended that a claim for injury benefit might be affected by a decision on a disablement benefit claim or vice versa and that the right to a benefit might depend on whether the statutory authorities or the medical authorities 'got in first'. While it is true that claims for injury benefit and for disablement benefit arise from an accident causing injury, the system devised and embodied in the Act in my opinion provides that such claims should from their inception be dealt with differently and separately.

Further, if the argument advanced is valid, it leads to some curious results. Where there had been a prior decision by the statutory authorities, it would mean that the medical authorities were precluded from discharging the duty imposed on them by the Act of determining whether there was a loss of faculty due to the relevant accident. If the statutory authorities had held that the injury was not caused by accident, they would be bound to say that there was no loss of faculty due to the accident without themselves having given any consideration to that question. If the statutory authorities held that the injury was due to the accident, they would only be able to decide whether it caused a loss of faculty. In neither case would they be deciding the question which the statute says they are to decide. In the first case, the decision would be that of the statutory authorities and in the second a decision on only part of the question entrusted to them. If Parliament had intended their function to be so limited, that could easily have been made plain in the Act, but I can find no indication of any such intention.

If this argument is right, it would also, I think, mean that a local appeal tribunal and a medical appeal tribunal might be inhibited in the discharge of their appellate functions. If an insurance officer decides that an injury is not due to the accident, that decision, it is said, is binding on the medical board which consequently has to hold that

a the injury was not caused by accident. If an appeal from the insurance officer comes before the local appeal tribunal after the medical board's decision, the local appeal board will, if the argument prevails, have to follow the decision of the medical board. If thereafter an appeal from the medical board is heard by a medical appeal tribunal, that tribunal could not allow the appeal as it would be bound by the decision of the local appeal tribunal. If there was then an appeal from the local appeal tribunal to the commissioner, he too could not allow the appeal for he would be bound by the decision of the medical appeal tribunal. So, if the course of dealing with the claims followed this sequence, as they might, the appeal provisions in the Act would be rendered nugatory and there would in reality be no effective appeal from the original decision of the insurance officer. This cannot have been the intention of Parliament.

c In support of their contention the appellants relied on *Re Dowling*² and it is convenient to consider that case now. Dowling felt an acute pain in his chest when he was lifting a heavy granite flagstone in the course of his employment. A small hiatus hernia was diagnosed. An insurance officer rejected his claim for injury benefit. His decision was upheld by the local appeal tribunal but the commissioner (H I Nelson Esq QC) on appeal held that the hernia was traumatic in origin and consequently that Dowling was entitled to injury benefit. Thereafter Dowling claimed disablement benefit. The medical board rejected his claim holding that the hernia was not caused by the accident. The medical appeal tribunal dismissed his appeal. On appeal to the commissioner on a point of law, he held that there had been no error in law and so dismissed the appeal.

e The question to be decided in this House was whether the decision of the commissioner in relation to the claim for injury benefit that the hernia was caused by the accident was binding on the medical authorities. If it was, all they were entitled to consider was whether a loss of faculty had resulted from the hernia and, if so, the degree of disability caused thereby. The same question would have arisen if the insurance officer had held that the hernia was caused by the accident. My noble and learned friends, Lord Reid and Lord Morris of Borth-y-Gest, Lord Hodson and Lord Guest held that the decision on the injury benefit claim that the hernia was caused by the accident was binding on the medical authorities. My noble and learned friends, Lord Reid and Lord Guest agreed with the speech of my noble and learned friend, Lord Hodson. Lord Morris of Borth-y-Gest reached his conclusion on different grounds. My noble and learned friend, Lord Hodson, said³:

g 'In the ordinary case where accident and injury are separate, there is no difficulty, but here the accident and the injury are the same. There would be no accident but for the injury. The problem in this case is to determine whether the decision of Mr. Commissioner NELSON stands, or whether it is cancelled by the subsequent decision of the medical tribunal. In my judgment, the "question" which the commissioner had to decide was one arising in connexion with a claim for benefit within the language of s. 36 (2) of the Act. In order to ascertain whether there was an accident, he had to resolve the conflict of medical testimony and, in doing so, he was acting within his jurisdiction. His decision is, accordingly, final according to the terms of s. 36 (3) of the Act . . . which provides: "Except as provided by this Part of this Act . . . any decision of a claim or question as provided by the foregoing provisions of this section shall be final." There is no reason to limit the meaning of the word "final", as the Minister seeks to do, to the particular claim which is being dealt with. The claims for injury and disablement benefit are linked together and in the normal case they follow one another.'

I regret that I cannot agree with this. I do not think that it is correct to say that claims for injury benefit and for disablement benefit are linked together. While

2 [1967] 1 All ER 210, [1967] 1 AC 725

3 [1967] 1 All ER at 219, [1967] 1 AC at 750

it is true that each claim must be based on an accident causing injury, apart from that different questions have to be decided in relation to each claim and by different bodies and a separate claim must be made for each benefit. a

While I do not seek to restrict the meaning of the word 'final', I cannot agree that in this Act it has the meaning given to it by my noble and learned friend. To say that a decision is final means that the decision cannot be altered and that there can be no further appeal from it. Section 36 (3) provides that decisions to which that subsection applies cannot be altered save as provided by the Act. It does not mean that a decision on a claim for one kind of benefit or on a question arising in connection therewith is binding and conclusive in relation to a claim for another kind of benefit or on a question arising in connection therewith. The words 'conclusive' and 'final' appear in a number of places in the Act and it is not, I think, conceivable that Parliament and the draftsman intended them to have the same meaning. Indeed, consideration of the sections in which the words appear show that in the Act the word 'final' is used in the sense I have stated and that where it is intended that a decision shall be binding in other proceedings the word 'conclusive' is used. b

Section 37 (5) states that the 'decision of the High Court on a reference or appeal under this section shall be final'. There the word 'final' means that there can be no appeal from that decision and that that decision is unalterable: s 49 (4) (1965 s 48 (4)) provides that a declaration that an accident was or was not an industrial accident is 'conclusive for the purposes of any claim for benefit in respect of that accident'. Section 72 (1965 s 70) contains both words. Section 72 (1) provides that in any proceedings (a) for an offence under the Act; or (b) involving any question as to the payment of contributions under the Act; or (c) for the recovery of any sums due to the Industrial Injuries Fund, the decision of the Minister on any 'special question' which has to be determined by him, subject to an appeal to the High Court on a question of law, shall, unless such an appeal is pending or the time for appealing has not expired, 'be conclusive for the purpose of those proceedings'. Section 72 (2) also provides that decisions on certain other questions are to be 'conclusive for the purpose of those proceedings' unless the question has been referred or the time for referring it has not run out, or a case has been stated or the time for applying for one to be stated has not expired. And s 72 (4) provides that where an appeal is pending or any application for a reference or for a case to be stated has been made or the time for appealing or for making such an application has not expired, the court dealing with the case 'shall adjourn the proceedings until such time as a final decision on the question has been obtained'. Again here 'final' must mean an unalterable and unappealable decision. c

I do not think that it is right to interpret the word 'final' in s 36 (3) as meaning 'conclusive for the purposes of any claim for benefit', the words used in s 49, and it appears to me that my noble and learned friend, Lord Hodson⁴, has given the word 'final' that meaning. If that had been the intended meaning, I would have expected the word used in s 36 (3) not to be 'final' but to find in the subsection words similar to those used in s 49. d

I find support for my view on this in the decision of this House in *Inland Revenue Comrs v Brooks*⁵, which was not cited in *Re Dowling*⁶. There the question was what meaning was to be given to the word 'final' in s 57 (10) of the Taxes Management Act 1880, which stated: e

'Appeals once determined by the General Commissioners . . . shall be final; and neither the determination of the Commissioners nor the assessment then and there made thereupon shall be altered at any subsequent meeting, or at any other time or place, except by order of the High Court when a case has been required as provided by this Act.'

f

4 [1967] 1 All ER at 219, [1967] 1 AC at 750 6 [1967] 1 All ER 210, [1967] 1 AC 725

5 [1915] AC 478

a Mr Brooks's income for income tax purposes had been determined by the General Commissioners. The Special Commissioners were required to determine his income for the same period for the purposes of super-tax. The Revenue contended that the Special Commissioners were bound by the General Commissioners' determination. It was held that they were not. Earl Loreburn said in reference to s 57 (10)⁷:

b 'It does not say that the determination is to be final for all purposes. When, therefore, another tax is imposed by another statute, whether it be a duty of income tax or not, and a different tribunal is directed to estimate the same figure as part of a greater whole, I do not read the section as imposing upon the new tribunal a duty to accept the determination of the old.'

And Lord Atkinson said⁸:

c 'In my view . . . the provisions as to the finality of the determination of the Commissioners for General Purposes . . . do not mean that the determinations . . . are to be final and conclusive, not only in the particular matter on which they were actually pronounced, but in all other matters and for all other purposes. Mr Ryde, for the respondent, but it correctly, I think, in saying that the s 57, sub-s. 10, simply means that there shall be no further proceedings before the Commissioners in the particular matter of dispute or inquiry which is the subject of the appeal.'

d

Section 36 (3) provides that except as provided 'any decision of a claim or question as provided by the foregoing provisions of this section shall be final'. The questions as provided by the foregoing provisions of the section are special questions and 'any question arising in connection with a claim for or award of benefit' (s 36 (2)). The 1965 Act, by s 50 (1), altered the language. It provides that except as provided by this Part of this Act any decision of a claim or question 'in accordance with this Part of this Act shall be final'. As the 1965 Act was a consolidation Act, this change of language does not, in my opinion, involve a change of meaning.

e

Much argument was directed to the meaning of the words 'any question arising in connection with a claim'. I do not think that they cover all incidental questions that have to be decided, for s 46 (2) (1965 s 45 (2)) distinguishes between decisions of a local appeal tribunal and the findings of fact material to a decision and s 36 (3) only applies to 'any decision of a claim or question'.

f

Power is given by s 51 (1965 s 50) to make regulations for prescribing the evidence to be required in connection with the determination of a claim or a question arising in connection therewith. It is unlikely that the power would be taken to make such regulations in respect of findings of fact and so this regulation-making power gives some support to the view that the words in question did not cover findings of fact material to a decision.

g

Section 45 (1) (1965 s 44 (2)) inter alia provides that all questions arising in connection with a claim for benefit must be submitted in the first instance to an insurance officer but this does not, I think, mean that the words are only intended to cover questions arising independently of a claim. That would give to the words too limited a meaning. I think that the words were intended to mean questions arising under the Act in connection with a claim and that they do not cover questions that have to be decided in order to determine a question which arises under the Act.

h

A decision that there was an accident which caused injury is, in my view, a decision on a question arising under the Act in connection with a claim and so final, save as provided by the Act, for the purposes of the claim. If the only injury alleged is hernia, then a decision that the accident caused injury is a decision that the accident caused the hernia and that is final save as provided by the Act. But as I have said, in my opinion it is final for the purposes of that claim and not conclusive in relation to a different claim.

j

I agree that Mr Commissioner Nelson had to resolve a conflict of medical testimony and that it was within his jurisdiction to do so, but I do not agree that the question for decision in the *Dowling* case⁹ was whether his decision was cancelled by the decision of the medical appeal tribunal. There is no appeal to that tribunal from his decision, which was final for the purposes of the injury benefit claim. No decision by the medical appeal tribunal could cancel his decision. The question is, not whether his decision was cancelled but whether his decision restricted that tribunal in the discharge of its statutory duty. I do not think it did.

I also do not agree that in the *Dowling* case⁹ the accident and the injury were the same. While it is true that there would have been no accident but for the injury, it does not appear to me to follow that the accident and the injury were the same. The words 'injury caused by accident' are no doubt derived from the Workmen's Compensation Acts. In those Acts and in these Acts 'accident' is treated as something distinct and separate from 'injury', and unless the accident caused injury there could be no claim for compensation under those Acts nor can there be for benefit under these. 'Accident' is not defined. I think it simply means the event or happening which caused the injury, in other words the cause of the injury. In *Dowling's* case⁹ the event or happening was the lifting of a heavy flagstone and the question which had to be determined in respect of both claims was whether that had caused the hernia. To say that the hernia, the injury, was the accident does not appear to me correct.

My noble and learned friend, Lord Morris of Borth-y-Gest, did not found his opinion at all on s 36 (3) and the meaning to be given to the word 'final'. He agreed that the decision on the injury benefit claim that the hernia was caused by accident was binding on the medical authorities when they considered the disablement questions and did so on two distinct grounds, each of which differed from those stated by my noble and learned friend, Lord Hodson. Lord Morris regarded the case as exceptional¹⁰ 'because a decision as to what caused the injury complained of also resolved the question whether there was an accident at all' and said¹¹ that, until there had been a determination that there had been an accident, a medical board would not be called upon.

He held that¹² 'A medical board could not reverse a determination which was a prerequisite to their being convened' and thought that the case could be decided on this ground alone. He went on to say¹³:

'Whether he does so suffer a loss of faculty "as the result of the injury" will be a question for determination by a medical board; but, in my view, the statutory language shows that they are only concerned with questions whether loss of faculty is the result of injury. They start with the premise that there has been injury caused by accident. They cannot say that there has been no injury. That will have been determined before they are invited to act.'

Both Lord Morris of Borth-y-Gest and Lord Hodson appear to have regarded the facts in *Dowling's* case⁹ as exceptional. The present appeals show that they may not have been so exceptional and, indeed, there may be a considerable number of cases in which the facts are very similar.

In the majority of cases, no doubt, a claim for injury benefit is made and determined before a claim for disablement benefit is decided, but the appellant Hudson's case shows that that is not always the case and that the decision of a medical board on a disablement benefit claim may precede the determination of an injury benefit claim.

⁹ [1967] 1 All ER 210, [1967] 1 AC 725

¹⁰ [1967] 1 All ER at 215, [1967] AC at 744

¹¹ [1967] 1 All ER at 216, [1967] 1 AC at 744

¹² [1967] 1 All ER at 216, [1967] 1 AC at 745

¹³ [1967] 1 All ER at 216, 217, [1967] 1 AC at 746

a Both the grounds stated by my noble and learned friend, Lord Morris of Borth-y-Gest, appear to me to depend on his conclusion that there must have been a determination that injury was caused by accident before the disablement questions come before a medical board. I cannot myself find any indication in the Act that this must be so although I recognise that it might happen. If it is so decided on an injury benefit claim, that will not, for the reasons I have given, be a final conclusion in relation to the disablement benefit claim.

b It is true that an insurance officer dealing with a disablement benefit claim can decide that the accident caused a particular injury. If he did so before the disablement questions were decided by a medical board, his decision would be final by virtue of s 36 (3) and binding on them. Where there is doubt whether the injury resulted from the accident, it is, as I read the Act, open to the insurance officer to defer a decision until after the decision of the disablement questions.

c Section 48 (1) (1965 s 47 (1)) provides that if on consideration of a claim or question the insurance officer is of opinion that a special question arises, he shall refer it for determination as required by the Act and deal with any other questions as if the special question had not arisen. Disablement questions, that is to say, the questions whether there has been a loss of faculty due to the relevant accident and, if so, the extent of the resulting disability, are special questions which he must refer to a medical board. This section does not require him, nor is there any provision in the Act which requires him, to decide whether or not there has been an accident causing injury before he refers the special questions to the medical board and before those questions are decided. If that was the intention of Parliament, one would expect to find some provision to that effect. The fact that the Act does not so provide permits a measure, and I think a desirable measure, of flexibility in its administration.

d A number of questions have to be decided before an injury benefit claim or a disablement benefit claim is allowed. In relation to an injury benefit claim on which no special question arises, the insurance officer, or, if he refers it to them, the local appeal tribunal, has to decide before the claim is allowed that there has been an accident causing injury and that the injury caused incapacity for work. In some cases an insurance officer may reject a claim on the ground that there was no accident causing injury. In others he may conclude that even if there was such an accident, there was no incapacity for work and he may reject the claim on that ground without deciding whether there was an accident causing injury. The Act does not prescribe the order in which he has to decide these questions and I see nothing in the Act to prevent him from rejecting a claim on one ground without deciding the other questions which have to be decided before a claim is allowed.

e Similarly on disablement benefit claims the Act does not provide, as it could have done, that the questions which have to be resolved for a claim to be allowed have to be decided in any particular order. In the appellant Jones's case there was no decision on the disablement benefit claim whether the accident caused the injury before the matter was referred to the medical board. I am consequently unable to agree with my noble and learned friend that a medical board will not be called on until there has been a decision that there had been an accident causing injury and that such a board starts with the premise that there has been injury caused by accident. Nor am I able to agree that the statutory language shows that they are only concerned with whether loss of faculty is the result of the injury. The statutory language leads me to the contrary conclusion.

f Section 11 (1) provided for payment of injury benefit if 'as the result of the relevant injury' the claimant is incapable of work. Section 12 (1) of the Act similarly provided that the loss of faculty must be 'the result of the relevant injury' but s 36 (1) (c) defined the first of the two disablement questions to be decided by a medical board as 'whether the relevant accident' resulted in a loss of faculty. That discrepancy between s 12 (1) and s 36 (1) (c) was eliminated by the 1953 Act which amended s 12 (1) by the deletion of the word 'injury' and the insertion in its place of the word 'accident'.

So the 1946 Act as so amended and the 1965 Act provide that the relevant accident, not the relevant injury, must have resulted in a loss of faculty. If this change had not been made in 1953 the argument that all the medical authorities were required to do was to decide whether there was a loss of faculty due to the injury would have been more persuasive. Parliament must have changed the word deliberately and perhaps did so with a view to making it clear that such an argument was invalid. However this may be, both s 12 (1) as amended and s 36 (1) (c) require the medical authorities to decide whether the relevant accident caused a loss of faculty, and I cannot, therefore, agree that the statutory language shows that a medical board is only concerned with whether loss of faculty is the result of the injury. It is for these reasons that I feel compelled to dissent from the grounds put forward by my noble and learned friend for his conclusion.

I take *Re Dowling*¹⁴ to have decided that a decision by the statutory authorities which preceded a decision by the medical authorities, that the hernia was caused by accident, was binding on the medical authorities. I think that that decision was wrong and, unless these appeals can be distinguished from it, one must consider whether it should now be followed.

The appellant Jones claimed injury benefit on 27th February 1964, the same day as the accident, on the ground that he had hurt himself when lifting a piece of scrap metal. When in hospital he was found to be suffering from a myocardial infarction. The insurance officer rejected the claim while accepting that his incapacity since 27th February had been due to myocardial infarction. He did so on the ground that that condition had not been brought about by the work he had been doing. The local appeal tribunal allowed his appeal on 6th November 1964, holding that the infarction was due to the exceptionally heavy work he had been engaged on. On 25th November he claimed disablement benefit.

The report of the medical board contains his account of the accident. The board examined him and found that he was suffering from a 'strain chest' and a myocardial infarction. They held that the strain resulted from the accident but that the myocardial infarction did not. They assessed the disability due to the strain at 3 per cent. The medical appeal tribunal found no reason to disagree with the medical board and the commissioner on appeal to him held that the medical appeal tribunal had not erred in law.

If the decision of the statutory authorities was binding on the medical authorities, they had to accept that he had suffered the myocardial infarction as a result of an accident. They did not do so, but accepted that the strain had been caused by the accident. They thus did not negative the conclusion that on 27th February the appellant Jones had suffered personal injury by accident but they substituted another injury to that found by the statutory authorities to have been caused.

It was on the ground that their decision did not involve the conclusion that there had been no injury by accident on 27th February that the commissioner, the Divisional Court¹⁵ and the Court of Appeal¹⁶ distinguished this case from that of *Dowling*¹⁴.

If the medical board had not on 17th December found that the appellant Jones was suffering from a strain, the case would be indistinguishable from *Dowling*¹⁴; and if the medical authorities had regarded themselves as bound by *Dowling*¹⁴ they would have had to assess the degree of disability due to myocardial infarction although in their opinion that did not result from the accident. If, however, the distinction drawn between this case and *Dowling*¹⁴ is valid, they can avoid doing so, if on examination of the claimant they are able to discover another distinct injury. This is bound, if right, to lead to anomalies, to one man getting disability benefit for a loss of faculty which in the opinion of the medical authorities did not result from the accident if on examination he was not found to be suffering from some other injury due to the accident, and to another man not getting disablement benefit for the same loss

¹⁴ [1967] 1 All ER 210, [1967] 1 AC 725

¹⁶ [1970] 1 All ER 97, [1970] 1 QB 477

¹⁵ [1969] 1 All ER 638, [1970] 1 QB 477

a of faculty if the medical authorities found him to be suffering from some other injury due to the accident. Such a result cannot, I think, have been contemplated by Parliament.

In my view, the distinction drawn is invalid. The injury found by the local appeal tribunal to have been caused was myocardial infarction. If, in consequence of *Re Dowling*¹⁷, that conclusion is binding on the medical authorities, they must accept b that myocardial infarction was caused by the accident and cannot avoid doing so by finding that the accident caused another injury. So, in my opinion, if *Re Dowling*¹⁷ stands, the appeal by the appellant Jones must be allowed.

The facts of the appellant Hudson's case are more complicated. On 19th January 1965 he hurt himself while lifting a heavy weight. He did not then claim injury benefit but on 20th September 1965 he applied for a declaration that he had suffered c an industrial accident on 19th January. In his application he was required to state what injury he had suffered. He stated that it was a hernia. His employers were required to complete a form which included the question, 'Are you satisfied that an accident occurred at the time, date and place stated?' To that the answer was 'Yes'. It also contained the question 'What injuries were observed or reported?' To that the answer was 'Suspected hernia'. The form sent to the employers was then stamped d with a rubber stamp which stated that the accident was an industrial accident. Later, on 3rd November 1965, the appellant Hudson claimed disablement benefit, stating in answer to the question 'In what way are you disabled as a result of the accident?', 'Suffered hernia'.

On 20th December 1965 the medical board found that the hernia resulted from the accident. They also found him to be suffering from a myocardial infarction. e They treated that condition as unconnected with the accident as no claim had been made on that account although they said that the considerable strain to which he had been subjected 'might also be the cause of the heart lesion'. On 13th July 1966 he claimed injury benefit, and on 5th August that claim was allowed. It was stated by the Ministry that 'no separate decision was given by the insurance officer in this case' and consequently it is not known whether he decided that the appellant f Hudson's incapacity for work was due to the hernia, or to his heart condition or to both. He had a heart attack the day after the accident. The medical appeal tribunal on 27th September 1966, dismissed the appellant Hudson's appeal. They said that the 'substantial question' was 'whether or not the heart condition is attributable to the accident' and said:

'Exertion being of itself no precipitating factor in myocardial infarction, we g can find nothing in this case to associate that condition with the relevant accident.'

They assessed the degree of disability due to the hernia at 3 per cent.

On these facts the following questions arise for consideration: (1) what was the effect of the declaration that the accident was an industrial accident; (2) whether h the medical board decided that the myocardial infarction was unconnected with the accident; and (3), if so, is that decision to be treated as final in the sense of conclusive and so binding on the statutory authorities when they came to consider the claim for injury benefit?

The declaration was made under s 49 (1965 s 48) which provided by sub-s (5) that:

'... an accident whereby a person suffers personal injury shall be deemed j ... to be an industrial accident if—(a) it arises out of and in the course of his employment; (b) that employment is insurable employment; and (c) payment of benefit is not, under the provisions of Part II of this Act, precluded because the accident happened while he was outside Great Britain ...'

Such a declaration is, as I have said, conclusive for the purposes of any claim for benefit in respect of that accident (s 49 (4); 1965 s 48 (4)).

Of what is it conclusive? It must be conclusive on whether the accident arose out of and in the course of his employment, on whether that employment was insurable employment, and on whether payment of benefit is not precluded because the accident happened while he was outside Great Britain. If, it may be years after the event, he claims disablement benefit or death benefit is claimed, the claimant is relieved by the declaration from having to deal with these matters. Is it conclusive that there was an accident? I think the answer must be 'Yes' for there can be no point in making a declaration that an accident was an industrial accident if later it can be said that there was no accident at all. Is it conclusive as to the accident having caused injury? Again I think for the same reason, it must be. The vital question is, is it conclusive as to the nature of the injury caused?

Section 49 (1) provides that where in connection with a claim for benefit, it is determined that the relevant accident was or was not an industrial accident, an express declaration of that shall be made and recorded. This language strongly suggests that such a determination has not to be made on every claim for benefit but only on some claims, and on those in which some or all of the matters on which the declaration is to be conclusive are in issue. Section 49 (1) goes on to provide that a claimant shall be entitled to have the question whether the relevant accident was an industrial accident determined even if his claim is disallowed on other grounds, and s 49 (2) enables a person who has suffered a personal injury by accident to have it determined whether or not the accident was an industrial accident without making any claim for benefit.

In these three cases, *Re Dowling*¹⁸ and the present appeals it would appear that on the day of the accident all three claimants suffered some injury by accident while at work. They all hurt themselves when lifting a heavy weight. If an insurance officer was satisfied that that was the case he could have made a declaration that the accident was an industrial accident without reaching any conclusion as to the precise nature of the injury suffered as a result of the accident. On an injury benefit claim when such a declaration has been made, the statutory authorities have still to determine whether there was incapacity for work, its cause and whether that resulted from the accident. On a disablement benefit claim, the medical authorities are not relieved by the making of such a declaration from discharging the duty the Act places on them of deciding whether there was a loss of faculty due to the accident. For the Act does not provide that the making of such a declaration relieves the statutory and the medical authorities of the obligation to decide these questions. If that had been the intention of Parliament, one surely would find some indication of it in the Act and the absence of any such indication leads me to the conclusion that such a declaration is not conclusive as to the nature of the injury suffered although conclusive that there was some injury due to the accident, some injury, it may be, of so trivial a character as not to give rise immediately to a claim for injury or for disablement benefit.

While I recognise that s 49 does not fit in very well with other provisions of the Act and with its general structure, I cannot interpret a declaration made under it as being conclusive as to the nature of the injury caused by the accident when the section contains no indication that that is to be the case.

As to the second and third questions, I do not think that the medical board can be regarded as having decided that the myocardial infarction was unconnected with the accident despite the fact that in their report they stated that it was for they said that the strain to which he had been subjected might have caused the heart lesion. It is, I think, clear from their report that they only entered that condition as unconnected as the claim for benefit had not been based on it. If, however, they had decided that the infarction was unconnected with the accident, their decision would, in the light of *Re Dowling*¹⁸, have been binding on the statutory authorities who would then have had to reject the claim for injury benefit.

- a Taking the view I do of the decision of the medical board, it was open to the insurance officer to award injury benefit on the ground that incapacity for work was due to the infarction and that that was caused by the accident. As I have said the ground on which the award was made is not recorded. It may have been on account of the hernia or the heart condition or both. One does not know. If it was awarded wholly or partly on account of the heart condition, then, if *Re Dowling*¹⁹ is to be applied, it was not open to the medical appeal tribunal to say that the accident had not caused the infarction and they and the commissioner erred in law in that respect.

- b So, again, if *Re Dowling*¹⁹ is followed, in my view if it be assumed that the insurance officer made his award on account of the heart condition, I see no alternative to allowing the appeal in the appellant Hudson's case. I do not, however, think that that should be assumed. It is for the appellant to show that that was the ground of the insurance officer's decision. Owing to the failure to record the grounds for that decision, he is not in a position to do so and consequently, although I do not regard it as a satisfactory result, even if *Re Dowling*¹⁹ stands, in my opinion his appeal fails. The fact that an insurance officer can award injury benefit without disclosing or recording his grounds for doing so does, however, lend some support to my view that decisions on injury benefit claims are distinct from and do not affect claims for disablement benefit and vice versa.

- d I now turn to the question whether *Re Dowling*¹⁹ should be followed. It is a comparatively recent decision and may not as yet have affected many claims. It is simply a decision on the construction of a statute. It is of great importance that the law should be as certain as possible and only in rare cases should this House regard a previous decision by the House as one not to be followed. Nevertheless, if the view be that the decision is clearly wrong, it is I think easier to decide that a recent case should not be followed than if it is one that has stood for a long time, for if it is in the latter category many may have acted in reliance on it. I see no valid reason for thinking that this House should be especially reluctant to correct an error if the decision thought to be wrong is as to the construction of a statute.

- e If *Re Dowling*¹⁹ is adhered to, I think that it is bound to be productive of anomalies between claimants for benefits out of the Industrial Injuries Fund. I think that that decision was wrong and also that the distinction sought to be drawn between that case and these appeals is also invalid and would, if valid, be productive of serious anomalies. When Lord Gardiner LC announced on 26th July 1966²⁰ the change in practice then adopted, he said, *inter alia*, that we should 'depart from a previous decision when it appears right to do so'. I think that it would be right to do so on this occasion and therefore would dismiss both appeals.

- f If I cannot conclude this speech without referring to one matter which caused me considerable concern. The medical appeal tribunal in the appellant Hudson's case appear to have held the opinion that myocardial infarction could not be caused by exertion. If that is right, the onset of the infarction was an unhappy coincidence with the lifting of a heavy weight. Our attention was drawn to a recent decision reported in the Digest of Decisions of the Commissioners published by the Stationery Office under the number R(1) 12/68 where it was held that infarction resulted from the effort required to lift a wardrobe. In that case the opinions of two eminent men in the medical profession were obtained. In the light of this decision it would seem that there has been a change in medical opinion and that it is possible that if the appellants Jones's and Hudson's claims for disablement benefit had now to be decided, they would meet with a different fate.

- g It does not appear that there is any provision in the Act which enables a decision by the medical authorities to be reviewed in consequence of a change of opinion in the medical profession or of advances in medical knowledge. It is, I think, regrettable that there is no power to review such decisions on those grounds.

For the reasons I have stated, in my opinion both appeals should be dismissed.

19 [1967] 1 All ER 210, [1967] 1 AC 725

20 See Note [1966] 3 All ER 77, [1966] 1 WLR 1234

LORD WILBERFORCE. My Lords, in order to avoid repetition and to simplify comparisons I have set out the basic relevant facts in a table (on the opposite page) which I hope enables the proper place and effect of *Minister of Social Security v Amalgamated Engineering Union (Re Dowling)*¹ to be seen. The dates of the various events repay a moment's study, for they illustrate, without nearly exhausting, the variety of the order, character and quality of decisions which may be found in individual cases, and the haphazard consequences which may flow from holding 'final', in the sense of 'conclusive for all purposes', whatever decision may come first. This may be anything from a reasoned decision on appeal by a body of medical experts after a full examination of evidence or by a commissioner on a full oral hearing (cf *Dowling's* case¹) to a decision evidenced by the affixing of a stamp by an insurance officer without any record of the grounds on which it proceeded, these being only ascertainable by inference (cf the appellant Hudson's case). No rational system can fail to take account of these differences; no verbal considerations in the statute should so compel.

I shall not repeat the conclusions to which I came in *Dowling's* case¹; to do so would be otiose now that they have been so effectively restated by the noble and learned Lords in the present appeals. The question which now has to be faced is whether the decision in *Re Dowling*¹ should be followed or departed from, and is one, for me, more difficult than the questions of construction which *Re Dowling*¹ and the present appeals involve.

There is no doubt where, normally, my predisposition would lie. On a question of construction of an Act of Parliament, as to which this House has the last word until Parliament itself intervenes, there are strong objections against a change of course by this House. Unless the cases, first and subsequent, wholly coincide, there may be a doubt which decision of the House, on one point or another arising in a future case, prevails, and litigants may be encouraged in future disputes, under this and other Acts, to take the chance of an appeal here, in the hope of procuring a departure, when otherwise they would not have done so. So even though (as I do) I found the decision in *Re Dowling*¹ unacceptable, I should be disposed to follow it.

I am so willing, insofar as *Re Dowling*¹ proceeded on the identification of accident with injury, even though this conclusion was based on an unverified assumption that this was an exceptional case. *Re Dowling*¹ was treated as such a case, and both majority opinions made this identification the basis of decision. The medical boards could not, it was said, reach a conclusion which would destroy the basis of their jurisdiction. It is when one goes further than this that I find difficulty. It is now said that *Re Dowling*¹ is authority for the proposition that 'final' in s 36 (3) of the National Insurance (Industrial Injuries) Act 1946 (s 50 (1) of the National Insurance (Industrial Injuries) Act 1965) means conclusive for the purpose of any claim to benefit. This is now said to be so generally, and not only in the special accident/injury case which *Re Dowling*¹ was.

I cannot bring myself to accept this. To do so means not merely accepting *Re Dowling*¹ but vastly extending it. It means applying to all cases under these Acts the principle of the finality of the first decision. This, to my mind, and I regret that I cannot be more unemphatic, is contrary to the plainest indications in the Act itself, is a conclusion not fully argued out in the opinions in *Re Dowling*¹, and is one likely to produce confusion and haphazard results. Of these the appellant Hudson's case is an excellent illustration, and the appellant Hudson's case is at least as normal a type of proceeding as *Re Dowling*¹. My loyalty to stare decisis, and my respect for those who decided *Re Dowling*¹, cannot extend so far as this and I would, in agreement with my noble and learned friends, Viscount Dilhorne and Lord Diplock, take another view.

I think there is no doubt that unless *Re Dowling*¹ is followed on this point, of what 'final' involves, neither appeal can succeed. So I must agree with those of your Lordships who would dismiss them.

M/I=Myocardial infarction
IO=Insurance officer

COMPARATIVE SUMMARY OF FACTS

Case	Date of incident	Decisions of statutory authorities on claim for injury benefit				Decisions of medical authorities on claim for disablement	
		Insurance officer	Local Appeal Tribunal	Commissioner	Medical Board	Medical Appeal Tribunal	
Re Dowling ²	3.8.61	Disallowed	Disallowed	4.3.63—Allowed on basis of traumatic hernia	29.4.63—Disallowed. Hernia not traumatic not the result of the relevant accident	6.8.63—Disallowed. Not satisfied on the balance of probabilities	
The appellant Jones	27.2.64 (same day off work for strained shoulder; on 6.3.64 employer says 'strained back')	Disallowed 24.8.64	6.11.64—Allowed on the basis of a finding that M/I was 'connected'	—	17.12.64—Allowed at 3 per cent for 12 months on basis of 'strain chest'. M/I not 'connected'	14.4.65—Affirmed medical board. Not satisfied on the balance of probabilities that M/I caused by the relevant accident	
The appellant Hudson	19.1.65	On 20.9.65 claimant applies for declaration that accident was an industrial accident. On 4.10.65 IO so certified by endorsement on employer's report specifying 'suspected hernia'. On 5.8.66 on basis of medical reports IO authorised injury benefit for period 20.1.65–19.4.65. No express finding but assumed to be on basis of M/I	—	—	20.12.65—Allowed at 3 per cent for life on basis of hernia. Noted that no claim made of M/I, so treated as unconnected	27.9.66—Affirmed medical board subject to variation of date. Found nothing to associate M/I with relevant accident	

LORD PEARSON. My Lords, in my opinion the decision of this House in *Minister of Social Security v Amalgamated Engineering Union (Re Dowling)*³ ought to be followed in the present cases for several reasons. a

First, there is the principle of stare decisis. A decision of this House has had the distinctive advantage of being final both in the sense that it put an end to the litigation between the parties and in the sense that it established the principle embodied in the ratio decidendi. Consequently it provided a firm foundation on which commercial, financial and fiscal arrangements could be based. Also it marked a definite step in the development of the law, irreversible except by Act of Parliament. This distinctive advantage of finality should not be thrown away by too ready use of the recently declared liberty to depart from previous decisions. b

Secondly, in *Dowling's case*³ the courts were confronted with a difficult question of construction arising under a complicated statute. The decision of such questions depends largely on an impression as to the meaning of words in their context, and often different minds have different impressions so that a divergence of opinion results. That is what happened in *Dowling's case*³. There were two conflicting views and each of them was tenable. That which ultimately became the minority view was taken by the three members of the Divisional Court, by one member of the Court of Appeal⁴ and by one of my noble and learned friends in this House. The view which became the majority view was taken by two members of the Court of Appeal⁴ and by four of my noble and learned friends in this House. On a count of judicial voices one might say the slender majority of six to five is not sufficient to prove conclusively the correctness of the view which prevailed, but the voices in favour afford unimpeachable evidence that it is a tenable view, in the absence of any demonstration that it was arrived at per incuriam or is for some other reason clearly unmain- c
tainable. No such demonstration has been given. That seems to me a sufficient reason for not overruling the decision in *Dowling's case*³. If a tenable view taken by a majority in the first appeal could be overruled by a majority preferring another tenable view in a second appeal, then the original tenable view could be restored by a majority preferring it in a third appeal. Finality of decision would be utterly lost. d
e

Thirdly, I must, with respect to all concerned, express my opinion that on the merits the decision of the majority in *Dowling's case*³ is acceptable and should be followed. f

Both for the explanation of the decision in *Dowling's case*³ and for the decision of the present appeals it is necessary to examine some of the provisions of Part II of the relevant Act relating to entitlement to benefit and some of the provisions of Part III relating to the determination of questions and claims. The general point that emerges is that there is a division of jurisdiction between several authorities or sets of authorities, and it is essential to see what are the lines of demarcation between their respective spheres of jurisdiction. g

The relevant Act has been taken for the purposes of these appeals to be the National Insurance (Industrial Injuries) Act 1946, as amended by the National Insurance (Industrial Injuries) Act 1953. It has been agreed that, so far as these appeals are concerned, no material difference would be made by taking the corresponding provisions of later Acts. h

In Part II of the relevant Act, s 7 (1) provides:

(1) Subject to the provisions of this Act, where an insured person suffers personal injury caused on or after the appointed day by accident arising out of and in the course of his employment, being insurable employment, then— i
(a) industrial injury benefit (in this Act referred to as "injury benefit") shall be

3 [1967] 1 All ER 210, [1967] 1 AC 725

4 [1966] 1 All ER 705, [1967] 1 QB 202

- a payable to the insured person if during such period as is hereinafter provided he is, as the result of the injury, incapable of work; (b) industrial disablement benefit (in this Act referred to as "disablement benefit") shall be payable to the insured person if at a time not falling within the said period he suffers, as the result of the injury, from such loss of physical or mental faculty as is hereinafter provided; (c) industrial death benefit (in this Act referred to as "death benefit") shall be payable to such persons as are hereinafter provided if the death of the insured person results from the injury.'

The opening words of s 11 (1) provide:

'An insured person shall be entitled to injury benefit in respect of any day on which, as the result of the relevant injury, he is incapable of work during the injury benefit period . . .'

- c The opening words of s 12 (1), as amended by s 33 of the 1953 Act, provide:

'Subject to the next following subsection, an insured person shall be entitled to disablement benefit if he suffers as the result of the relevant accident from loss of physical or mental faculty such that the extent of the resulting disablement assessed in accordance with the following provisions of this section amounts to not less than one per cent . . .'

- d Sections 19 to 24 provide death benefits for various persons—widows, widowers, children of the deceased's family, parents, relatives and women having the care of the deceased's children—if the appropriate conditions are fulfilled.

- e The first few lines of s 7 (1) have been treated as raising one composite question whether the claimant (or the deceased if the claim is for a death benefit) sustained an industrial accident and this composite question has been referred to as 'the gateway question', because a claimant for benefit has to obtain a favourable answer to this question before he can, so to speak, pass through the gate and into the field where he will be eligible for one of the three benefits if he fulfils the conditions appropriate to that benefit. The composite question can be resolved into the component questions which are its elements, namely, (1) whether the claimant (or the deceased in some cases) was an insured person; (2) whether he suffered personal injury; (3) whether the personal injury was caused by accident; (4) whether the accident arose out of and in the course of his employment, and (5) whether the employment was insurable employment. The claimant must obtain a favourable answer to each of these component questions before he can pass through the gate.

- g In Part III of the relevant Act s 36 makes the division of jurisdiction between the several authorities or sets of authorities. Under sub-s (1) (a) the Minister (i.e. in 1946 the Minister of National Insurance) is to determine six classes of questions, of which the first is whether a person is or was employed in insurable employment. Under sub-s (1) (b) various questions as to family relationships, such as might arise on claims for death benefit, are to be determined in like manner as corresponding questions under the Family Allowances Act 1945. Subsection (1) (c) provides that—

- h 'any question—(i) whether the relevant accident has resulted in a loss of faculty; . . . (iii) at what degree the extent of disablement resulting from a loss of faculty is to be assessed, and what period is to be taken into account by the assessment; shall be determined by a medical board or medical appeal tribunal constituted in accordance with the following provisions of this Act.'

- j The medical board and the medical appeal tribunal have been conveniently referred to as 'the medical authorities', and this expression can include also the commissioner (i.e. the national insurance commissioner) when determining an appeal from a medical appeal tribunal.

Section 36 (2) provides:

'Subject to the foregoing provisions of this section, any claim for benefit and

any question arising in connection with a claim for or award of benefit shall be determined by an insurance officer, a local appeal tribunal or the Commissioner appointed or constituted in accordance with the following provisions of this Act.' a

The insurance officer and the local appeal tribunal have been referred to as 'the statutory authorities' and this expression can include also the commissioner when determining an appeal from a local appeal tribunal. Although the expression is convenient for distinguishing these authorities from the medical authorities, it would not be right to infer that the 'statutory authorities' are wholly unmedical. Under s 43, whereas sub-s (1) provides for local appeal tribunals to consist of employers' representatives and insured persons' representatives and a chairman appointed by the Minister, sub-s (2) provides: b

'Regulations may make provision that in such cases as may be prescribed one or more medical practitioners shall sit with the tribunal either as additional members or as assessors and for the appointment by the Minister of medical practitioners to act for this purpose either generally or for such cases or for such tribunals as the Minister may determine.' c

Section 36 (3) provides:

'Except as provided by this Part of this Act or by the Family Allowances Act, 1945, as applied by paragraph (b) of subsection (1) of this section, any decision of a claim or question as provided by the foregoing provisions of this section shall be final.' d

Section 36 (5) provides:

'Any such question as is mentioned in subsection (1) of this section is hereafter in this Act referred to as a "special question", and the questions mentioned in paragraph (c) of that subsection are hereafter so referred to as the "disablement questions." ' e

Section 39 (1) by its opening words provides that the case of any claimant for disablement benefit shall be— f

'referred by the insurance officer to a medical board for determination of the disablement questions in accordance with the following provisions of this Part of this Act relating to the determination of claims . . . '

Section 45 (1) and (2) provide:

'(1) All claims for benefit shall be submitted forthwith to one of the insurance officers and, subject to the provisions of this Part of this Act, all questions arising in connection with any such claim or with an award of benefit shall in the first instance be so submitted. g

'(2) The insurance officer shall forthwith take into consideration any claim or question submitted to him for examination as aforesaid.'

Subsection (3) contains provisions for the action to be taken by an insurance officer if on consideration of a claim or question he is of opinion that no special question arises. Section 48 (1) provides: h

'If on consideration of a claim or question the insurance officer is of opinion that a special question arises, he shall, subject to and in accordance with regulations—(a) refer the special question for determination as required by this Part of this Act; and (b) deal with any other question as if the special question had not arisen.' j

Section 48 (2) authorises the making of regulations giving some latitude as to the order in which questions are to be dealt with.

Section 49 provides for the making of a declaration that the relevant accident

- a was an industrial accident, even if a claim for benefit is disallowed for other reasons and even if no claim for benefit has been made. Subsection (4) provides:

‘Subject to the provisions of this Part of this Act as to appeal and review, any declaration under this section that an accident was or was not an industrial accident shall be conclusive for the purposes of any claim for benefit in respect of that accident, whether or not the claimant is the person at whose instance the declaration was made.’

b

Subsection (5), so far as it is material for the present purpose, provides:

‘For the purposes of this section, an accident whereby a person suffers personal injury shall be deemed, in relation to him, to be an industrial accident if—(a) it arises out of and in the course of his employment; (b) that employment is insurable employment . . .’

c

There are in this Part of the Act various provisions for appeal from and review of determinations.

Under s 36 (3), subject to certain exceptions ‘any decision of a claim or question as provided by the foregoing provisions of this section shall be final’. One has to consider (i) what are the questions to the decision of which finality attaches and (ii) what is the scope or degree or nature of the finality.

d

The questions to the decision of which finality attaches must, I think, include the questions referred to in sub-s (1), which are there described as ‘questions arising under this Act’, and are ‘special questions’ by virtue of sub-s (5). Also under sub-s (5) disablement questions are a species of the genus special questions. Furthermore, the questions to the decision of which finality attaches must, I think, include the residual questions which are to be determined by the statutory authorities under sub-s (2) and are there described (subject to the foregoing provisions of the section) as ‘any question arising in connection with a claim for or award of benefit’. It can be inferred from s 46 (2) that a distinction is to be drawn between decisions, on the one hand, and, on the other hand, findings on questions of fact material to the decision.

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I think it is clear from s 49 that finality attaches to the decision of the composite question whether there was an industrial accident. But I think finality also attaches to decisions of the component questions arising under ss 7 and 49. One of the component questions is whether the claimant (or the deceased) was employed in insurable employment. That is a special question to be determined by the Minister, and it seems clear from s 36 (1) and (3) that his determination of this question must be final. It is reasonable to suppose that finality attaches equally to the other component questions including the questions whether the claimant (or the deceased) suffered injury and whether the injury was caused by accident, and whether the accident arose out of and in the course of the employment. These are residual questions. They are not special questions to be decided as provided under s 36 (1). Therefore, they fall into residue, so to speak, and can only be determined by the statutory authorities under sub-s (2). These questions arise in every case—they are ‘gateway questions’—and they must be determined by somebody, and there is no one else to determine them except the statutory authorities. I think finality attaches to the decision by the statutory authorities of each of these component questions—whether the person suffered injury, whether the injury was caused by accident, and whether the accident arose out of and in the course of the employment.

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Then what is the scope or degree or nature of the finality which attaches to the decision of these questions? For what purpose is the decision final? Conceivably the finality might be only for the purposes of a claim to some particular benefit— injury benefit or disablement benefit or death benefit. But that does not seem appropriate in relation to the decision of the composite ‘gateway question’ or its component questions to which I have referred. These are not specially related to particular benefits. They are the common and fundamental questions, on each of

which a favourable answer is required as an introductory qualification for any of the three benefits. a

It seems to me there is a division of jurisdiction, and, so far as is material for present purposes, the lines of demarcation are not difficult to discern, and they are evidently intended to prevent contradictory decisions being given by different authorities on the same question. The special questions are assigned to the authorities specified in s 36 (1), and the residual questions are assigned to the statutory authorities by sub-s (2). If the Minister has decided that a person was in insurable employment, surely it is not open to the statutory authorities or the medical authorities to say that he was not. If the medical authorities have decided that the relevant accident resulted in a loss of faculty, surely it is not open to the Minister or the statutory authorities to say it did not? Then equally if the statutory authorities decide that a person sustained personal injury caused by accident arising out of and in the course of his employment, surely it is not open to the Minister or the medical authorities to say he did not? It seems to me to follow from the scheme of determinations for which Part III of the Act provides that a determination by one set of authorities within its proper sphere of jurisdiction must be accepted, and must not be contradicted or ignored, by the other authorities or sets of authorities. b

The insurance officer, being one of the statutory authorities and the initiator, decides whether there was an injury-causing accident arising out of and in the course of the employment. Then he refers the case to the medical authorities for them to determine the disablement questions, the first of which is whether the relevant accident has resulted in a loss of faculty. What is the relevant accident? By definition in s 88 it is 'in relation to any benefit, the accident . . . in respect of which that benefit is claimed or payable'. Initially, when the claimant first makes his claim, there is only an alleged injury-causing accident. But when the insurance officer has decided that the alleged injury-causing accident happened, it must be assumed that it did happen, and that necessary assumption is the basis of the reference to the medical authorities and they must accept it as the basis of their determination of the disablement questions. c

When the statutory authorities decide that an injury-causing accident has happened, they must identify it. In many cases it could be identified without describing in detail or with exactness the nature of the injury: it would be sufficient to state the nature of the injury in general terms, e.g. 'broke his leg' or 'multiple injuries' or 'strained himself' or 'suffered internal injuries'. In such cases the medical authorities would have to accept that there was an accident and that it did cause injury of the general nature described, but they would be at liberty, in considering whether any disability resulted, to form their own view as to the nature of the injury so long as this view was not inconsistent with the general description given in the statutory authorities' decision. d

The special feature of *Dowling's* case⁶ was that the injury was not something separable from the accident: there was no accident apart from the injury. The decision of the statutory authorities was that in effect the heavy work brought on a hiatus hernia; apart from the hiatus hernia there was no accident; the causation of the hiatus hernia by the heavy work was the essence of the accident and a necessary part of its identification. Therefore, when the medical authorities decided that the hiatus hernia was not brought on by the heavy work, they were denying the happening of the accident and thereby contradicting the decision of the statutory authorities and so exceeding their jurisdiction. e

In my opinion, the case of the appellant Jones is similar in principle to *Dowling's* case⁶ and should be decided in the same way. This appellant, when doing some heavy work, felt pain in his back. Some days later he was found to be suffering from myocardial infarction. The insurance officer however, dismissed this appellant's claim for injury benefit on the ground that his incapacity for work was due to the f

⁶ [1967] 1 All ER 210, [1967] 1 AC 725 g

a myocardial infarction and the myocardial infarction was not brought on by the heavy work and so there was no injury by accident arising out of and in the course of his employment. But then this appellant appealed to the local appeal tribunal, and they reversed the decision of the insurance officer, holding that the heavy work did bring on the myocardial infarction, so that there was an injury by accident arising out of and in the course of the employment and as it caused incapacity injury benefit was payable. As there was no further appeal, this decision stood. When this appellant b claimed disablement benefit, the case was duly referred to the medical board for them to decide the disablement questions. The happening and nature of the accident, as decided by the local appeal tribunal, were notified to the medical authorities in this way. On the back of the file sent to the medical board was set out 'Information supplied by National Insurance Office' and para 4, so far as material, was in these terms: 'Description of the incident accepted as the industrial accident . . . Whilst c lifting a buffer on to wagon he sustained a myocardial infarction'. That paragraph correctly stated the effect of the local appeal tribunal's decision. Thus the relevant accident as determined by the statutory authorities and notified to the medical authorities was heavy work causing myocardial infarction. The medical authorities should have taken that determination as the basis of their determination of the disablement questions; they should have determined what was the loss of faculty d resulting from that accident, the occurrence of which they had to assume. Instead of doing that, they held that the heavy work only caused back strain and did not cause the myocardial infarction. Thus their decision contradicted the decision of the statutory authorities as to the happening and nature of the accident, and was ultra vires. The commissioner on appeal held that the decision of the medical authorities was not ultra vires. In my opinion, his decision was incorrect in law and the order e of certiorari should issue. Accordingly I would allow the appeal in the case of the appellant Jones.

The case of the appellant Hudson is more difficult. I will not attempt to describe the series of events, because that has been described in the opinion of my noble and learned friend, Lord Morris of Borth-y-Gest, which I have had the advantage of f reading. One has to ascertain what was the ultimate decision of the statutory authorities—in this case only the insurance officer—as to the happening and nature of the accident.

I think it is clear that this appellant was incapacitated for work in the period following the accident by the heart trouble, the myocardial infarction, and not by the inguinal hernia. He must have thought at that time that the heart trouble was unconnected with the accident. For that reason he did not then claim injury benefit, g but did claim and obtain sickness benefit and a declaration that he had suffered an industrial accident. Also for that reason, when he claimed disablement benefit he claimed it only in respect of the hernia. This claim was duly referred to the medical board for them to determine the disablement questions. On the back of the file sent to the medical board the 'Information supplied by local office' contained in para 4 the words: 'Description of incident accepted as the industrial h accident—Whilst lifting a piece of electronic equipment he strained himself'. That was at that time the insurance officer's decision as to the happening and nature of the accident, and the medical board acted consistently with the insurance officer's decision when they assessed the disability in respect of the hernia only and treated the heart trouble as an unconnected condition because there was no claim in respect of it.

i But the medical board included in their report observations which showed that in their opinion the heart trouble might be in truth connected with the accident. The insurance officer must have taken into account these observations and the letters from this appellant's solicitors and the medical opinion of Dr Somerville that there was a direct causal relationship between the development of the heart trouble and this appellant's physical effort earlier on 19th January 1965. When the insurance

officer gave instructions for the difference between sickness benefit and injury benefit to be paid to this appellant for the period from 19th January 1965, this involved a decision that injury benefit was payable, which on the facts could only be on the basis that the heart trouble was connected with the physical effort—in other words, that the accident was hard work causing myocardial infarction. I suppose that this further decision as to the happening and nature of the accident can be regarded as an amplification or interpretation of the previous decision—‘Whilst lifting a piece of electronic equipment he strained himself’—and not as a departure from it. Certainly more formal procedure would have been preferable. The further decision seems not to have been formulated nor recorded nor communicated to the medical board or the medical appeal tribunal. The medical appeal tribunal cannot be blamed for not accepting and following this further decision if it was not communicated to them. But it would not be right for this appellant’s claim to be defeated by lack of communication between the authorities or by any other procedural omission on their part for which he was not responsible. Notwithstanding the procedural difficulties, I think effect should be given to the merits of this appellant’s position, and I would allow the appeal.

LORD DIPLOCK. My Lords, there are four questions for determination by this House in these conjoined appeals:

(1) What was the ratio decidendi of this House in *Minister of Social Security v Amalgamated Engineering Union (Re Dowling)*? (2) Does it govern either or both of the instant appeals? (3) If so, was it wrong? (4) If it was wrong, should it be overruled?

The statutory provisions which fell to be construed in *Dowling’s* case⁷ were those of the National Insurance (Industrial Injuries) Act 1946, as it had been amended in 1953. They have since been replaced by corresponding provisions in the consolidation Act of 1965, but it is common ground that this consolidation entailed no alteration in the existing law. My noble and learned friend, Viscount Dilhorne, has already analysed sufficiently the relevant provisions of the Act of 1946 (as amended). I can go straight to the question: what did the majority of this House decide in *Dowling’s* case⁷?

There were two different rationes decidendi, one expressed by my noble and learned friend, Lord Morris of Borth-y-Gest, the other by my noble and learned friend, Lord Hodson. It was with the latter that my noble and learned friends, Lord Reid and Lord Guest, concurred. It therefore represents the ratio decidendi of this House which must be either followed or overruled⁷.

In *Dowling’s* case⁷ the claimant had alleged that as a result of physical exertion in the course of doing the ordinary work for which he was employed he had suffered a single identifiable internal injury—hiatus hernia. There was thus no incident occurring in the course of the claimant’s employment which could be identified as having any of the characteristics of an ‘accident’ unless it was in fact the cause of the hiatus hernia which he sustained. The claim for injury benefit had been decided on appeal by the deputy commissioner after hearing oral evidence from medical experts.

It is apparent that all four members of this House who were in favour of dismissing the appeal regarded it as being an exceptional and not an ordinary case. The ratio decidendi of Lord Morris of Borth-y-Gest was, as I read his speech, confined to cases in which a claim was made in respect of (1) a single identifiable internal injury; (2) alleged to be caused by doing the ordinary work for which the claimant was employed. Lord Hodson also, in the passage cited by my noble and learned friend, Viscount Dilhorne, which contains the kernel of his reasoning says⁸:

‘In the ordinary case where accident and injury are separate, there is no difficulty, but here the accident and the injury are the same. There would be no accident but for the injury.’

a It is reasonable to infer from this that those members of this House who formed the majority in *Dowling's* case⁹ were not alerted to the fact that, taken at its face value, the reasoning of Lord Hodson could not be limited in its applicability to cases which exhibited the exceptional characteristics to which I have drawn attention as presented by *Dowling's* case⁹ itself. In the passage cited from Lord Hodson's speech the wide construction placed on the expressions 'question' and 'final' in s 36 (3) of the Act, makes the reasoning equally applicable to any finding as to the medical nature of the injury suffered by any claimant which has been made by an insurance officer, on whatever material happened to be available to him, in the course of dealing with a claim for injury benefit or for a declaration that an accident was an industrial accident.

b My Lords, the second question can be quickly answered in the instant appeal by the appellant Jones. A local appeal tribunal had found that the appellant Jones's accident had caused myocardial infarction. On Lord Hodson's reasoning in *Dowling's* case⁹ the medical board and medical appeal tribunal were bound to accept this finding as correct. In the case of the appellant Hudson, however, the insurance officer made no express finding as to the medical nature of the injuries which the appellant Hudson suffered as a result of his accident. That the insurance officer was satisfied that the accident had caused the myocardial infarction as well as the hernia is no more than an inference, though a strong one, from his act in authorising the payment of injury benefit to the appellant Hudson. But if I were able to accept the ratio decidendi of the majority in *Dowling's* case⁹ I do not think that I ought to boggle at this. It would be very hard luck for the appellant Hudson if I did. This makes it necessary to embark on the third question: was the ratio decidendi of the majority in *Dowling's* case⁹ wrong?

e The function of this House in *Dowling's* case⁹, as in the instant appeals, was to ascertain how Parliament intended that claims for benefit under the National Insurance (Industrial Injuries) Act 1946 should be dealt with in factual circumstances such as those found to exist in *Dowling's* case⁹ and in the instant appeals. That Act was one of several which together wrought a major change in social policy and introduced the welfare state. To find out the meaning of particular provisions in social legislation of this character calls, in the first instance, for a purposive approach to the Act as a whole to ascertain the social ends it was intended to achieve and the practical means by which it was expected to achieve them. Meticulous linguistic analysis of words and phrases used in different contexts in particular sections of the Act should be subordinate to this purposive approach. It should not distract your Lordships from it.

g When in 1946 the government of the day promoted and Parliament passed the first National Insurance (Industrial Injuries) Act, and National Insurance Act, there had been many years experience of the operation of the Workmen's Compensation Acts and the recording of industrial accidents for the purposes of the Factory Acts. Parliament must have been well aware that the number of claims for injury benefit of which one of the qualifying criteria, namely, incapacity for work, was the same as that for sickness benefit under the National Insurance Act, would run into thousands a week, and that in the great majority of them there would be readily available sufficient material from reliable sources to verify the claim, i.e. a medical certificate from the claimant's doctor and a report of the accident from his employer.

h The social purpose of injury benefit was to provide the claimant with an income to replace his earning while he was incapable of work. It was a short-term benefit available for a period not exceeding six months from the date of the accident. It would fail in its social purpose unless it were allowed quickly. One would, therefore, expect that Parliament contemplated a statutory procedure for the examination and allowance of claims which would be administratively simple and speedy in the great majority of cases.

Given the number of claims for injury benefit which Parliament must have contemplated, it must also have contemplated that the vast majority of them would be disposed of in the claimant's favour by the insurance officer to whom by s 45 (1) of the Act all claims for benefit were to be submitted in the first instance. Otherwise local appeal tribunals and the commissioner and his deputies would have been overwhelmed. Experience has indeed shown that only about one claim in every two hundred goes to a local appeal tribunal. An insurance officer has no medical qualifications to enable him of his own knowledge to diagnose the claimant's injury or to determine whether it renders him incapable of work. Parliament must have contemplated that an insurance officer would normally rely on a certificate from the claimant's own doctor for this diagnosis and would normally rely on the claimant's own written description of the accident which caused the injury, verified, if thought necessary, by the employer's report of it.

My Lords, before allowing a claim for injury benefit the insurance officer must no doubt be satisfied (1) that some incident occurred in the course of the claimant's employment, (2) that the incident was a cause of *some* personal injury to him, and (3) that as a result of the injury he was incapable of work on the days for which injury benefit is claimed. But provided that the insurance officer is satisfied that the incident occurred and that it resulted in the incapacity for work, there is no need for him to be satisfied as to the precise medical nature of the personal injury which constitutes the intermediate link in the chain of causation. Parliament must have contemplated that the insurance officer would normally accept as sufficient without further enquiry whatever description of the incapacitating injury appeared on the medical certificate signed by the claimant's own doctor, however detailed or summary as a diagnosis that description might be. But Parliament can hardly have contemplated that the acceptance of that diagnosis as justification for payment of injury benefit, it may be only for a single day, should affect conclusively the claimant's future rights to a different kind of benefit, disablement benefit, which might endure for the remainder of his life and which had not yet been the subject of any claim.

Injury benefit becomes payable three days after an incapacitating accident and continues to be payable at a daily rate for a total period of six months if the incapacity for work so long endures. Disablement benefit is not payable until the claimant's right to injury benefit is exhausted, either because he has become capable of work or because six months have elapsed since the accident. The need for haste which is a dominant factor in achieving the social purpose of injury benefit is not of comparable importance in claims for disablement benefit. The right to disablement benefit is not dependent on incapacity for work, although it may be increased if the disablement also results in total or partial incapacity for work. Its primary social purpose is to recompense the claimant for his loss of the amenities of life during the period for which he suffers physical or mental disabilities from the accident—which may be for the remainder of his life.

In order to assess the rate of any disablement benefit to which a claimant is entitled and the period for which it will be payable it is always necessary to make an accurate diagnosis of the medical condition of the claimant, to determine to what extent any morbid condition diagnosed was a result of the accident and not of some other congenital defect, injury or disease and to make an accurate prognosis of the likelihood of any future improvement in his condition and, if there is a likelihood, of when the improvement can be expected to occur. On the result of this diagnosis and prognosis may depend the claimant's entitlement to a disablement pension for the remainder of his life.

One would, therefore, expect that Parliament would provide machinery for a more thorough and expert diagnosis and prognosis of the claimant's medical condition resulting from the injury where a claim was for disablement benefit, than whatever diagnostic material happened to be available to an insurance officer at an earlier date when he was called on to deal with a claim for injury benefit. For, as already pointed

- a out, this would be likely to consist of no more than a hastily prepared certificate of incapacity for work by a general practitioner of unknown diagnostic skill and professional expertise in specialised branches of medicine. This natural expectation is borne out by the requirement in ss 36, 39 and 48 of the Act, that the case of a claimant for disablement benefit is to be referred to a medical board for the determination of the questions: whether the relevant accident has resulted in a loss of faculty; and at what degree the extent of disablement resulting from a loss of faculty is to be assessed, and what period is to be taken into account by the assessment.

b My Lords, in this broad analysis of what appears to be the rational basis of the Act, I have been referring to the ordinary kind of case which must have been in the forefront of Parliament's contemplation. It is one in which the insurance officer, as he is entitled to do, allows a claim for injury benefit on no other medical diagnostic material than that which the claimant's own general practitioner has chosen to set out in a certificate of the claimant's incapacity for work at some period within six months after the accident. From such a decision by the insurance officer there is no appeal; although there is one from his disallowance of a claim.

c It is true that the Act contemplates that regulations may be made empowering, although not requiring, an insurance officer himself to obtain reports from other medical practitioners and to refer claims as to which he finds himself in doubt to a local appeal tribunal who may be similarly empowered, and in addition may be empowered to summon witnesses to give oral evidence. There may, thus, be cases, and *Dowling's case*¹⁰ was one of them, where on a claim for injury benefit there is an abundance of expert medical reports and oral evidence directed to the diagnosis of the claimant's medical condition and its cause. But this will not be so except in a tiny proportion of the total of claims. Parliament might rationally have decided to provide that subsequent claims for disablement benefit, in those exceptional cases where there had already been a thorough investigation of the medical aspects of the claim for injury benefit, should be dealt with by a procedure different from that applicable in the ordinary case where no medical investigation had been made beyond acceptance by an insurance officer of the certificates of the claimant's general practitioner. But I do not understand that anyone contends that Parliament has done so in the Act. If previous diagnoses of the medical consequences of the incident relied on by the claimant accepted for the purposes of a claim for injury benefit are to be binding on a medical board in any subsequent claim for disablement benefit, this must be so whether the diagnosis was accepted by the commissioner, a local appeal tribunal or an insurance officer and whatever was the material on which acceptance of the diagnoses was based.

g Does, then, the actual language of s 36 (3) of the Act drive one to the inescapable conclusion that, despite the conferment on the medical authorities (medical boards and medical appeal tribunals) of exclusive jurisdiction to determine 'the disablement questions' as defined in s 36 (1) (c), they are nevertheless bound to accept as correct the opinion previously formed by an insurance officer as to the medical condition of the claimant and its cause, however exiguous the diagnostic material on which his opinion was based, and however demonstrably false in the light of medical knowledge his opinion may have been?

h Lord Hodson's reasoning in *Dowling's case*¹⁰ was dependent on the meanings which he expressly ascribed to the words 'question' and 'final' in s 36 (3) and to the meanings of the expressions 'accident' and 'personal injury' which are implicit in his statement 'here the accident and injury are the same'. It is thus necessary to examine the ways in which these three words are used in the Act. But before doing so there are two preliminary observations I desire to make.

i The first is that by the time a long and controversial bill becomes a statute one must not be surprised to find some lack of consistency between the language used in

one section and that used in another. The second is that the attention of the draftsman and of Parliament will have been concentrated on the ordinary type of case to which it was contemplated that the statute would apply. Little light is thrown on the intention of Parliament by testing the meaning of the words of a statute by seeing what would be the result of applying them in that meaning to some unlikely or even fanciful hypothesis of fact. The result may be one which Parliament would have taken measures to avoid if it had given its mind to that particular concatenation of circumstances. But that is an insufficient reason for rejecting a meaning of the words which leads to that result, if that meaning leads to a sensible result in the ordinary type of case which must have been within the contemplation of Parliament.

The Act of 1946 (which I will call 'the statute') creates and regulates the entitlement of insured persons to three separate and distinct kinds of benefit: injury benefit, disablement benefit and death benefit. Each kind of benefit is payable in respect of a different period. There is no overlapping. Each kind of benefit is the subject of a separate and distinct claim. The conditions of entitlement to each kind of benefit are different. All that is common to them is that successive rights to each of the three kinds of benefit may arise from the same 'accident'.

Section 7, which contains the general description of and conditions of entitlement to each of the three benefits, avoids the use of the compound phrase 'personal injury by accident' which had appeared in successive Workmen's Compensation Acts since 1897. It is reasonable to suppose that the change in phraseology was deliberate—although there is an isolated lapse into the expression 'personal injury by accident' in s 49 (2) of the statute.

In the context of the statute 'accident' is used as descriptive of the first event in three claims of causation:

- (1) Accident—personal injury—incapability of work.
- (2) Accident—personal injury—loss of faculty—disablement.
- (3) Accident—personal injury—death.

The occurrence of the last event in each chain creates the entitlement to the particular benefit; injury benefit, disablement benefit or death benefit. It is, thus, accurate to speak of any later event in the chain as resulting from any earlier event; of loss of faculty as resulting from an accident, as the draftsman of the statute did in s 12 (as amended by the Act of 1953) and s 36; or as resulting from a personal injury as he did in ss 7 and 12 (prior to the amendment). It might have been for neater draftsmanship to have amended s 7 also in 1953; but there was no necessity to do so. It is also accurate to speak of a claim for benefit being made in respect of any event in the chain of causation: as being made in respect of an accident or as being made in respect of an injury as the draftsman did in s 88. I find no real linguistic difficulty in any of the expressions used in the statute to describe the successive events in these three chains of causation.

In popular speech 'accident', the first event in each chain, is used in a variety of meanings of which the common characteristics are unexpectedness and, generally, misfortune. As was pointed out by Lord Macnaghten in *Fenton v Thorley & Co Ltd*¹¹ it embraces both an event which was not intended by the person who suffers the misfortune and an event which, although intended by the person who caused it to occur, resulted in a misfortune to him which he did not intend. An event which constitutes an 'accident' with which the statute is concerned, has two limiting characteristics: the misfortune which it causes must be 'personal injury' to an insured person; and the event must be one which can be identified as arising out of and in the course of that person's employment. It cannot be the 'personal injury' itself of which it is described as the cause. It must be something external which has some physiological or psychological effect on that part of the sufferer's anatomy which sustains the actual trauma, or some bodily activity of the sufferer which would be perceptible to an

a observer if one were present when it occurred. It is convenient to call this external event or bodily activity the causative incident.

b It is true that the causative incident assumes its character as an 'accident' within the meaning of the statute because of its result, the 'personal injury'. But it is no more accurate to say that 'the accident and the injury are the same' where the injury is the unintended result of an intentional bodily activity of the suffered himself, than where it is the result, which ex hypothesi is not intended by the suffered, of some fortuitous event which the suffered did not himself intend. The most that can be said is that it may be easier to identify the causative incident in the latter case than in the former unless the personal injury resulting from an intentional bodily activity of the sufferer was immediately accompanied by visible or painful symptoms.

c 'Personal injury' is only an intermediate link in each of the three chains of causation of which the final result is incapability of work, death or disablement. It is used in that statute as a generic term embracing all adverse physical or mental consequences of an 'accident'. A diagnostician of sufficient skill could no doubt analyse any trauma resulting from an accident into a number of detailed components. Even the fracture of a single bone is necessarily accompanied by some damage to adjacent muscles, blood vessels and nerves. But accurate diagnosis of the personal injury is not necessary in determining entitlement to injury benefit or death benefit if it is obvious that there has been personal injury of some kind and that its consequence has been incapacity for work or death.

d In contrast, the additional link in the chain of causation between 'personal injury' and 'disablement', i.e. 'loss of faculty', in a claim for disablement benefit, and the statutory method of assessment of the degree of disablement do call for an accurate diagnosis of the personal injury resulting from the accident which is still subsisting at the time at which the claim is made. 'Loss of faculty' is used in the statute to describe a cause of disabilities to do things which in sum constitute the disablement. It is used in the medical sense of loss of power or function of an organ of the body.

e Under the statute benefit of any of the three kinds is payable as the result of an 'award of benefit' made by a statutory authority (an insurance officer, a local appeal tribunal or the commissioner) in response to a 'claim' for that particular kind of benefit by a claimant which is submitted in the first instance to an insurance officer. The submission of a claim does not give rise to any 'lis'. There is no opponent to the claim and consequently there are no 'issues' in the sense in which that term is used in relation to adversarial litigation in courts of law. The general doctrine of res judicata which operates inter partes is thus inapplicable to claims for benefit. The sole function of the insurance officer, as of any other statutory authority, is to satisfy himself whether or not the claimant is entitled to the kind of benefit he has claimed and, if so, the amount of benefit to which he is entitled. The legal consequences of his decision are those which the statute itself ascribes to it. There can be no question of issue estoppel.

f All 'claims' for benefit are ultimately disposed of by the determination of a statutory authority either to make an award or to determine that an award cannot be made (ss 45 (3) (a) and (b) (ii), 48 (2) (b)). 'Determination' connotes the activity of deciding, 'decision' connotes the result. But s 36 treats a 'claim' as capable of giving rise to more than one 'question' which may call for determination either by a statutory authority or by some other authority. 'Special questions' (other than those referred to in sub-s (1) (a) (ii), (iii) and (iv)) which include 'disablement questions' are examples of 'questions' to be determined by other authorities. The decision of a 'special question' does not of itself entitle the claimant to an award of benefit. In any claim where a 'special question' arises there must also arise other questions on which the claimant's entitlement also depends and these must be dealt with by the statutory authorities before an award of benefit can be made. The three classes of 'decision' that sub-s (3) makes 'final' are (a) the decision by a statutory authority of a claim, (b) the decision by the appropriate other authority of a 'special question' arising in

connection with a claim, and (c) the decision of a statutory authority of any 'question' other than a 'special question' arising in connection with a claim. a

Section 45 (1) requires all claims for benefit, whether they raise 'special questions' or not, to be submitted in the first instance to an insurance officer. It also contemplates the submission of a 'question arising in connection with' a claim for benefit as distinct from the submission of a 'claim' itself. Subsections (2) and (3) draw a clear distinction between these types of submission.

Where a 'claim' is submitted the only 'decision' of it that the insurance officer is empowered to make under that section is either a decision to allow the claim in whole or in part or a decision that an award cannot be made. If he refers it, as he may, to a local appeal tribunal, their power of decision is similarly limited. Under s 49 (1), however, the insurance officer may be required in connection with a claim also to determine the 'question' whether the relevant accident was an industrial accident. Where a 'question' is submitted the only decision of it that the insurance officer is empowered to make is to answer 'the question' in favour of or adversely to the claimant. b

'Claimant' is defined in s 88 as 'a person claiming benefit', and, so far as is relevant for present purposes, as including also only 'an applicant for a declaration that an accident was or was not an industrial accident'. By s 49 (2) such a declaration may be applied for independently of any claim for benefit. It would seem, therefore, that the only 'question' as distinct from a 'claim', which is capable of being submitted to an insurance officer under s 45 (1) is the question whether an accident which a claimant alleges he has sustained was an industrial accident. c

The decision of any claim to benefit or of a separately submitted question whether an accident was an industrial accident may or may not involve a 'special question'; but it will inevitably make it necessary for the statutory authority to make findings of material facts. The material facts may be clear or may be subject to doubt or difficulty. It is manifest from the terms of s 46 (2) that a distinction is drawn between 'questions of fact' which are material to the decision of a claim or of a 'question' which is submitted for 'decision', and the 'question' itself which is so submitted. The former are expressed to be the subject of 'findings', to which finality is *not* accorded by s 36 (3). d

Sections 45 (3) and 48 (1) impose on an insurance officer the duty of analysing the 'claim' or 'question' submitted to him in order to form an opinion whether or not any 'special question' arises. I do not think that in these contexts he is required to treat a special question as arising if there is no doubt or difficulty as to the answer to it. Otherwise s 45 (3) would never be applicable. Every claim to any kind of benefit and every declaration that an accident was an industrial accident necessarily depends on whether the claimant (or the deceased) was employed in insurable employment; and that is a 'special question'. On the other hand, a 'special question' always arises in connection with a claim for disablement benefit, for the extent of the disablement which determines the amount of disablement benefit payable must be the subject of an assessment by the medical authorities which the insurance officer is not himself empowered to make. e

If as a result of his analysis the insurance officer is of opinion that a 'special question' does arise he must refer it for determination by the appropriate other authority. But this will leave other questions still to be dealt with by him before he will be in a position to make a 'decision' of the claim or of the 'question' whether the accident was an industrial accident, which was the subject of the initial submission to him. It is significant that s 48 (1) (b) uses the neutral expression 'deal with any other questions as if the special question had not arisen'. This throws one back to s 45 (3), which requires him to make 'findings' on questions of fact material to his decision and to make 'decisions' as to whether or not an award can be made or whether or not the accident was an industrial accident as the case may be. The distinction between 'dealing with' questions and the 'determination of' questions is also drawn in s 48 (2) (a). f

- a and (b). These make good sense if 'determination' is restricted to 'special questions' and the question whether the relevant accident was an industrial accident.

I conclude, therefore, that a 'decision' of a 'question' to which finality is accorded by s 36 (3) of the Act is restricted to (1) the decision of a 'special question' by the appropriate authority to determine that question under s 36 (1), and (2) the decision of the question whether an accident was an industrial accident by the statutory authority under s 49.

- b It is suggested that s 51 (1) (g), which enables regulations to be made—

'for empowering the Minister, an insurance tribunal or an insurance officer to refer to a medical practitioner for examination and report any question arising for his or their decision',

- c suggests that questions of medical fact are themselves the subject-matter of 'decisions'. The wording of that paragraph is capable of supporting such an inference, but to draw it would not only run counter to the distinction drawn between 'findings on questions of fact' and 'decisions' in s 46 (2) (b); but would lead to a further dilemma. If a question of fact material to the decision of a Minister's 'special question' is itself another 'question' for 'decision' distinct from the 'special question' itself, s 48 (1) (b) would require it to be dealt with by an insurance officer and not by the Minister.
- d The Minister would never have any power of reference under s 51 (1) (g).

- As to the meaning of the expression 'final' in relation to decisions of claims or questions, I agree with my noble and learned friend, Viscount Dilhorne, and for the reasons which he gives, that it simply means that there shall be no further proceedings in the particular matter for determination except by way of appeal or review as provided for by the statute. It does not mean that the decision shall be conclusive in any other proceedings. Where this is intended the word 'conclusive' is used.

- e My Lords, s 39 (1) requires that:

'The case of any claimant for disablement benefit shall be referred by the insurance officer to a medical board for determination of the disablement questions . . .'

- f It thereupon becomes the duty of the medical board to enquire 'whether the relevant accident has resulted in a loss of faculty', and to assess the extent of the disablement resulting from a loss of faculty. Section 12 (2) directs them to conduct this enquiry by ascertaining all the disabilities to which the claimant may be expected to be subject during the period covered by the assessment but to exclude from the assessment any disabilities which are the result of a congenital defect or of an injury of disease received or contracted before the relevant accident.

- g In a claim for disablement benefit the insurance officer has no jurisdiction himself to determine the question whether the relevant accident resulted in any loss of faculty. Nor can he deprive the medical board of its jurisdiction to do all that the statute directs they shall do. On the other hand, the insurance officer has jurisdiction to determine the question whether the relevant accident was an industrial accident
- h and to determine the amount of benefit to which the claimant is entitled in accordance with the assessment of his disabilities made by the medical board.

- i The starting point of the enquiry into the question which the medical board has jurisdiction to determine is the same causative incident, 'the relevant accident', as constitutes the starting point of the enquiry into the question which the insurance officer has jurisdiction to determine. Where different questions relating to the same causative incident have to be determined by separate decision-making authorities, no doubt the causative incident had to be identified in order to ensure that both authorities are enquiring into the same incident. But identification of the incident is all that is needed. If, as in the statute, one of the decision-making authorities is also the authority which refers to the other decision-making authority the question which the latter has jurisdiction to determine, it cannot deprive the latter authority of its

jurisdiction to determine it itself, by incorporating in the description of the causative incident any matter which is not necessary to ensure that both decision-making authorities are directing their minds to the same causative incident. The insurance officer cannot, by incorporating in his description of an identified causative incident what he believes to be its medical consequences, curtail the jurisdiction of the medical board to form their own opinion of what its medical consequences really are.

The statute is concerned with benefit for accidents and injuries that really happened. But the expressions 'relevant accident' and 'relevant injury' are used in the statute to describe the causative incident and resulting injury, in respect of which benefit is claimed, at various stages in the proceedings before what really happened has been finally determined by the appropriate decision-making authority. At the stage at which the disablement questions are referred by an insurance officer to a medical board he must be of opinion on the information then before him that at the time of the causative event alleged by the claimant in the course of his employment and that what he was doing resulted in *some* trauma to him however slight it may have been. Otherwise no disablement question would arise for reference. But the insurance officer's opinion as to the medical nature of the trauma or as to its continuing medical results is irrelevant for the purpose of his reaching a decision whether or not to refer the disablement questions to a medical board.

The medical board, on the other hand, on the claim being referred to them, may have to find as facts what the claimant was doing in much greater detail than was necessary to form an opinion as to whether he was doing it in the course of his employment, and what was the precise medical nature of any trauma as a result of doing it which was capable of causing any loss of faculty. It is not, however, necessary for them to enquire into whether he suffered any other trauma which was not capable of causing any loss of faculty found by the medical board to be present at the date of the reference of the disablement questions to them. It would be erroneous to suppose that a medical board has no jurisdiction to find facts as to precisely what the causative incident was, as well as what its medical consequences are at the date of the reference. The review provisions in s 40 (1) are inconsistent with any other view.

My Lords, I believe that I have now covered all the semantic points relied on by the parties at the hearing as throwing light on the meaning of the crucial words 'decision' and 'final' in s 36 (3) and the expression 'the relevant accident' in s 36 (1) (c) (i). There is nothing in this literal approach to the construction of the statute to persuade me that Parliament intended that any finding of fact as to the medical consequences of an accident made by a statutory authority for the purpose of determining a claim for injury benefit or of making a declaration that the accident was an industrial accident, or any description by an insurance officer of the medical consequences of the relevant accident in his reference to a medical board of the case of a claimant for disablement benefit, should deprive the medical authorities of their exclusive jurisdiction and duty under s 36 (1) (c) to determine what loss of faculty has resulted from the relevant accident at the time of a claim for disablement benefit. If this means that there may be cases in which there are conflicting findings of fact by statutory authorities and medical authorities in claims for different kinds of benefit arising out of the same accident, it is a regrettable but inevitable consequence of a scheme whereby the medical consequences of an accident are decided by different decision-making authorities according to the kind of benefit claimed.

There remains the last question: ought *Dowling's case*¹² to be overruled or followed or distinguished? Your Lordships are all agreed that it ought not to be distinguished. Hitherto it has been found possible to limit its application to cases where an accident results in a *single* injury not susceptible of further diagnosis into more than one injury and occurring as the result, not of some fortuitous incident but in the course of doing the ordinary work that the claimant was employed to do. This has been done up until now by regarding the reasoning of Lord Hodson in *Dowling's case*¹² as being the same

¹² [1967] 1 All ER 210, [1967] 1 AC 725

a as that of Lord Morris of Borth-y-Gest. But the closer analysis to which Lord Hodson's speech has been subjected in the instant appeals makes it impossible to continue so to limit it without intellectual dishonesty.

Ought this House, then, to follow it notwithstanding that the majority of your Lordships who have heard the instant appeals think that it is wrong? It is a recent decision, but I see no greater reason for perpetuating recent error than for leaving
b ancient error uncorrected. In view of the limited application which has been given to *Dowling's case*¹³ in practice, to overrule it is unlikely to defeat the expectations of any appreciable number of claimants for injury benefit whose accidents have already occurred. But to give it the wider application which must now be recognised as attributable to it may have fortuitous and arbitrary consequences of the kind to which Viscount Dilhorne has drawn attention, in any future claim for disablement benefit for an internal injury, particularly an injury to heart or back or a hernia.

c These consequences, which cannot have been intended by Parliament, could be averted by amending legislation. But it would be unrealistic to suppose that this could be done quickly. The immense volume of cases which would require to be decided in the meantime, the pressure under which insurance officers must work if injury benefit is to be paid timeously, the burden which would fall on medical boards
d of ascertaining whether an insurance officer had at some time previously expressly or inferentially made a finding as to the medical results of the relevant accident, the invidious position in which members of medical authorities would be placed if bound to accept for the purposes of their assessment of the degree of disablement statements of medical opinion which they themselves knew to be unjustified; considerations such as these would persuade me that the right course in the public interest would be to overrule *Dowling's case*¹³ notwithstanding that it is a decision on the construction
e of a statute which after some delay could be put right by Parliamentary action. I should myself, therefore, overrule *Dowling's case*¹³ and dismiss both of these appeals.

But although the majority of your Lordships are of the firm opinion that the ratio decidendi in *Dowling's case*¹³ was wrong only a minority of three are prepared to overrule it. This a minority has no power to do. If then Lord Hodson's speech
f in *Dowling's case*¹³ must still be treated as expounding the true meaning of the statute I see no escape from the conclusion that it governs the appellant Jones's appeal and I think it would be unjust to the appellant Hudson to reach a contrary conclusion in his appeal. So I agree reluctantly that both appeals must be allowed.

Since writing my speech, I have had the advantage of reading the afterthoughts of my noble and learned friend, Lord Simon of Glaisdale, on the possibility of introducing into this country the practice of prospective overruling which is currently
g being developed by courts in the United States of America. The question whether the common law recognises such a power in your Lordships' House when acting as an appellate court of last resort was not touched on in the course of the hearing. Accordingly, I do not think it appropriate to do more than to express my concurrence with my noble and learned friend's suggestion that it is a topic which deserves consideration
h in a subsequent case in which the relevant decisions of federal and state courts in the United States can be examined.

LORD SIMON OF GLAISDALE. My Lords, my noble and learned friends have acquainted your Lordships with the details of the statutory scheme and of the facts of the two cases under appeal; and I presume to take advantage of their narration, only referring in due course to the points of particular significance to the argument which I venture to submit to your Lordships. I propose to submit that
j argument within the following framework:

(1) The ratio decidendi in *Minister of Social Security v Amalgamated Engineering Union (Re Dowling)*¹³

(2) Independent construction of the National Insurance (Industrial Injuries) Act 1946, i.e. the construction which impresses me independently of authority. I shall consider this problem under three heads: (a) structural or functional; (b) linguistic; (c) general. a

(3) The problem of distinguishing *Dowling's case*¹⁴. I propose to consider the question under four heads: (a) the approach of the Divisional Court¹⁵ and the Court of Appeal¹⁶; (b) is the appellant Jones's case on its facts distinguishable from *Dowling's case*¹⁴? (c) is the appellant Hudson's case on its facts distinguishable from *Dowling's case*¹⁴? (d) if either is distinguishable, should it be distinguished? b

(4) Should *Dowling's case*¹⁴ be overruled?

(5) The 'onus of proof'.

(6) The final consequences of the foregoing considerations on the two appeals. c

(7) Some afterthoughts.

I shall refer throughout to the provisions of the 1946 Act, which (as amended in 1953) governs the appellant Jones's case, adding in brackets after each first reference a reference to the corresponding provision of the National Insurance (Industrial Injuries) Act 1965, which technically governs part of the appellant Hudson's case, but which was a consolidation statute. I shall for convenience refer to 'the statutory authorities' and 'the medical authorities' to denote respectively the channels insurance officer/local appeal tribunal/commissioner and medical board/medical appeal tribunal/commissioner. Italics throughout are my own. d

*The ratio decidendi of Dowling's case*¹⁴.

As I read the judgment of the majority in *Dowling's case*¹⁴, it established the three following propositions: (1) a decision of the statutory authorities on any material matter which is within their jurisdiction is 'final' (at least, when there has been no prior inconsistent decision of the medical authorities on a material matter within their jurisdiction); (2) 'final' here means 'conclusive for all purposes under the Act', and not merely 'conclusive for the purposes of the particular claim which is being dealt with'; (3) a decision of the medical authorities which is inconsistent with a prior decision of the statutory authorities which is so 'final' is a nullity¹⁷. It is, in my view, implicit in the majority judgment that a decision of the medical authorities on any matter within their jurisdiction is similarly 'final' in the absence of a prior inconsistent decision of the statutory authorities. e

I think that my noble and learned friend, Lord Morris of Borth-y-Gest, concurred with the majority in the conclusion of the appeal on a quite independent approach, which did not depend on the statutory provision for 'finality', but which turned on the concept that cases where the accident and the injury are identical are special cases, in which the medical authorities would be destroying the basis of their own jurisdiction if they failed to accept a prior decision of the statutory authorities. I find little, if any, reflection of this viewpoint in the judgment of the majority, which was, I think, of general application. This difference of approach between that of the majority in *Dowling's case*¹⁴ and that of my noble and learned friend, Lord Morris of Borth-y-Gest, seems to me to be of importance, since it was on the basis of the speech of my noble and learned friend, Lord Morris of Borth-y-Gest, that the Divisional Court¹⁵ and the Court of Appeal¹⁶ distinguished the instant cases from *Dowling's case*¹⁴. f

Construction of the statute: structural (or functional) g

I accept that, contrary to what has sometimes been urged in the past, it is impossible to separate the statutory scheme out neatly so that medical matters fall for determination by the medical authorities while all others fall for determination either by the Minister or the statutory authorities. But the fundamental impression that the h

¹⁴ [1967] 1 All ER 210, [1967] 1 AC 725

¹⁵ [1969] 2 All ER 631 and 638, [1970] 1 QB 477

¹⁶ [1970] 1 All ER 97, [1970] 1 QB 477

¹⁷ See [1967] 1 All ER at 219, [1967] 1 AC at 749, 750 j

a scheme of the Act makes on me is that (leaving aside death benefit) there are certain basic differences between injury benefit on the one hand, and disablement benefit on the other—in purpose, in scope, and therefore in machinery—and that these differences are the key to the interpretation of the Act. Injury benefit is temporary only; its call on public funds is limited; it should be rapidly available to the injured employee. Disablement benefit, on the other hand, is potentially of much longer duration (indeed, potentially lifelong); it is therefore liable to involve a greater call b on public funds; and there is less urgency in its assessment. Moreover, assessment of loss of faculty and of degree and likely period of disablement, which are relevant only to disablement benefit, are peculiarly subjects for medical judgment.

It is by reason of these differences between the purposes, necessities, scopes, implications and consequences of injury benefit and disablement benefit respectively that c the medical authorities are concerned, and only concerned, with disablement benefit. The statutory authorities must resolve such medical problems as arise on matters other than claims for disablement benefit as best they may, invoking such medical counsel as is necessary and available and practicable. But it in no way follows that the medical authorities are absolved from performing their own statutory functions in relation to claims for disablement benefit. Those statutory functions—to decide d whether the relevant accident has resulted in a loss of faculty and to assess the extent and likely duration of disablement resulting from a loss of faculty—are laid down in s 36 (1) (c) (1965, s 37). They cannot be performed if the medical authorities are bound by a previous decision of a statutory authority, which the medical authorities may believe—perhaps even, by clinical examination, may know—to be wrong.

I would add that so to bind the medical authorities could operate equally against a claimant as in his favour; and that, in any case, the taxpayer too is entitled to have his e interest considered. I would also add that the construction put on the statute in *Dowling's case*¹⁸ involves, in effect, importing the concept of issue estoppel into the administrative law of industrial injury insurance. This seems to me to be singularly inappropriate. Moreover, it will be quite capricious and fortuitous which 'gets in f first'—a statutory or a medical authority—so as to make a finding which is conclusive on the other. The appellant Hudson's case itself provides an instance of the complexities and difficulties that can be involved.

There is yet another structural indication that the medical authorities are autonomous within their own sphere. By s 36 (1) (c) (i) the medical authorities are to determine whether the relevant accident has resulted in any loss of faculty. By s 4 (3) of the 1953 Act a decision that the relevant accident has *not* resulted in a loss of faculty is to be reviewable by the machinery, and subject to the conditions, of review of the g decisions of the medical authorities (s 40; 1965, s 40): these differ materially from the machinery and conditions of review of decisions of the statutory authorities (see s 50; 1965, s 49).

Construction of the Act: linguistic

h It must be rare for linguistic analysis of an elaborate Act of Parliament to be conclusive—even when the drafting inspires confidence, as (I hope I may say without seeming presumptuous) that of the statute in question does with me. But in the instant case linguistic examination peculiarly and powerfully reinforces the impression which I get from a functional structural analysis.

The crucial linguistic problem is the meaning of the word 'final' in s 36 (3) (1965, s 50 (1)). The same word is used in s 37 (5) (1965, s 35 (3) invoking National Insurance j Act 1965, s 65 (7)), where it undoubtedly means 'without further appeal'. On the other hand, 'final' in s 36 (3) stands in discrepancy with s 49 (1965, s 48) (declarations that an accident is an industrial accident): in sub-s (4) of each section the words are '*conclusive for the purposes of any claim for benefit in respect of that accident . . .*' It also stands in discrepancy with s 72 (1965, s 70) (decisions in any proceedings for an offence

under the Act or involving any question as to the payment of contributions under the Act or for the recovery of any sum due to the Industrial Injuries Fund), s 72 (1) providing that—

‘the decision of the Minister on any question which under this Act is required to be determined by him subject to an appeal on a question of law to the High Court shall, unless such an appeal is pending or the time for so appealing has not expired, *be conclusive for the purpose of those proceedings.*’

(The wording of the 1965 Act is not materially different; and the italicised words are identical). Similar language is used in s 72 (2) (nothing corresponding in the 1965 Act); whereas s 72 (4) (1965, s 70 (3)) provides for an adjournment of proceedings ‘until such time as a *final* decision on the question has been obtained’—where ‘final’ seems again to mean ‘not subject to further appeal’. I find it impossible to believe that such discrepancy in terminology was other than advertent on the part of the draftsman—indeed, it seems to me essentially the sort of detail which he would be bound to discuss with and explain to officials in the course of preparation of the Bill leading to the Act.

If the foregoing is correct, it follows that ‘final’ in s 36 (3) must mean something other than ‘conclusive for the purposes of any claim for benefit in respect of that accident’. It could mean either or both of two things: (1) ‘not subject to appeal or review “except as provided by this part of this Act”’ (opening words of s 36 (3)); (2) that an employee is not to be deprived of injury benefit (either prospectively or retrospectively) merely because a decision of a question arising in connection therewith conflicts with a subsequent decision on a question arising in connection with a claim for disablement benefit. Although ‘final’ in s 36 (3) could, merely on linguistic analysis, mean either of these things alone, I think that the structural/functional analysis determines that it means both. *Inland Revenue Comrs v Brooks*¹⁹, although turning on the construction of a very different sort of statute, shows that the word ‘final’ in an Act of Parliament is quite capable of bearing simultaneously both these meanings and no other (in particular, not ‘conclusive for all statutory purposes’).

This construction is, in my view, borne out by s 36 (2) (cf 1965, ss 37, 43, 50 (1)). It starts with the words ‘Subject to the foregoing provisions of this section’. The effect of that is that the sphere of the statutory authorities’ determination is what is left after the subtraction of ‘special questions’, which include the questions in s 36 (1) (c) that are to be determined by the medical authorities. This delimitation of the sphere of determination of the statutory authorities makes it impossible that their decisions should in any way bind the medical authorities, and is only consistent with ‘final’ meaning something less than ‘conclusive for the purpose of any claim under this Act’.

In view of the opinion I have formed on the meaning of the word ‘final’ in s 36 (3), it is unnecessary for me to come to any conclusion on the meaning of the word ‘question’ in that subsection. I merely summarise my view in deference to the extensive arguments—that the meaning which seems best to fit the subsection is a wide one, namely, ‘any matter which calls for an answer in order for a statutory requirement to be satisfied’.

I venture also to interpolate at this stage my conception of the meaning of certain other crucial terms used in the statute—‘accident’, ‘injury’, ‘loss of faculty’, ‘disability’, ‘disablement’. (In addition, two further terms have figured in the argument—‘incident’ (also used in the statutory forms) and ‘symptom’.) None of these terms is the subject of statutory definition; and this suggests to me that they are used in their ordinary senses, and convinces me that any attempt at judicial definition would be inappropriate. It was suggested in argument that various of these terms were interchangeable—especially incident/accident, accident/injury and loss of faculty/

- a disability. Although in particular cases the concepts may overlap, the statute envisages them as separate—in order for ‘disablement’ benefit to be payable, the ‘accident’ must result in ‘injury’, which must result in ‘loss of faculty’, which must result in ‘disability’: see s 7 (1965, s 5); s 12 (1) as amended by 1953, s 3 (1) (1965, s 12); and *R v Industrial Injuries Comr, ex parte Cable*²⁰. Without, as I say, attempting definition, my understanding of the terminology is as follows: ‘Incident’ is some thing which happens in a way remarkable to sensory perception in a mentally separable period of time. ‘Accident’ is an untoward incident, or a mishap. ‘Injury’ is hurt to body or mind. ‘Symptom’ is indication of injury apparent on clinical examination. ‘Loss of faculty’ is impairment of the proper functioning of part of the body or mind. ‘Disability’ is partial or total failure of power to perform normal bodily or mental processes. ‘Disablement’ is the sum of disabilities, which, by contrast with the powers of a normal person, can be expressed as a percentage.

c *Construction of the Act: general*

I have tried to set out independently the matters, functional and linguistic, which strike me most forcibly in attempting the interpretation of the statute. But I would add that I find myself convinced by the entire argument of my noble and learned friend, Lord Wilberforce, in *Dowling’s case*¹.

- d *Distinguishing Dowling’s case*¹: the approach of the Divisional Court² and Court of Appeal³

The Divisional Court² and the Court of Appeal³ distinguished *Dowling’s case*¹ from the cases under instant appeal on the ground that in *Dowling’s case*¹ there was a single injury which itself constituted the accident, whereas in each of the cases under instant appeal the statutory authority had found two injuries, either of which would have justified the issue of injury benefit: the medical authorities could therefore conclude that only one of those injuries was, for the purpose of disablement benefit, the result of the accident, without thereby contradicting the conclusion of the statutory authority that injury benefit was payable, or (to put it another way) destroying the basis of their own jurisdiction. No other ground of distinction has been suggested.

- f *Is the appellant Jones’s case distinguishable from Dowling’s case*¹?

In my view, the crux of the appellant Jones’s case lies in ‘the finding [of the local appeal tribunal] on questions of fact material to decision’ of 6th November 1964 allowing the appellant Jones’s appeal from the refusal of the insurance officer to permit the issue of injury benefit to him. These findings were expressed as follows:

- g ‘Satisfied that appellant had no previous history of cardiac infarction and that the symptoms noticed shortly after the accident were in fact those of Infarction though not recognised as such, also that the work he was engaged on at the time was exceptionally heavy for him as a fitter.’

- h The matter is placed beyond doubt by the written information supplied by the national insurance office to the medical board. In the heading ‘Description of incident accepted as the industrial accident’ the word ‘accepted’ was underlined in ink; and thereunder was written ‘Whilst lifting a buffer on to wagon he sustained a myocardial infarction’. ‘Accepted’ here must mean ‘accepted by the insurance officer on the basis of the finding of the local appeal tribunal of 6th November 1964’. In other words, the statutory authorities had found that ‘the relevant accident’ was over-exertion while lifting a buffer and ‘the relevant injury’ was a myocardial infarction.
- j This was the basis on which injury benefit was issued. The finding of the medical

20 [1968] 1 All ER 9 at 10, [1968] 1 QB 729 at 737

1 [1967] 1 All ER 210, [1967] 1 AC 725

2 [1969] 2 All ER 631 and 638, [1970] 1 QB 477

3 [1970] 1 All ER 97, [1970] 1 QB 477

board that myocardial infarction, though present, was an 'unconnected condition', and their consequent refusal to find that the ascertained loss of faculty or disablement due to myocardial infarction was the result of the relevant accident, were inconsistent with the decision of the local appeal tribunal which was the basis for the issue of injury benefit to the appellant Jones. The appellant Jones's case is therefore a 'single injury' (or 'accident/injury') case, and is in my view indistinguishable from *Dowling's case*⁴.

*Is the appellant Hudson's case distinguishable from Dowling's case*⁴?

The facts are far from simple. On 4th October 1965 the insurance officer made a declaration under s 49 (1965, s 48) that the appellant Hudson had sustained an industrial accident. A number of questions arise from this. First, did the declaration involve a finding of 'injury by accident'? Answer, clearly, Yes; these are the very words used in s 49 (2). Secondly, did it find a specific injury? Answer, Yes, hernia; because that was the injury which the appellant Hudson claimed that he had sustained. Thirdly, was it 'conclusive' that the accident resulted in hernia? Answer, Yes, provided *Dowling's case*⁴ stands as good law. Fourthly, was it conclusive that the accident resulted *exclusively* in hernia? Answer, No; because the declaration made no such finding expressly, nor was such a finding necessary.

On 20th December 1965 the medical board had to perform its statutory function in relation to the appellant Hudson's claim for disablement benefit, no claim for injury benefit having yet been made. The medical board found a right inguinal hernia as a fully relevant condition (i.e. resulting from 'the relevant accident'). So far, in accord with the insurance officer's declaration of 4th October 1965. They recorded myocardial infarction as an 'unconnected condition'; but their 'Remarks' thereon were as follows:

'The board discussed this case as his heart attack occurred the day of the rupture when he had been subjected to considerable strain which might also be the cause of his heart lesion but this is made unconnected as no claim has been made ...'

This means that the medical board had found that the myocardial infarction was not 'connected with' the relevant accident because the appellant Hudson had not formally and in terms claimed it to be so. It is common ground that the medical board thus proceeded erroneously in law; although 'connected with' is the term used in the form, and is not the statutory term, which is 'the result of'. It is, however, argued for the respondent that the medical board, however erroneously in law, came to the conclusion that the myocardial infarction did not result from the relevant accident. If they had, their finding would not have conflicted with the declaration of the insurance officer of 4th October 1965 (because he had found only hernia as 'the injury by accident') but (if *Dowling's case*⁴ stands, and if it has, as I think, implicit in it the concept that 'finality/conclusiveness' operates both ways between the statutory and medical authorities) their finding would have subsequently been conclusive on the statutory authorities that myocardial infarction was not the result of the relevant accident. But I do not think that the medical board did make any finding that the myocardial infarction was not the result of the relevant accident. On the contrary, I think the medical board advisedly refrained from coming to any such conclusion; but instead 'made it unconnected' (again not a statutory term) because they, wrongly, thought they were obliged to do so. They did not, in my view, come to any decision whether or not the accident resulted in a myocardial infarction, whether regarded as loss of faculty or disability or disablement (the only matters with which the medical board was concerned).

However, the insurance officer understandably took the medical board as indicating a medical opinion that the myocardial infarction was the result of the accident. In

a consequence, on 5th August 1966, the insurance officer allowed the issue of injury benefit to the appellant Hudson. That the myocardial infarction was 'the relevant injury' for the purpose of this issue of injury benefit is apparent from a passage from the 'Minister's observations' dated 3rd August 1966:

b 'He was incapacitated for work from 19.1.65 to 19.4.65 by reasons of "Chest pain", "Myocardial infarct" [sic] and "coronary thrombosis" and injury benefit has now been allowed for the period from 19.1.65 to 19.4.65.'

As I have indicated, there was no prior decision to the contrary which precluded the insurance officer from allowing the issue of injury benefit on the basis of the relevant injury being myocardial infarction.

c The appellant Hudson appealed from the medical board to the medical appeal tribunal (presumably because he was dissatisfied that the medical board, in considering the myocardial infarction, had 'made it unconnected'). The medical appeal tribunal in effect rejected the appellant Hudson's appeal; their 'Reasons for decision, including findings on all material questions of fact' were:

'Exertion being of itself no precipitating factor in myocardial infarction, we can find nothing in this case to associate that condition with the relevant accident.'

d They assessed disablement in respect of the hernia at 3 per cent.

e It follows that the appellant Hudson's case does differ from *Dowling's case*⁵ in being a case of more than one injury found by the statutory authorities, i.e. hernia found by the insurance officer for the purpose of the industrial injury declaration and myocardial infarction found by the insurance officer for the purpose of injury benefit. If, therefore, the ground of distinction drawn by the Divisional Court⁶ and the Court of Appeal⁷—namely, between 'single injury' (or 'accident/injury') and multiple injury cases—is valid, the appellant Hudson's case is distinguishable from *Dowling's case*⁵. It is therefore now for consideration whether this is a valid ground of distinction.

*Should the appellant Hudson's case be distinguished from Dowling's case?*⁵

f The argument that I felt of greatest weight in favour of distinguishing between the 'single injury' (or 'accident/injury') case and that of multiple injury rests on the assertion, put forward on behalf of the respondent, that the statutory scheme has been found to work on the basis of *Dowling's case*⁵, but that to follow *Dowling's case*⁵ from the 'single injury' (or accident/injury) case into that of multiple injury would involve an extension of *Dowling's case*⁵ which would be harmful to the administration of the scheme. But it was argued in *Dowling's case*⁵ that the decision which this House ultimately came to would seriously hinder administration; yet it is now admitted that the wolf that was then so vociferously apprehended did not in fact turn up to mangle the scheme. In these circumstances I am the less ready to listen to fresh cries, particularly when warnings of administrative confusion rest on bare assertion. It might, however, be urged, secondly, that if *Dowling's case*⁵ turns on a construction of the Act which no longer commends itself, it should be as narrowly confined as possible. However that may be, in my judgment the arguments against distinguishing *Dowling's case*⁵ are overwhelming.

h In the first place, to distinguish *Dowling's case*⁵ in the manner suggested runs counter to the scheme of the Act by treating as a juristically separate category cases where 'the injury is the accident', whereas the Act envisages the concepts of accident and injury as distinct, the injury as *resulting from* the accident. It is therefore only in a loose sense that one can speak of the injury being the accident. Secondly, the suggested distinction would produce highly artificial distinctions and extremely

5 [1967] 1 All ER 210, [1967] 1 AC 725

6 [1969] 2 All ER 631 and 638, [1970] 1 QB 477

7 [1970] 1 All ER 97, [1970] 1 QB 477

capricious results, dependent not only on whether the statutory authorities or the medical authorities 'get in first' but also on the exact way the insurance officer frames his findings or on whether some (possibly miniscule) secondary injury can be spelt out of the accident. As I understand it, it was partly to obviate such refinement in distinction and such capriciousness in result that the declaration of 26th July 1966⁸ was made. Thirdly, it is arguable that there is, strictly speaking, no such thing as a 'single injury': e.g. even a cut finger could involve laceration of skin, flesh, muscle, tendon and nerve; here would lie a further fruitful source of refinement and caprice. Fourthly, the suggested ground of distinction relies on the reasoning and the language of the judgment of my noble and learned friend, Lord Morris of Borth-y-Gest, in *Dowling's case*⁹; and I have ventured to point out that this differs from the judgment of the majority of the House. It would be absurd, at least so far as I myself am concerned, to distinguish, and thus affirm within its own sphere, *Dowling's case*⁹, on a basis that neither finds support in the ratio decidendi of the majority nor accords with the construction that I have ventured to favour. In my view, therefore, the choice lies between following or overruling *Dowling's case*⁹.

Should Dowling's case⁹ be overruled?

I have already indicated that, if the matter were res integra, I would presume to put a different construction on the Act than that which commended itself to the majority of the House in *Dowling's case*⁹. Nevertheless, I am clearly of opinion that it would be wrong now to seek to depart from that decision, for the following reasons:

(1) The declaration of 26th July 1966⁸ itself implies that the power to depart from a previous decision of your Lordships' House is one to be most sparingly exercised.

(2) A variation of view on a matter of statutory construction—so much a matter of impression—would, I should have thought, rarely provide a suitable occasion, by itself, that is to say, for it would be different if it were convincingly shown that a previous construction, clearly demonstrated to be wrong, was causing administrative difficulties or individual injustice.

(3) Your Lordships will, I apprehend, be reluctant to encourage frequent litigants before your Lordships' House—like the Secretary of State for Social Services in this type of case or the Commissioners of Inland Revenue in revenue cases—to endeavour to re-open arguments once concluded against them—particularly since appellate committees do not sit in banc, so that similar arguments might be put forward in successive cases in the hope of finding a favourably constituted committee. (It was claimed on behalf of the respondent that it was of importance, in this connection, that *Inland Revenue Comrs v Brooks*¹⁰ was not drawn to the attention of the House in *Dowling's case*⁹; but, in my view, *Inland Revenue Comrs v Brooks*¹⁰, although useful, is only of marginal significance, since it turned on the construction of words of a particular statute of a very different character from those your Lordships are now considering. I would also apply in this context what Lord Shaw said in a different one in *Hoystead v Taxation Comr*¹¹:

'Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result . . . If this were permitted litigation would have no end, except when legal ingenuity is exhausted.')

(4) On the instant issue there is obviously much to be said for each side; one has only to consider the speeches with which your Lordships have already been favoured.

⁸ See Note [1966] 3 All ER 77, [1966] 1 WLR 1234

⁹ [1967] 1 All ER 210, [1967] 1 AC 725

¹⁰ [1915] AC 478

¹¹ [1926] AC 155 at 165, [1925] All ER Rep 56 at 62

a Although I have myself come to a clear conclusion one way, I recognise the strength of the counter-arguments. In particular, there are four powerful contra-indications on the all-important structural/functional approach: (a) if one starts with what will after all be the typical case of the insurance officer deciding 'the gateway question' the scheme of the Act will make an entirely different impression; (b) conclusiveness is of special value in disputes falling within administrative jurisprudence; (c) conflicting decisions on medical matters may lead an unsuccessful claimant for disablement benefit to feel a sense of ill-usage; (d) the superior apparatus for review of decisions by the statutory authorities (who will generally 'get in first') is an argument for giving the decisions of those authorities a force overriding those of the medical authorities; in particular, it seems to be a defect that there can be no medical review in the light of a change in dominant medical opinion—perhaps by reason of a new discovery.

c (5) As I have indicated, despite dire prophecy the decision in *Dowling's case*¹² has not rendered the statutory scheme unworkable; nor have I myself been convinced that this would be its effect if it were extended from 'accident/injury' (or 'single injury') cases. It was argued that the medical authorities might be left in doubt as to the relevant injury found by the insurance officer as a basis for the issue of injury benefit; but such cases will be rare, especially in view of the fact that the insurance officer can be required to give his reasons for disallowing a claim, so that his medical finding(s) will, in difficult cases, generally be apparent to the medical authorities on the face of the record.

d (6) If *Dowling's case*¹² really causes inconvenience, it seems to me that the remedy lies far more appropriately with the legislature than in your Lordships' House sitting judicially. Parliament has facilities for advice (both from the executive and from industry) as to all possible repercussions, which your Lordships do not have; and, in particular, the statutory review procedure may need reconsideration in any new context.

e (7) In 1969 there were two statutes amending the National Insurance (Industrial Injuries) Act 1965; and certainly one of those would seem to have provided an opportunity to modify the rule in *Dowling's case*¹² if this had been necessary. The Minister having failed to take that parliamentary opportunity, he should not, in my view, be encouraged to invite us now to take this step, with our far more limited knowledge.

f (8) One of the bases of the declaration of 26th July 1966¹³ was that the following of precedent 'may lead to injustice in a particular case'. I am not merely unconvinced that the following of *Dowling's case*¹² would lead to injustice in the cases under instant appeal: I think there is some indication to the contrary. The medical evidence available in these cases and in others to which your Lordships' attention has been drawn shows that there has been a conflict of medical opinion whether exertion can result in myocardial infarction; and it also indicates, so far as I can judge, a shift in preponderant medical opinion from a negative to an affirmative view in the matter. I cannot but feel that it would be hard on the appellants if *Dowling's case*¹² were overruled in such a way as to saddle them with an expression of, it may be, temporarily adverse medical opinion.

g (9) I am left uncertain what would be the effect of overruling *Dowling's case*¹² on decisions thereafter come to on the basis that it was correctly decided. Before departing from a previous decision, your Lordships, I surmise, would require to be positively satisfied that such a course would not involve unacceptably the re-opening of issues long concluded or the risk of individual hardship in cases intermediately decided (and I do not limit my observations to the possible liability for the repayment, but extend them to adjustment of life on the basis of a decision).

12 [1967] 1 All ER 210, [1967] 1 AC 725

13 See Note [1966] 3 All ER 77, [1966] 1 WLR 1234

The 'onus of proof'

On this matter I find myself completely in agreement with the judgments in the Divisional Court¹⁴ and the Court of Appeal¹⁵; and I should merely be presuming on your Lordships' patience if I tried to express my views in my own words, inevitably less felicitous.

Conclusion on the appeals

To sum up, in my view the appellant Jones's appeal is covered directly by *Dowling's* case¹⁶, which should, in my judgment, be followed; while the appellant Hudson's case should not be distinguished from *Dowling's* case¹⁶, which should again be followed. I would therefore allow both appeals.

Afterthoughts

I am left with the feeling that, theoretically, in some ways the most satisfactory outcome of these appeals would have been to have allowed them on the basis that they were governed by the decision in *Dowling's* case¹⁶, but to have overruled that decision prospectively. Such a power—to overrule prospectively a previous decision, but so as not necessarily to affect the parties before the court—is exercisable by the Supreme Court of the United States, which has held it to be based on the common law: see *Linkletter v Walker*¹⁷.

In this country it was long considered that judges were not makers of law but merely its discoverers and expounders. The theory was that every case was governed by a relevant rule of law, existing somewhere and discoverable somehow, provided sufficient learning and intellectual rigour were brought to bear. But once such a rule had been discovered, frequently the pretence was tacitly dropped that the rule was pre-existing; for example, cases like *Shelley's Case*¹⁸, *Merryweather v Nixan*¹⁹ or *Priestley v Fowler*²⁰ were (rightly) regarded as new departures in the law. Nevertheless the theory, however unreal, had its value—in limiting the sphere of lawmaking by the judiciary (inevitably at some disadvantage in assessing the potential repercussions of any decision, and increasingly so in a complex modern industrial society), and thus also in emphasising that central feature of our constitution, the sovereignty of Parliament. But the true, even if limited, nature of judicial lawmaking has been more widely acknowledged of recent years; and the declaration of 26th July 1966¹ may be partly regarded as of a piece with that process. It might be argued that a further step to invest your Lordships with the ampler and more flexible powers of the Supreme Court of the United States would be no more than a logical extension of present realities and of powers already claimed without evoking objection from other organs of the constitution. But my own view is that, although such extension should be seriously considered, it would preferably be the subject-matter of Parliamentary enactment. In the first place, informed professional opinion is probably to the effect that your Lordships have no power to overrule decisions with prospective effect only; such opinion is itself a source of law; and your Lordships, sitting judicially, are bound by any rule of law arising extra-judicially. Secondly, to proceed by Act of Parliament would obviate any suspicion of endeavouring to upset one-sidedly the constitutional balance between executive, legislature and judiciary. Thirdly, concomitant problems could receive consideration—for example, whether other courts supreme within their own jurisdictions should have similar powers as regards the

¹⁴ [1969] 2 All ER 631 and 638, [1970] 1 QB 477

¹⁵ [1970] 1 All ER 97, [1970] 1 QB 477

¹⁶ [1967] 1 All ER 210, [1967] 1 AC 725

¹⁷ (1965) 381 US 618

¹⁸ (1581) 1 Co Rep 93

¹⁹ (1799) 8 Term Rep 186

²⁰ (1837) 3 M & M 1, [1835-42] All ER Rep 449

¹ See Note [1966] 3 All ER 77, [1966] 1 WLR 1234

- a rule of precedent; whether machinery could and should be devised to apprise the courts of the potential repercussions of any particular decision; and whether any court (including the appellate committee of your Lordships' House) should sit in banc when invited to review a previous decision.

Appeals allowed.

- b Solicitors: W H Thompson (for the appellants); Solicitor, Department of Health & Social Security.

S A Hatteea Esq Barrister.

Willingale (Inspector of Taxes) v Islington Green Investment Co

- c CHANCERY DIVISION
GOFF J
13th, 14th, 20th JULY 1971

- d *Income tax – Corporation tax – Deduction in computing profits – Charges on income – Yearly interest payment – Unlimited private company – Close company – Shares held by father and two sons – All three directors but none whole-time service director – Company owning property – Loans by father and bank to company to acquire property – Death of father – Two sons and solicitor father's executors – Bank loan repaid out of father's estate – Yearly interest paid by company to father's executors – Administration of father's estate not completed at time of payment – One son ceased to be director during relevant accounting period – Whether yearly interest charge on income – Finance Act 1965, s 52, Sch 11, para 9 (1), Sch 18, para 5 (b), (c).*

- The taxpayer company had an issued share capital of £10,000 divided into 10,000 shares of £1 each. The shares were issued as to 200 to M and as to 4,900 each to J and C who were M's sons. M, J and C were the original directors but none was a whole-time service director. The taxpayer company purchased property costing
f nearly £66,000 with the assistance of loans from its bankers (guaranteed by M) and from M. M died on 11th July 1965 and the three executors named in the will were a solicitor and J and C. At the date of his death the taxpayer company owed M £27,500, but later the executors repaid the bank loans and the taxpayer company then owed the estate of M a total of £57,500. During the accounting period 6th April 1966 to 25th March 1967 the taxpayer company paid M's estate £1,827 in yearly interest.
g During that period M's shares in the taxpayer company had not been transferred into the names of the executors and the administration of M's estate had not been completed. On 9th January 1967 J ceased to be a director of the taxpayer company and in August 1967 his shareholding was sold to C. The taxpayer company was assessed to corporation tax for the accounting period 6th April 1966 to 25th March 1967. During that accounting period the taxpayer company was a close company and
h J and C were 'participators' within para 4 of Sch 18 to the Finance Act 1965. The taxpayer company claimed that the yearly interest paid by it to the executors was a 'charge on income' and, therefore, an allowable deduction against the total profits of the taxpayer company by virtue of s 52 (1)^a. The Crown contended that the yearly interest was a 'distribution of the company' within the meaning of para 9 (1) of

- j a Section 52, so far as material, provides: '(1) In computing the corporation tax chargeable for any accounting period of a company any charges on income paid by the company in the accounting period (but not before the year 1966-67), so far as paid out of the company's profits brought into charge to corporation tax, shall be allowed as deductions against the total profits for the period as reduced by any other relief from tax. (2) Subject to the following subsections, "charges on income" means for the purposes of corporation tax

(Continued at foot of p 200)

Sch 11^b and therefore excluded, under s 52 (2), from being a charge on income, on the basis that the executors were, within para 5 (b) and (c) of Sch 18^c, associates in relation to the participator C. a

Held – (i) The yearly interest was not prevented from being a charge on income on account of para 5 (b) which could not apply, since a will was not, for the purposes of the statutory definition of settlement, a ‘disposition’ (see p 207 j and p 208 b and j, post). *Inland Revenue Comrs v Buchanan* [1957] 2 All ER 400 applied; further even if a will could be a disposition (i.e. ‘provision in an instrument which deals with particular property’), personal representatives of an estate which was still in course of administration could not be said to be the ‘trustees of any settlement’ within the meaning of para 5 (b) (see p 208 e to j, post). b

(ii) The yearly interest was however prevented as a distribution from being an allowable deduction as a charge on income because the executors were within the meaning of para 5 (c) ‘interested’ in M’s shares; in that paragraph the word ‘interested’ covered both fiduciary and beneficial interests and there was no difference in that context between trustees and executors who had not yet completed the administration and who accordingly had the whole right of property (see p 209 h and p 210 b and c, post). c

Inland Revenue Comrs v Park Investments Ltd [1966] 2 All ER 785 applied. d

Notes

For allowance of charges on income, see Supplement to 20 Halsbury’s Laws (3rd Edn) para 2009.

For the Finance Act 1965, s 52, Sch 11, para 9, Sch 18, paras 4 and 5, see 45 Halsbury’s Statutes (2nd Edn) 583, 696, 732. e

In relation to the year 1970–71 and subsequent years of assessment s 52 of, and Sch 11, para 9, and Sch 18, paras 4 and 5 to, the Finance Act 1965 have been replaced respectively by ss 248, 284 and 303 of the Income and Corporation Taxes Act 1970.

Cases referred to in judgment

Bibby (J) & Sons Ltd v Inland Revenue Comrs [1944] 1 All ER 548, 170 LT 370; *affd* HL [1945] 1 All ER 667, 114 LJKB 353, 173 LT 17, 29 Tax Cas 167, 28 Digest (Repl) 429, 1884. f

Comr of Stamp Duties v Livingston [1964] 3 All ER 692, [1965] AC 694, [1964] 3 WLR 963, Digest (Cont Vol B) 247, *258a.

Gartside v Inland Revenue Comrs [1968] 1 All ER 121, [1968] AC 553, [1968] 2 WLR 277, Digest (Cont Vol C) 326, 74a. g

Inland Revenue Comrs v Buchanan [1957] 2 All ER 400, [1958] Ch 289, [1957] 3 WLR 68, 37 Tax Cas 365, 28 Digest (Repl) 283, 1254.

Inland Revenue Comrs v Park Investments Ltd [1966] 1 All ER 803, [1966] 1 WLR 540; *affd* CA [1966] 2 All ER 785, [1966] Ch 701, [1966] 3 WLR 65, 43 Tax Cas 200, Digest (Cont Vol B) 427, 1585b.

Philipson-Stow v Inland Revenue Comrs [1960] 3 All ER 814, [1961] AC 727, [1960] 3 WLR 1008, 21 Digest (Repl) 40, 156. h

(Continued from p 199)

payments of any description mentioned in subsection (3) below, not being dividends or other distributions of the company; but no payment which is deductible in computing profits or any description of profits for purposes of corporation tax shall be treated as a charge on income. (3) The payments referred to in subsection (2) above are—(a) any yearly interest, annuity or other annual payment and any such other payments as are mentioned in section 169 (3) of the Income Tax Act 1952, but not including sums falling within section 169 (4) (rents, etc.). . . . j

b Schedule 11, para 9 (1), so far as material, is set out at p 207 b, post

c Schedule 18, para 5, is set out at p 207 d and e, post

- a *Ponder, Re, Ponder v Ponder* [1921] 2 Ch 59, [1921] All ER Rep 164, 90 LJCh 426, 125 LT 568, 47 Digest (Repl) 170, 1386.

Case stated

- b 1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 24th November 1969, Islington Green Investment Co ('the taxpayer company') appealed against an assessment to corporation tax for the accounting period 6th April 1966 to 25th March 1967 in the sum of £5,000.

- c 2. Shortly stated the question for the commissioners' decision was whether yearly interest amounting to £1,827 paid by the taxpayer company during the aforesaid accounting period to the estate of A H Michell, deceased, in the circumstances set out below was a charge on the income of the taxpayer company and allowable as a deduction against the total profits of the taxpayer company for the accounting period in accordance with s 52 of the Finance Act 1965 ('the Act').

[Paragraph 3 set out the documents proved or admitted before the commissioners.]

- d 4. The following facts were admitted between the parties: (1) The taxpayer company was an unlimited private company incorporated on 19th January 1961 under the Companies Act 1948 with a nominal capital of £50,000 in 50,000 ordinary shares of £1 each. It was a property owning company and owned various freehold properties situated mainly in the Islington district of London. (2) The taxpayer company's issued capital comprised 10,000 shares of £1 each fully paid and originally was registered in the names of and beneficially owned by:

e	A H Michell	200 shares
	and his two sons:	
	J F C Michell	4,900 shares
	C H W Michell	4,900 shares
		<hr/> 10,000 shares <hr/>

- f The aforementioned three shareholders were also the original directors of the taxpayer company. (3) A H Michell died on 11th July 1965, leaving a widow, his two sons and a daughter. Probate of his will dated 9th March 1961 was granted on 4th October 1965 to the three executors named therein, i.e. P M Armitage (a solicitor), J F C Michell and C H W Michell. (4) At the time of the appeal hearing A H Michell's shares in the taxpayer company had not been transferred into the names of the executors of his will, and the administration of his estate according to the will had not been completed. (5) J F C Michell retired from the board of directors of the taxpayer company on 9th January 1967 and his shareholding was sold to C H W Michell for full consideration in August 1967. At the time of the appeal hearing the shareholders were:

h	A H Michell, deceased	200 shares
	C H W Michell	9,799 shares
	P C B Pockney (nominee for C H W Michell)	1 share
		<hr/> 10,000 shares <hr/>

- j (6) To fill the vacancy on the taxpayer company's board of directors P C B Pockney was appointed a director on 9th January 1967 since which date he and C H W Michell continued to comprise the board of directors. (7) During the relevant accounting period the taxpayer company was a 'close company' within para 1 of Sch 18 to the Act, and C H W Michell and J F C Michell were 'participants', in relation to the company within para 4 of Sch 18. At no time had any director of the taxpayer company been a 'whole-time service director' of the company within para 6 (3) of

Sch 18. (8) The properties purchased by the taxpayer company cost a total of £65,982 and to date only one costing £7,797 had been sold. That disposal took place during the relevant accounting period, and the provisions of Part III of the Act (capital gains tax) were applied to the disposal. (9) In order to finance the purchase of the properties, loans were obtained by the taxpayer company from, inter alia, the taxpayer company's bankers (secured by deposit of title deeds and guaranteed by A H Michell) and from A H Michell. Interest had been paid regularly thereon, and at the time of his death on 11th July 1965 the taxpayer company owed A H Michell £27,500. Subsequently, in order to cancel the guarantees given to the bank by A H Michell the executors of his will repaid the bank loans so that at the date of the appeal hearing the taxpayer company owed the estate of A H Michell deceased £57,500. Interest had been paid to the executors regularly, and no formal security was held by them other than the title deeds relating to certain properties which were held by the taxpayer company's bankers to their order. (10) During the relevant accounting period yearly interest of £1,827 was paid to the estate of A H Michell deceased.

5. It was not in dispute that the aforementioned yearly interest of £1,827 consisted wholly of payments within s 52 (3) (a) of the Act.

6. It was contended on behalf of the taxpayer company: (1) that the yearly interest amounting to £1,827 satisfied the definition of 'charges on income' in s 52 (2); (2) that the amount of £1,827 should be allowed as a deduction against the total profits of the taxpayer company for the relevant accounting period in accordance with s 52 (1); (3) that the appeal should be allowed and the assessment be adjusted accordingly.

7. It was contended on behalf of the inspector of taxes: (1) (a) that for the purpose of para 5 (b) of Sch 18 to the Act the definition of 'settlement' included dispositions and trusts created under a will or on an intestacy; (b) that as A H Michell was an associate of C H W Michell (who was a director), under para 5 (a) of Sch 18, the trustees of the settlement created by the will of A H Michell were themselves associates of C H W Michell within the meaning of para 5 (b) of Sch 18. (2) (a) That for the purpose of para 5 (c) of Sch 18 the legal personal representatives and trustees of the will of A H Michell were persons 'interested in' shares the subject of a trust or forming part of the estate of a deceased person; they were therefore both 'participants' and 'associates' of each other; (b) that C H W Michell was a director of the taxpayer company, owned shares in his own right and was also 'interested in' the same shares as one of the legal personal representatives and trustees; the legal personal representatives and trustees were therefore 'associates' of C H W Michell. (3) That as the yearly interest on the money advanced was paid to associates of a director, who was also a participator, it was therefore a 'distribution' within the meaning of para 9 (1) (a) of Sch 11 to the Act and was not one of the 'charges on income' (as defined in s 52 (2) of the Act) which was allowable as a deduction against the total profits for the relevant accounting period under s 52 (1) of the Act. (4) That the appeal should fail and the assessment be determined accordingly.

[Paragraph 8 set out the cases referred to.]

9. The commissioners who heard the appeal took time to consider their decision and gave it in writing on 6th January 1970, as follows:

'1. The question for our decision in this appeal is whether payments amounting to £1,827 made by the [taxpayer company] to the executors of the will of A. H. Michell, deceased, during the accounting period 6th April, 1966 to 25th March, 1967, by way of yearly interest on loans is a charge on the [taxpayer company's] income and therefore allowable as a deduction against the [taxpayer company's] total profits for Corporation Tax purposes by virtue of Section 52 (1), Finance Act 1965. It is not disputed that the payments making up the £1,827 fall within one or more of the descriptions mentioned in paragraph (a) of Section 52 (3),

and the question turns on whether the said amount of £1,827 falls within the definition of "charges on income" in Section 52 (2), as claimed by the [taxpayer company], or whether, as claimed by the Crown, it is caught by the words of exclusion in the said Section 52 (2) "not being . . . distributions of the company".

2. The [taxpayer company] was incorporated as an unlimited private company on 19th January, 1961. The original directors of the [taxpayer company] were A. H. Michell and his two sons J. F. C. Michell and C. H. W. Michell, and these three individuals also held the whole of the [taxpayer company's] issued share capital of 10,000 £1 shares, as follows—

A. H. Michell	200 shares
J. F. C. Michell	4,900 shares
C. H. W. Michell	4,900 shares
	<hr/>
	10,000
	<hr/>

It is agreed that the [taxpayer company] is and was during the relevant accounting period a close company and that at no time has any of its directors been a whole-time service director.

3. Following the death of A. H. Michell on 11th July, 1965, J. F. C. Michell and C. H. W. Michell continued as the only two directors of the [taxpayer company] until 9th January, 1967, when J. F. C. Michell retired as a director and was succeeded by P. C. B. Pockney. Since that date C. H. W. Michell and P. C. B. Pockney have continued as the only two directors of the [taxpayer company].

4. The answer to the question we have to decide (see paragraph 1 above) depends upon the interpretation of certain provisions contained in the 11th and 18th Schedules to the Finance Act 1965. For Corporation Tax purposes "distribution" is defined, for close companies, by Part II, 11th Schedule, under Paragraph 9 (1) of which "distribution" includes inter alia, unless otherwise stated, "(a) any interest or other consideration paid or given by the company to a director who is not a whole-time service director, but is a participator, for the use of money advanced by any person, or to a person who is an associate of such a director for the use of money so advanced". Sub-paragraph (5) of the said Paragraph 9 provides that, in the said Paragraph, any reference to a participator includes an associate of a participator. "Participator" and "associate" are defined in Paragraphs 4 and 5 respectively in Part I of the 18th Schedule to the Finance Act 1965. "Participator" is there defined, in general, as, in relation to any company, a person having a share or interest in the capital or income of the company. "Associate" is there defined as meaning, in relation to a participator:—(a) a person in any of the following relationships to the participator, that is to say, husband or wife, parent or remoter forebear, child or remoter issue, brother or sister, and partner; (b) the trustee or trustees of any settlement in relation to which the participator is, or any such relative of his (living or dead) as is mentioned in sub-paragraph (a) above is or was, a settlor ("settlement" and "settlor" here having the same meaning as in Chapter III of Part XVIII of the Income Tax Act, 1952, and "relative" including a husband or wife); (c) where the participator is interested in any shares or obligations of the company which are subject to any trust or are part of the estate of a deceased person, any other person interested therein.

5. Probate of A. H. Michell's will was granted on 4th October, 1965, to P. M. Armitage, J. F. C. Michell and C. H. W. Michell, the executors named therein. The administration of the estate has not yet been completed, and the 200 shares in the [taxpayer company] which were originally registered in the name of

A. H. Michell continue to be so registered. J. F. C. Michell's shares in the [taxpayer company] were sold for full consideration to C. H. W. Michell in August 1967. a

'6. It is common ground that both J. F. C. Michell and C. H. W. Michell were participators, in relation to the [taxpayer company], throughout the relevant accounting period, that both are executors of the will of A. H. Michell, deceased, and are among the residuary legatees thereunder. The appeal was, for convenience, argued before us in relation to C. H. W. Michell (who was a director of the [taxpayer company] through the relevant accounting period) as a participator, and we adopt a similar course in the succeeding paragraphs of this decision. On this basis, the question we have to decide is whether the yearly interest paid by the [taxpayer company] to the executors was paid to an associate of C. H. W. Michell. b

'7. The Crown do not seek to contend that sub-paragraph (a) of Paragraph 5, 18th Schedule, applies and the question for our decision, therefore, falls to be resolved by considering whether sub-paragraph (b) or sub-paragraph (c) of paragraph 5 applies. c

'8. In relation to sub-paragraph (b), it is not admitted on behalf of the [taxpayer company] that the will of A. H. Michell, deceased is a settlement though it is not denied that, if it is a settlement, then it is a settlement in relation to which the participator's father (being "any such relative of [the participator] (living or dead) as is mentioned in sub-paragraph (a) of Paragraph 5) was a settlor. It is, however, contended on behalf of the [taxpayer company] that "trustee or trustees" in sub-paragraph (b) of Paragraph 5 is to be interpreted as meaning trustee or trustees in the full sense, that a distinction should be drawn between executors qua executors and executors qua trustees, that the executors of the will of A. H. Michell deceased will not become trustees until the administration of the deceased's estate has been completed, and that as it has not yet been completed the said executors were not at the material time an associate in relation to the participator C. H. W. Michell within sub-paragraph (b) of Paragraph 5. In support of these contentions we are referred to the cases of *Re Ponder*^d, and *Re Cockburn (decd)*^e. d

'9. On behalf of the Crown it is pointed out that Paragraph 5 of the 18th Schedule adopts the definition of "settlement" in Chapter III, Part XVIII, Income Tax Act, 1952—"any disposition, trust, covenant, agreement or arrangement" (Section 411 (2)). As to "disposition", the Crown emphasise the wide meaning of the word and refer us to the case of *Duke of Northumberland v A-G*^f in support of the proposition that "disposition" can include trusts created under a will. As to "trust" the Crown invite our attention to the terms of Section 68 (17) and Section 69 (1) and (2), Trustee Act, 1925. The Crown contend that the meaning of "trustee or trustees" in Paragraph 5, 18th Schedule, should not be limited in the sense contended for on behalf of the [taxpayer company], that the fact that the administration of the estate of A. H. Michell, deceased, has not yet been completed is irrelevant and that the executors of the will of the said deceased are an associate of C. H. W. Michell within sub-paragraph (b) of Paragraph 5. e

'10. In relation to sub-paragraph (c) of the said Paragraph 5, it is contended for the [taxpayer company] that as the 200 shares in the [taxpayer company] held by A. H. Michell deceased, which are part of his estate, are still registered in his name and have not been transferred to the executors, neither the participator (C. H. W. Michell) nor the executors are "interested" therein. Further it is contended that the interest of an executor in any part of the estate of a deceased person is not a beneficial interest, and that a beneficial interest is what is required to be shown to exist if sub-paragraph (c) is to be satisfied. It follows, f

^d [1921] All ER Rep 164

^f [1905] AC 406

^e [1957] 2 All ER 522

it is contended for the [taxpayer company], that the executors are not an associate of C. H. W. Michell within the said sub-paragraph (c).

'11. The Crown contend that the said 200 shares are subject to a trust created by the will, and are part of the estate of the deceased, that "interested" in sub-paragraph (c) is not limited in meaning so as to refer only to a beneficial interest, that the participator (C. H. W. Michell) is "interested" in the said shares and that the executors are also "interested" in them. Accordingly, the Crown contend, the executors are an associate of the participator within sub-paragraph (c).

'12. We are referred to a number of cases concerning the meaning to be attached to "an interest" or "interested". Our attention was invited on behalf of the [taxpayer company] to, in particular, *Lord Sudeley v A-G*^g. On behalf of the Crown we were referred to, inter alia, *Inland Revenue Comrs v Park Investments Ltd*^h and in particular to the remarks of Danckwerts, L.J.:-

"I do not accept the argument that 'persons interested in any shares . . . which are subject to any trust' does not include trustees. The words, in my opinion, are exactly applicable to the position of a trustee who holds shares subject to a trust, and a trustee has an interest in such shares—a legal interest."

'13. After careful consideration of the arguments addressed to us and the cases to which we are referred, we have come to the conclusion that the contentions of the [taxpayer company] are to be preferred to those of the Crown.

'14. In regard to sub-paragraph (b) of Paragraph 5, 18th Schedule, we think that the decisions in *Re Ponder*^j, and *Re Cockburn (decd)*^k support the [taxpayer company's] argument that there is a distinction between executors qua executors and executors qua trustees, and that executors change into trustees when the administration of the deceased's estate is completed. It follows that, in our opinion, the administration of the estate of A. H. Michell deceased being not yet completed, the executors of his will have not yet assumed the functions of trustees to which they were appointed by the will and are not, and were not during the relevant accounting period, the trustees of a settlement within the said sub-paragraph (b). In view of our decision on this point it is unnecessary for us to reach a conclusion on the question whether the said will is a settlement.

'15. In regard to sub-paragraph (c) of Paragraph 5, 18th Schedule, we consider that the case of *Lord Sudeley v A-G*^g supports the [taxpayer company's] contention that C. H. W. Michell, as participator, is not "interested" in the 200 shares in the [taxpayer company] which are registered in the name of the deceased and form part of his estate. We have in mind in particular the opinions of Lord Halsbury L.C. and Lord Herschell, and especially the sentence in the latter opinion^l "I do not think that they have any estate, right, or interest, legal or equitable, in these New Zealand mortgages . . ." We hold accordingly that the participator C. H. W. Michell is not "interested" in the said 200 shares. In view of our finding on this point it is unnecessary for us to pronounce upon the question whether the executors are "interested" in the said shares. As however C. H. W. Michell is both the participator and one of the executors we record our view that it would not be inconsistent with our finding that the participator is not "interested" therein if it were held that the executors are "interested" therein; we do not think it is permissible, in interpreting and applying sub-paragraph (c), to proceed on the basis that C. H. W. Michell can be treated as playing two separate roles at once, as a participator in relation to the opening words of the sub-paragraph and as part of "any other person" in relation to the closing words thereof.

^g [1897] AC 11

^h [1966] 2 All ER 785

ⁱ [1966] 2 All ER at 795

^j [1921] All ER Rep 164

^k [1957] 2 All ER 522

^l [1897] AC at 18

'16. The appeal accordingly succeeds. We hold that the executors of the will of A. H. Michell deceased were not during the relevant accounting period an associate of such a director as is mentioned in sub-paragraph (a) of Paragraph 9 (1), 11th Schedule, Finance Act, 1965, that the yearly interest paid by the [taxpayer company] to the said executors during the said accounting period was not a distribution of the [taxpayer company] but is within the definition of "charges on income" in Section 52 (2) of the said Act and is allowable as a deduction against the [taxpayer company's] total profits according to the terms of Section 52 (1) of the said Act. We leave figures to be agreed in the light of our decision.'

10. Figures were agreed between the parties and on 28th April 1970, the commissioners discharged the assessment accordingly (agreed balance of charges to be carried forward £154).

The Crown appealed by way of case stated to the High Court.

G M Godfrey QC, P W Medd and J P Warner for the Crown.

S T Bates QC and Bruce Holroyd Pearce QC for the taxpayer company.

Cur adv vult

20th July. **GOFF J** read the following judgment. This is an appeal on a question of corporation tax, which was imposed by s 49 of the Finance Act 1965. By s 51 (1), the tax is assessed and charged on the full amount of the profits without any other deduction than is authorised by the Act. Then, by s 52 (1), there is an allowable deduction for charges on income, but by sub-s (2) of that section the expression 'charges on income', which is otherwise defined in sub-s (3), is made to exclude 'dividends or other distributions of the company'.

The question which the Special Commissioners had to determine and which has now come before me is whether certain yearly interest amounting to £1,827 paid by the taxpayer company to the estate, i.e. the executors, of one A H Michell, deceased, was a charge on the income of the taxpayer company and allowable as a deduction against the total profits of the taxpayer company. The case states in para 5 that it was not in dispute that the £1,827 consisted wholly of payments within s 52 (3) (a), and was therefore a charge on income, but the question is whether it was a distribution within sub-s (2) and so not allowable.

The facts are set out in detail in para 4 of the case, and I need not rehearse them fully here. It is sufficient to observe the following. A H Michell, deceased, had two sons (to whom, for ease of reference, I will refer as 'John' and 'Charles') each of whom was throughout the relevant accounting period a substantial shareholder in the taxpayer company, and therefore a participator within the meaning ascribed to that expression in para 4 (1) of Sch 18 to the Act. John afterwards sold and transferred his shares to Charles, but nothing turned on that. Charles was at all material times a director. The deceased father was the registered owner of 200 shares and, as was found in para 4 (4) of the case:

'At the time of the appeal hearing A. H. Michell's shares in the [taxpayer company] had not been transferred into the names of the executors of his said will, and the administration of his estate according to the said will had not been completed.'

The executors were a Mr Armitage, who was a solicitor and was not a shareholder or director of the taxpayer company, together with John and Charles. Further, it was found by para 4 (7) of the case:

'During the relevant accounting period the [taxpayer company] was a "close company" within paragraph 1 of Schedule 18 to the Act, and C. H. W. Michell [i.e. Charles] and J. F. C. Michell [i.e. John] were "participators", in relation to the [taxpayer company] within paragraph 4 of the said Schedule. At no time

- a has any director of the [taxpayer company] been a "whole-time service director" of the [taxpayer company] within paragraph 6 (3) of the said Schedule.'

On those findings, the extended meaning of 'distribution' in relation to a close company contained in para 9 (1) of Sch 11 applies. That, so far as material, provides as follows:

- b 'In relation to a close company "distribution" includes, unless otherwise stated,—(a) any interest or other consideration paid or given by the company to a director who is not a whole-time service director, but is a participator, for the use of money advanced by any person, or to a person who is an associate of such a director for the use of money so advanced . . .'

'Participator' is defined in para 4 (1) of Sch 18, but I need not further refer to that.

- c What is highly important, and almost the whole battleground, is para 5 of Sch 18, which I now read:

- d 'For purposes of the provisions of this Act relating to close companies including this Schedule, "associate" means, in relation to a participator,—(a) a person in any of the following relationships to the participator, that is to say, husband or wife, parent or remoter forebear, child or remoter issue, brother or sister, and partner; (b) the trustee or trustees of any settlement in relation to which the participator is, or any such relative of his (living or dead) as is mentioned in subparagraph (a) above is or was, a settlor ("settlement" and "settlor" here having the same meaning as in Chapter III of Part XVIII of the Income Tax Act 1952, and "relative" including a husband or wife); (c) where the participator is interested in any shares or obligations of the company which are subject to any trust or are part of the estate of a deceased person, any other person interested therein; and has a corresponding meaning in relation to a person other than a participator.'

The commissioners, in a reserved decision which is fully set out in para 9 of the case, upheld the taxpayer company's contention that the £1,827 was not a distribution within the meaning of the Act, and discharged the assessment accordingly.

- f It is common ground that Charles was a director who was not a whole-time service director but was a participator, and the Crown's case is that his two co-executors were associates, therefore the £1,827 was a distribution, and the commissioners ought so to have held. Actually, at all material times John was also a participator, but nothing turns on that. It is argued by the taxpayer company per contra as an answer in limine that the payment was a joint payment to the three executors and therefore was not on any showing a payment either to a participator or to associates. In other words, it is said that the disjunctive 'or' in the penultimate line of para 9 (1) of Sch 11 postulates two mutually exclusive alternatives. I cannot so read the words, even allowing for the strict construction which is required in a taxing statute. It would produce the manifest absurdity of excluding a payment made to a participator and his wife jointly.

- g h I must then look to see whether the two co-executors were associates of Charles, for which purpose I have to turn to para 5 of Sch 18. Para 5 (a) is not applicable, but the Crown rest their case on para 5 (b) and (c), which I have already read. So far as para 5 (b) is concerned, the first question is whether there is a settlement which throws me back to the definition of 'settlement' in s 411 (2) of the Income Tax Act 1952, which, so far as material, is in these words:

- j 'In this Chapter, "settlement" includes any disposition, trust, covenant, agreement or arrangement . . .'

The Crown say that the will of A H Michell is a disposition. The taxpayer company do not dispute that a will may be a disposition, but they say it cannot be for present purposes because this statutory definition has been construed by the court as excluding

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a will. In support of this submission they rely on *Inland Revenue Comrs v Buchanan*¹. The decision there on that part of the case was actually on s 20 of the Finance Act 1943, and not on s 21 of the Finance Act 1936, sub-s (9) of which contained the definition now embodied in s 411 (2) of the 1952 Act. But that does not matter, because s 20 of the 1943 Act was ancillary to s 21 of the Act of 1936, and therefore the same definition was involved. The case cited clearly establishes the proposition for which the taxpayer company contend so far as Chapter 3 of Part 18 of the Income Tax Act 1952 is concerned, and indeed as counsel for the taxpayer company has himself pointed out such a conclusion was inevitable in the context. The Crown seeks to escape that way and says that in the 1965 Act the context is different, or at least that there is no such compelling context as Chapter 3 provided, and they invite me not to apply the decision in *Buchanan's* case². In my judgment, I cannot possibly do that in a taxing Act, even if it would be correct in any case, which I doubt. If the legislature has not said what it meant, that is unfortunate, but the words of para 5 (b) in this respect, whatever criticisms there may be of other parts of it, are definite and unambiguous. They are, "settlement" and "settlor" here having the same meaning as in Chapter III of Part XVIII of the Income Tax Act 1952'. I cannot possibly read that as meaning, 'shall be defined as those words respectively are defined in s 411 (2) of the Income Tax Act 1952, but shall not have the meaning which the court has construed those words to have, and which must, therefore, be taken to be their meaning in Chapter 3'.

That is sufficient to dispose of the Crown's claim under para 5 (b), but it would be right, I think, that I should express briefly the view I would have taken on the rest of the argument on that paragraph had the contention not collapsed in this way. In the first place, 'disposition' may mean 'the instrument, will or settlement by which property is disposed of' or 'the provision in an instrument which deals with particular property': see per Viscount Simonds in *Philipson-Stow v Inland Revenue Comrs*³. In the context afforded by the collocation of words in the definition, the latter appears to me to be the true view. If, therefore, contrary to my decision, the will could be a disposition, one would have to look not to the will in general but to the provisions of the will devising or bequeathing property to trustees, in this case the settlement (using that word in its strict meaning) of The White Bungalow, Hoxne, in cl 8 of the will and the residuary gift in cl 9. It seems to me to follow that the expression 'the trustee or trustees of any settlement' cannot refer to executors as such, but only to trustees, and in my judgment the taxpayer company rightly distinguish the two: see *Re Ponder, Ponder v Ponder*⁴. The £1,827 was not paid to the trustees as such. They could not give a receipt. It was paid to the legal personal representatives. Here, they are the same people, but they might not have been and might not be so in other cases; and in any given case the trustees indeed might, owing to the insufficiency of the estate, never become entitled at all, whether being different persons or the same persons in a different capacity. Once one looks, as it seems to me one must, to the gift on trust and not to the will at large, then it follows in my view that the expression 'trustee or trustees of any settlement' in para 5 (b) cannot include the personal representatives of an estate still in course of administration, be they executors or administrators.

Accordingly, in my judgment, a claim under para 5 (b) fails, and I turn to para 5 (c). Here, the Crown has two alternative strings to its bow. First, it says the executors are interested in the shares as executors; one of them, Charles, is ex hypothesi a participator, and the other two are therefore associates, they being interested in the same shares. This involves looking separately at Charles on the one hand as participator and at his co-executors as associates on the other, which the commissioners

1 [1957] 2 All ER 400 at 402, 403, [1958] Ch 289 at 295, 296

2 [1957] 2 All ER 400, [1958] Ch 289

3 [1960] 3 All ER 814 at 818, 819, [1961] AC 727 at 742

4 [1921] 2 Ch 59, [1921] All ER Rep 164

- a shrank from doing. In my judgment, however, that presents no difficulty, although the payment was joint, since here one is not looking at the payment. That difficulty, if it be one, I have already dealt with as a preliminary question on the construction of para 9 (1) of Sch 11. Here one is considering the relationship of a participator to other persons, and I see no difficulty in making that analysis merely because they are all co-executors. Alternatively, the Crown says that each of the executors has a beneficial interest under the will, Charles and John as residuary legatees and all three in the small pecuniary legacy and yearly sum given to each of them by cl 4 and 5 of the will respectively.

- b The taxpayer company submitted that the first claim must fail because 'interest' in para 5 (c) refers only to beneficial interest and does not include a fiduciary one. The taxpayer company further submitted that the alternative fails also because no beneficiary has any legally recognisable interest in any of the assets of a deceased person's estate until administration is completed, but only a chose in action, consisting of the right to have the estate properly administered; and they rely on the decision of the Privy Council in *Comr of Stamp Duties v Livingstone*⁵. If they were right on both limbs, this would be a most extraordinary result indeed.

- c It was not argued that the word 'interest' in para 5 (c) cannot cover both fiduciary and beneficial interests; nor, in my opinion, would that be so: see *Inland Revenue Comrs v Park Investments Ltd*⁶, where Sellers LJ dealing with precisely similar words in s 256 (3) of the Income Tax Act 1952, said 'an interest in the trusts seems to me to involve both the trustees and the beneficiaries'. The fact that there might be trustees and beneficiaries having interests at the same time presents no difficulty. The Crown is entitled to choose either if on the facts one alone will satisfy the conditions of the section: see per Buckley J in the same case⁷.

- d The argument for limiting the word 'interest' to a fiduciary one proceeded on the footing that para 5 as a whole is dealing with family interests, which, so it was said, shows that fiduciary interests are not within the ambit of para 5 (c). I am not at all satisfied that the premise is right, but, even if it be, with all respect I wholly fail to see how any such conclusion follows. On the other hand, the case of *Park Investments Ltd*⁸, to which I have already referred, affords strong support for the view that a fiduciary interest is included: see in particular per Danckwerts LJ⁹. I do not overlook the fact that, although the words were the same, the context was not, but I see no such difference as would affect the conclusion.

- e I derive further support for the inclusion of fiduciary interests from *J Bibby & Sons Ltd v Inland Revenue Comrs*¹⁰, where Lord Greene MR said:

- f "The distinction between a legal and a beneficial interest is sufficiently well-known to justify the belief that, if the legislature had intended to draw it, it would have said so in express terms."

- g Further, I can see no difference in this respect between a trustee and an executor who has not yet completed the administration, and in *Park Investments Ltd*¹¹ Winn LJ said "persons interested in any shares", etc., does include trustees, does include executors'. True, he went on to say:

- h "... but is in the subsection for the sole purpose of preventing the addition of one or more persons as holders of shares by putting the shares into the hands of two or three or four trustees instead of one trustee, and also in contemplation of a

- i 5 [1964] 3 All ER 692, [1965] AC 694
 6 [1966] 2 All ER 785 at 794, [1966] Ch 701 at 723
 7 [1966] 1 All ER 803 at 812, [1966] 1 WLR 540 at 551
 8 [1966] 2 All ER 785, [1966] Ch 701
 9 [1966] 2 All ER at 795, [1966] Ch at 723, 724
 10 [1944] 1 All ER 548 at 550, 29 Tax Cas 167 at 173
 11 [1966] 2 All ER at 797, [1966] Ch at 727

case where there is more than one executor or administrator of an estate—all aimed against the arithmetical aggregation...'

But that was on the context point whether fiduciary interests are included at all (and I have already dealt with that), not on the question whether executors are included as well as trustees. If there be any difference for present purposes between an executor and a trustee—and I have already said that I can see none—it can only serve to point more strongly to an executor as a person having an interest because, as Viscount Radcliffe explained in the *Livingstone* case¹², an executor pending completion of the administration has the whole right of property. In my judgment, therefore, this appeal succeeds under para 5 (c) on the ground that the participator Charles and his co-executors both have interests as executors in the deceased's 200 shares.

In the circumstances, it is unnecessary for me to deal with the alternative submission of the Crown, on which the question was much canvassed before me whether the decision in the *Livingstone* case¹³ applies or is distinguishable on the ground that the word 'interest' has many meanings or a wide meaning and is peculiarly dependent on the context. Lord Radcliffe, referring to beneficiaries in an unadministered estate, used these words¹⁴:

'They can be said, therefore, to have an interest in respect of the assets, or even a beneficial interest in the assets, so long as it is understood in what sense the word "interest" is used in such a context.'

The width of the word and its variety of meanings, and the necessity to consider the context, were further pointed out by Lord Reid and Lord Wilberforce in *Gartside v Inland Revenue Comrs*¹⁵.

Nevertheless, I would just say this, that there appears to me to be a strong context in para 5 (c) to distinguish the *Livingstone* case¹³ principle, since the words are:

'where the participator is interested in any shares . . . of the company which are subject to any trust or are part of the estate of a deceased person . . .'

It would look as if that must be referring to an interest in an estate not completely administered, since otherwise the shares will have vested absolutely either in the participator or in trustees, and they are separately and specifically covered. However, as I have said, it is unnecessary for me to decide this question, and I leave it open.

Finally, for the sake of completeness I would add that, whatever be the true view on this point, the alternative claim could not have succeeded, in my judgment, because I construe the word 'therein' as referring not to the estate or trust but to the shares. This would prevent the independent executor, Mr Armitage, from having an interest on any construction of that word, for his only interest was in the legacy and annuity.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Norton, Rose, Botterell & Roche* (for the taxpayer company).

M Buckley Edwards Esq Barrister.

¹² [1964] 3 All ER at 699, [1965] AC at 712

¹³ [1964] 3 All ER 692, [1965] AC 694

¹⁴ [1964] 3 All ER at 700, [1965] AC at 713

¹⁵ [1968] 1 All ER 121 at 125, 134, [1968] AC 553 at 602, 617

a Mercer Alloys Corporation and another v Rolls Royce Ltd

COURT OF APPEAL, CIVIL DIVISION

DAVIES, PHILLIMORE AND STEPHENSON LJJ

11th, 12th, 13th, 14th, 17th MAY 1971

b *Practice – Parties – Substitution – Substitution after judgment – Action by two companies against defendants – Agreement to compromise action – Consent judgment – Second plaintiff company merging before judgment with third company – Application after judgment to substitute third company as second plaintiff – Power of court to allow substitution – Circumstances in which exercisable – RSC Order 15, rr 6 (2), 7 (2).*

c On 30th April 1970 the plaintiffs, two Californian companies, Mercer and Stalco, issued a writ against the defendants claiming £600,416 13s 4d damages for alleged breach of contract. On 31st July 1970, unknown to the defendants and the plaintiffs' English advisers, Stalco (the second plaintiffs) merged with another Californian company, Whittaker. From that date according to Californian law Stalco, while ceasing to exist as a separate corporate entity, continued to exist for the purpose of pending suits.

d On 25th February 1971, an agreement having been reached to compromise the action, the defendants consented to judgment against them for £335,000, the action still standing in the name of Mercer and Stalco as plaintiffs. The defendants however, having learnt in March 1971 of the merger, subsequently sought to set aside the consent judgment, contending that since at the material date Stalco had ceased to exist, both the agreement and the judgment were null and void. The plaintiffs applied to amend the title of the action by substituting Whittaker as second plaintiffs. The defendants conceded that had they known of the merger prior to the consent judgment they would have had no objection to Whittaker being substituted for Stalco.

e The plaintiffs applied to amend the title of the action by substituting Whittaker as second plaintiffs. The defendants conceded that had they known of the merger prior to the consent judgment they would have had no objection to Whittaker being substituted for Stalco.

Held – The plaintiffs were entitled to and would be granted an order joining Whittaker as second plaintiffs in substitution for Stalco because—

f (i) the court had power both under rules of court, i.e. RSC Ord 15, rr 6 (2)^a and 7 (2)^b, and by virtue of its inherent jurisdiction to make such an order after judgment in certain circumstances (see p 216 c, p 217 h and p 218 h, post); Dictum of Denning LJ in *Pearlman (Veneers) SA (Pty) Ltd v Bartels* [1954] 3 All ER at 600 and of Singleton LJ in *Thynne (Marchioness of Bath) v Thynne (Marquess of Bath)* [1955] 3 All ER at 138 applied;

g (ii) in the present circumstances it was right and proper and in the interests of justice for the court to order the amendment, since at the time of the settlement it had been the intention of the parties to put an end to the litigation between them and the amendment would give effect to that intention (see p 216 d and e, p 217 a and j and p 218 d, post).

Notes

For amendment and setting aside judgments or orders, see 22 Halsbury's Laws (3rd Edn) 784-793, paras 1664-1674, and for a case on the amendment of the title of an action, see 50 Digest (Repl) 99, 815.

a RSC Ord 15, r 6 (2), so far as material, provides:

'At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application—(a) order any person . . . who has for any reason ceased to be a proper or necessary party, to cease to be a party; (b) order any person who ought to have been joined as a party . . . be added as a party . . .'

j **b** RSC Ord 15, r 7 (2), so far as material, provides:

'Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the court may, if it thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party . . .'

Cases referred to in judgments

MacCarthy v Agard [1933] 2 KB 417, [1933] All ER Rep 991, 102 LJKB 753, 149 LT 595, 27 Digest (Repl) 252, 2032. a

Meier v Meier [1948] 1 All ER 161, [1948] P 89, [1948] LJR 436, 27 Digest (Repl) 593, 5545. *Pearlman (Veneers) SA (Pty) Ltd v Bartels* [1954] 3 All ER 659, [1954] 1 WLR 1457, 50 Digest (Repl) 99, 815.

Thynne (Marchioness of Bath) v Thynne (Marquess of Bath) [1955] 2 All ER 377, [1955] P 272, [1955] 3 WLR 108; *rvsd CA* [1955] 3 All ER 129, [1955] P 272, [1955] 3 WLR 465, Digest (Cont Vol A) 812, 6612a. b

Interlocutory appeal

This was an appeal by the defendants, Rolls Royce Ltd, against a decision of Donaldson J on 7th April 1971, dismissing a motion by the defendants to set aside a consent judgment dated 25th February 1971 under which the defendants were ordered to pay to the first plaintiffs, Mercer Alloys Corpn, and the second plaintiffs, Stalco International Corpn, the sum of £335,000 and costs. The plaintiffs in their cross-appeal sought to substitute another company, Whittaker Corpn, as second plaintiffs. The facts are set out in the judgment. c

A J L Lloyd QC, K S Rokison and P N Legh-Jones for the defendants. d
C L Hawser QC, A H Head and A G Hawser for the plaintiffs.

DAVIES LJ. This is the defendants' appeal from an order of Donaldson J made on 7th April 1971 by which he dismissed their motion to set aside a consent judgment dated 25th February 1971 whereby it was adjudged that the defendants pay to the plaintiffs £335,000 and costs. The plaintiffs are, or were at the date of the writ, as the title of the action shows, two Californian companies. I shall refer to them as 'Mercer' and 'Stalco'. The defendants are, of course, the world-renowned engineering company. e

In October 1969 a contract was entered into between the parties whereby the plaintiffs or one or other of them agreed to sell and deliver to the defendants in 1970 a large quantity of nickel. That contract was never performed. The plaintiffs alleged that the defendants repudiated it, and the defendants for their part alleged that it was the plaintiffs who repudiated it and that in any event the parties were never ad idem. The writ in the action was issued on 30th April 1970. It was specially endorsed and claimed £392,000 damages for breach of contract. By a subsequent amendment made in January 1971 the claim was increased to £600,416 13s 4d. f

Unknown to the defendants and to the plaintiffs' English solicitors, Messrs Denton, Hall & Burgin, Stalco had on 31st July 1970 been merged into another Californian corporation called Whittaker Corpn, hereinafter called 'Whittaker'. By a certificate of that date issued by the Secretary of State of California, it is certified that as from that date Stalco had ceased to exist as a separate corporate entity. It is this fact that has given rise to the present dispute. g

The hearing of the action had been fixed for 10th March 1971. But on 4th February 1971 a receiver was appointed by the debenture-holders of the defendants. Negotiations then took place with a view to the settlement of the action and eventually it was agreed that the defendants should submit to judgment for £335,000 and costs. Counsel for the defendants explained to us that the receiver was anxious to reduce the possible quantum of damages and the liability for costs which might be incurred if the action were fought out and the plaintiffs were to succeed. So there followed the consent judgment of 25th February 1971. h

On the next day, 26th February, the benefit of the judgment was assigned by Mercer and Whittaker to Marcus Brothers Textile Corpn, a New York corporation, who immediately set about taking proceedings to enforce the judgment in New York, New Jersey, Delaware, California, France and Germany. It would appear j

a that, when consenting to the judgment, the receiver had no immediate intention of satisfying it. But the enforcement proceedings by Marcus put the defendants in considerable difficulty. For it appears that, in the American states, at any rate, and possibly in France and Germany too, there is available a process, unknown to our law, by which a plaintiff who commences an action can at the same time and before trial obtain an order in the nature of attachment to seize or freeze the assets of the defendant. And we were told that in each of those five or six jurisdictions assets of the defendants—in each case more than enough to satisfy this judgment debt—have been so attached or frozen.

b Faced with this situation and when they learned of the fact that Stalco had on 31st July 1970 been merged into Whittaker, the defendants on 30th March 1971 applied to the court to set aside the judgment on the ground that before its date Stalco had ceased to exist and that therefore the agreement and the judgment were null and void. The case, with many ramifications, really turned on the effect of s 4116 of the Corporations Code of California, and particularly on the third paragraph thereof. That section provides as follows:

c '(1) Cessation of existence of constituent corporations: Rights of creditors and liens upon property: Pending actions. Upon merger or consolidation pursuant to this article, the separate existence of the constituent corporation ceases, and the consolidated or surviving corporation shall succeed, without other transfer, to all the rights and property of each of the constituent corporations, and shall be subject to all the debts and liabilities of each, in the same manner as if the consolidated or surviving corporation had itself incurred them.

d '(2) All rights of creditors and all liens upon the property of each of the constituent corporations shall be preserved unimpaired, limited in lien to the property affected by such liens immediately prior to the time of the consolidation or merger.

e '(3) Any action or proceeding pending by or against any constituent corporation may be prosecuted to judgment, which shall bind the consolidated or the surviving corporation, or the consolidated or surviving corporation may be proceeded against or substituted in its place.'

f Put as shortly as possible, the contention for the defendants is that the first paragraph of that section effectively puts an end to the existence of the merged corporation (Stalco) for all purposes, and that the third paragraph merely enables what I may call the take-over corporation (Whittaker) to carry on pending actions in the name of Stalco or to substitute its own name for that of Stalco. To put it another way, they submit that the first paragraph is substantive and the third merely procedural. The plaintiffs, on the other hand, contend that the first paragraph does not entirely kill Stalco and that by the third paragraph its existence is continued for the purpose of pending suits albeit that the benefit of such choses in action enures entirely to Whittaker.

g The case was fully argued before Donaldson J. The defendants' contention was supported by an affidavit of an American lawyer, Mr Schiff, and that of the plaintiffs by the oral evidence of another American lawyer, Mr Marsh, who in the course and in support of his evidence referred to a large number of American decisions and statutes. At the end of it all, in a full judgment, the learned judge came down on the side of the plaintiffs. 'I consider', he said, 'that Stalco had not ceased to exist in any relevant sense when the consent judgment was given'. It is to be observed that he said that in these circumstances it was not necessary for him to express any view on the submission for the plaintiffs that he ought to affirm the judgment while substituting Whittaker for Stalco.

j The defendants' case was even more elaborately presented in this court. As I ventured to remark in the course of the argument, it was beautifully prepared by the defendants' solicitors and, of course, admirably argued by counsel on their behalf.

But when counsel for the plaintiffs rose to address the court he mentioned that one of the points he wished to argue, pursuant to the plaintiffs' notice, was that in any event the court should give leave to amend the title of the action by substituting or adding Whittaker as a party in order to meet the justice of the case and in order to carry out the clear intention of the parties. When this point was adumbrated by counsel for the plaintiffs, we invited him to deal with it first before entering on the main area of controversy.

There was some discussion whether the court had power to make such an amendment to the proceedings at this stage, that is to say after judgment. The 'slip' rule, RSC Ord 20, r 11, was referred to; but for myself I do not think that that rule is apt to cover the present case. There was also a reference to RSC Ord 15, rr 6 and 7; and I think it may very well be that those rules would enable the court to make the suggested amendment.

Apart from those rules, fundamentally, in my view, the power to make such an amendment rests in the inherent jurisdiction of the court to make such amendments as are necessary to meet the justice of the case. Counsel for the defendants has strenuously argued this morning that the court has no power. He takes really two points on it. He says first of all that the agreement between these parties and the judgment were nullities and a nullity cannot be amended. He also says that the court cannot make any such amendment unless the judgment does not carry out the intention of the parties.

So far as concerns the second point, if anything is clear in this case it is that the then parties wished to settle the dispute on the contract and to put an end to the litigation. So far as concerns the first point, we were referred to two cases, by both counsel for the plaintiffs and for the defendants. The first of them was *Pearlman (Veneers) SA (Pty) Ltd v Bartels*¹. That was a case in which a gentleman who traded in the name of 'Bernhard Bartels' had a judgment against him in this country for something over £47,000. It was sought to enforce the judgment in Germany, and Mr Bartels then took the not very meritorious point that he was not 'Bernhard' Bartels but 'Josef' Bartels. This court, composed of Denning and Hodson LJ, substituted his proper name in the title of the action, the name of the defendant being amended to 'Josef Bartels trading as Bernhard Bartels'. It is important, I think, to read the judgment of Denning LJ in that case. Referring to the defendant's point, he said²:

"That plea sounds very ill in the mouth of the defendant, who instructed solicitors in this country in the name of Bernhard Bartels, made a contract in the name of Bernhard Bartels, entered appearance and fought the whole action in this country in the name of Bernhard Bartels, and now, when it is a matter of enforcing the judgment in Germany, says there is no such person as Bernhard Bartels.

"In order to overcome this very technical point, the plaintiff company apply to the English courts and ask for leave to amend the name of the defendant to "Josef Bartels trading as Bernhard Bartels". The master and the judge, SLADE, J., have made the necessary amendment, and the defendant now appeals to this court contending that these courts have no jurisdiction to amend a judgment once it has been entered. Reliance was placed on the decision of this court in *MacCarthy v. Agard*³. The distinction between that case and the present was drawn by SLADE, J., in a judgment with which I fully agree. In *MacCarthy v. Agard*³ the plaintiff did not seek only to amend the name or the description of the defendant. He sought to alter the very judgment itself, which was in a special form applicable to a married woman. He asked that the operative and substantive part of the

¹ [1954] 3 All ER 659, [1954] 1 WLR 1457

² [1954] 3 All ER at 660, [1954] 1 WLR at 1458

³ [1933] 2 KB 417, [1933] All ER Rep 991

a judgment should be omitted. This court, by a majority, held that that could only be done by way of appeal, that is, by leave to appeal being granted and an appeal being lodged accordingly. Nevertheless, in the course of that case itself it appears that this court gave leave to amend the title of the action.

b 'When the substantive judgment is not being altered, but only the title of the action, it is to my mind plain that this court has ample jurisdiction to correct any misnomer or misdescription at any time whether before or after judgment. That is what the master and the learned judge have done in this case. The judgment, which is for £47,353 2s. 6d. with costs against the defendant is unaltered. All that is necessary to be done, which this court has ample power to do, is to alter the title by describing the defendant in the name which he now says is his correct name, Josef Bartels, but adding, so that there shall be no possibility of misunderstanding, "trading as Bernhard Bartels". It is to be hoped, this amendment being made, that there will be no difficulty in enforcing this judgment in Germany according to its true intent. I think this appeal should be dismissed.'

Hodson LJ put the jurisdiction, I think, more on what was then RSC Ord 28, r 11, and is now RSC Ord 20, r 8, but does not now apply after judgment. He said⁴:

d 'I think the wording of that rule is wide enough to cover the amendment of the title and I do not accept the objection which counsel for the defendant has raised, that the rule must necessarily only apply to proceedings before judgment.'

The other case, the well-known case which counsel for the defendants has been discussing in his argument this morning, is *Thynne (Marchioness of Bath) v Thynne (Marquess of Bath)*⁵. That, it will be remembered, was a case that arose out of the marriage of the Marquess and Marchioness of Bath, as they subsequently became. The lady filed a petition for divorce. She alleged that her marriage had taken place in 1927, and she obtained an undefended decree in relation to that marriage. Subsequently her solicitors found out, no doubt to their horror, that the parties had gone through a ceremony of marriage 12 months earlier, in 1926. The question then arose whether that decree was null or whether it could be amended. Lord Merriman P refused to amend it⁶, but this court, by a majority, (Singleton and Morris LJJ,) did give leave to amend the allegation as to the date and place of the marriage and so on. Hodson LJ dissented on the ground that there was no jurisdiction. It is not uninteresting to notice that all three of the learned lords justices in that case cited, without any sign of disapproval, the earlier case of *Pearlman v Bartels*⁷, to which I have just referred. But the point that counsel for the defendants makes on that case is that all three of the Lords Justices treated the decree as being a valid decree dissolving the status of marriage, and it would appear that they took the view that if the decree had been null and void it would not have been possible to make it good in the Court of Appeal.

h Those are the two broad points made by counsel for the defendants in his argument to us this morning: namely, that if this judgment was a nullity (and one must presume for present purposes that it was, though of course the learned judge decided otherwise, and we are not going to decide it at all), then no amendment could cure it; and secondly, counsel for the defendants says, as I have said, that you cannot amend unless you are satisfied that the judgment does not carry out the intention of the parties.

j So far as the second point is concerned, it is perfectly clear to me, as I have already said, that it was the intention of the parties to settle this litigation. Counsel for the defendants I think conceded (and I will return to this again in a moment) that, had it

4 [1954] 3 All ER at 661, [1954] 1 WLR at 1459

5 [1955] 3 All ER 129, [1955] P 272

6 See [1955] 2 All ER 377, [1955] P 272

7 [1954] 3 All ER 659, [1954] 1 WLR 1457

been known to the parties on 25th February 1971 that Whittaker had succeeded Stalco in the sense that I have described, nobody would have had the slightest objection, either as to the agreement or the subsequent judgment, to Whittaker being substituted for Stalco. One can look at it in this way. Supposing that, instead of this not being discovered until some time in March 1971, when it was brought to the notice of the defendants, it was discovered on the day after Donaldson J had ordered judgment to be entered for the plaintiffs. The judgment, according to the argument of counsel for the defendants, would then also be a nullity, having been pronounced in the form that it was. It seems to me preposterous to imagine that if they had gone back to Donaldson J on 26th February or 27th February 1971 it would have been impossible for him to make the amendment.

In my view, both under the rules of court I have mentioned and in the exercise of its inherent jurisdiction to see that justice is done and that the intention of the parties is carried out—though this, I agree, is a somewhat extreme case—the court has the power and, if the facts justify it, should exercise the power. I am therefore satisfied that, in the circumstances of this case, the court has jurisdiction to make the amendment.

One then asks whether, in all the circumstances of the case, it would be right and proper to make it. In my judgment, the answer to that is 'Yes'. To repeat something I have already said, in February 1971 the object of the parties in reaching the settlement was to put an end to the litigation. The receiver was content to pay or to submit to judgment for about half of the claim. It made no difference at all to him whether the judgment was in favour of Mercer or Stalco or anyone else, so long as the defendants were protected from the claim for the balance of the £600,000 odd. If Whittaker are joined as parties, the settlement will be binding on them and this object will be achieved. But if the main argument of counsel for the defendants is right and were to prevail and Whittaker are not joined, then I apprehend that Whittaker could start another action the next day for the whole of the £600,000.

It is conceded, as I have already said, by the defendants that had they known in February of this merger they would have had no objection to Whittaker being joined as parties for the purposes of the settlement and the consent judgment. That is obviously right, since the issue of liability in the action and the measure of damages could not in any event be affected by the particular identity of the plaintiff or plaintiffs.

It is further pointed out by the plaintiffs that to refuse the amendment might, in the event of the defendants' argument on the main point of the case proving successful and the action having to go to trial, cause serious delay to the plaintiffs' ability to recover the sum which the defendants in February 1971 agreed to pay. Indeed it would seem that the only benefit which the defendants can possibly derive from their present attitude is to postpone the evil day of payment and to hamper or put a stop to the present enforcement proceedings in foreign courts.

I confess that I have been unable to appreciate any real reason why, in justice to all parties and to give effect to their clear intention, this amendment should not be made. In the light of this conclusion it is, perhaps fortunately, unnecessary and undesirable to express any opinion on the most interesting and difficult questions which arose on the main point of the case.

PHILLIMORE LJ. I agree. In the course of his judgment in *Thynne (Marchioness of Bath) v Thynne (Marquess of Bath)*⁸ Morris LJ said:

'I respectfully agree with what was indicated by EVERSLED, L.J., in *Meier v. Meier*⁹: "I prefer not to attempt a definition of the extent of the court's inherent jurisdiction to vary, modify or extend its own orders if, in its view, the purposes of justice require that it should do so".'

a As I think, this is a case where the purposes of justice clearly require that the court should make the amendment to which Davies LJ has referred, and indeed if it failed to do so the purposes of justice would clearly be stultified.

What has happened here? When this action originally began it was perfectly properly constituted with Mercer Alloys Corpn and Stalco International Corpn as the plaintiffs. In July 1970 there was merger: Stalco International Corpn merged with b Whittaker, who indeed owned them previously—they owned all the shares. Under s 4116 of the Corporations Code of California it would clearly have been quite proper for the action, if it had been in California, to have gone on without any amendment of the parties. Of course, if Whittaker had wanted to they could have had their name substituted for that of Stalco, but it was quite unnecessary. Counsel for the defendants says that that is not the position in this country—that the third paragraph of s 4116 is purely procedural and that in this country it was necessary for this c amendment to be made. I assume that he is right. He concedes, very fairly, that if, on the day when the parties reached agreement on the compromise of the action, anyone had thought to mention the fact of this merger, there could have been no objection by his clients to the substitution of Whittaker for Stalco as one of the two plaintiffs. Nobody stood to gain anything by leaving the action constituted in the d name of Mercer and Stalco as opposed to Mercer and Whittaker. There was never any intention to deceive. What had happened was merely that the American lawyers, no doubt realising that the action would have been properly constituted in California, did not realise that this correction was necessary in England. Consequently the English solicitors for the plaintiffs were not informed of the true situation.

The situation then comes within the words of Singleton LJ in *Thynne v Thynne*¹⁰. e In the course of his judgment he said, dealing with the inherent jurisdiction of the court:

'It is a power, or a right, which ought not to be cut down. It enables the court, in a proper case, to put right something which is incorrectly stated and to keep its records in line with the real position. It is discretionary in the court, and it ought not to be used if it can cause injustice to anyone, or if in any sense the f exercise of it can offend against the public weal.'

I fail to see how this amendment can cause injustice to anyone or offend against the public weal.

Counsel for the defendants has relied on passages in the judgments of the three lords justices in *Thynne v Thynne*¹¹ suggesting that an amendment could not be made under the inherent jurisdiction if the order of the court (in that case a decree) had g been null and void. He says here that as Stalco had ceased to exist following the merger the consent judgment is a nullity. For my part, I think that that is a much too restricted approach. I prefer the approach of Evershed LJ¹² to which I have already alluded.

I think also that this amendment clearly comes within the wording of RSC Ord h 15, r 7, to which Davies LJ has referred. What happened here was that, although of course it does not come within the 'slip' rule, there was in fact an accidental omission by these American litigants; and if ever an accidental omission which has caused no injustice calls for the exercise of the inherent jurisdiction and the use of RSC Ord 15, r 7, it is this one. I think too that support is to be gained from the case of *Pearlman (Veneers) SA (Pty) Ltd v Bartels*¹³, to which Davies LJ has referred. i True, the judgment there could not have been said to be a nullity, and it was treated as a misnomer of misdescription. I do not think that in truth this was anything more.

¹⁰ [1955] 3 All ER at 138, [1955] P at 301

¹¹ [1955] 3 All ER 129, [1955] P 272

¹² In *Meier v Meier* [1948] P 89 at 95

¹³ [1954] 3 All ER 659, [1954] 1 WLR 1457

For those reasons, I entirely agree that this amendment should be made and that this appeal should, accordingly, be dismissed. a

STEPHENSON LJ. I also agree. The learned judge, considering that Stalco had not ceased to exist in any relevant sense when the consent judgment was given and that there were therefore no grounds for setting it aside, expressed no view on the plaintiffs' submission that he should affirm it while substituting Whittaker Corpn in place of Stalco. I share the view expressed by Davies and Phillimore LJ in the judgments just delivered that we should now affirm his judgment, substituting Whittaker for Stalco under the inherent jurisdiction of the court and under RSC Ord 15, rr 6 or 7. b

I am satisfied that if the merger of Stalco with Whittaker on 31st July 1970 had been known to the judge and to the defendants on 25th February 1971, the suit would have been settled as it was settled and the judgment would have been given that was given, except that if the plaintiffs has asked then for the substitution they now seek from this court it would have been agreed to by the defendants and ordered by the judge. I am also satisfied that the substitution we now order carries out the intention of the parties and of the court and, so far from working injustice, is what the purposes of justice require. c

If, as counsel for the defendants contends, the court's jurisdiction to amend one of its own judgments or orders is limited to amendments which carry out the court's intention at the time when it gave the judgment or made the order, there is an obvious objection to the proposed substitution in the admitted fact that the judge, like the defendants, had never heard of Whittaker when he gave the judgment under appeal. d

But in *Thynne (Marchioness of Bath) v Thynne (Marquess of Bath)*¹⁴, Hodson LJ, dissenting, thought that the commissioner, whose decree the parties sought to correct, intended to dissolve their marriage, but the marriage solemnised in 1927 and not the marriage solemnised in 1926, of which he had never heard; whereas Singleton and Morris LJ, who agreed in allowing the amendment, thought that the court intended to dissolve the lawful marriage that was subsisting, whatever the true date of its solemnisation. That generous interpretation of judicial intention encourages me to think that I shall be doing justice to the facts as well as to the parties in this case if I attribute to the judge an intention to order payment of the agreed figure to the persons really entitled to the damages claimed in the action, although one of them was Whittaker, of whom he had never heard. e

Another objection to the proposed substitution is simply that it is a substitution, not the mere correction of a misnomer, as in *Pearlman (Veneers) SA (Pty) Ltd v Bartels*¹⁵, and a new party never can be, or at least never ought to be, added to a suit after judgment, either under the inherent jurisdiction of the court or under RSC Ord 15. I see no reason why the court should not have such jurisdiction to substitute when only by doing so can it do justice. The cases in which such jurisdiction should be exercised must be rare, but the peculiar facts of this case make it, in my judgment, one of them. f

Finally, it is said that we are amending a nullity, something which has never been done, and cannot be done, under our inherent jurisdiction or under the rules. That may be logical, but it is, in my judgment, quite unreal. We are effecting the true intention of all those concerned in this case, as expressed in the consent judgment, to put an end to this litigation—something I should be sorry to think we had no jurisdiction to do. g

¹⁴ [1955] 3 All ER 129 at 138, 142, 147, [1955] P 272 at 301, 308, 315, 316

¹⁵ [1954] 3 All ER 659, [1954] 1 WLR 1457 h

- a* Appeal dismissed. Order that Whittaker Corpn be joined as second plaintiffs in substitution for Stalco International Corpn. Leave to appeal to the House of Lords refused.

Solicitors: Herbert Smith & Co (for the defendants); Denton, Hall & Burgin (for the plaintiffs).

Gordon H Scott Esq Barrister.

b

R v Clarke

COURT OF APPEAL, CRIMINAL DIVISION

LORD WIDGERY CJ, SACHS LJ AND ACKNER J

- c* 23rd NOVEMBER, 7th DECEMBER 1971

Criminal law – Insanity – Defect of reason from disease of the mind – Necessity of proving that accused was deprived of power of reasoning.

- d* In order to establish the defence of 'not guilty by reason of insanity' under the M'Naghten rules it is necessary to show that, by reason of a disease of the mind, the accused was deprived of the power of reasoning. The rules do not apply to those who retain the power of reasoning but who in moments of confusion or absent-mindedness fail to use their powers to the full (see p 221 c, post).

Note

- e* For the defence of insanity in criminal cases, see 10 Halsbury's Laws (3rd Edn) 287-289, paras 530-533, and for cases on the subject, see 14 Digest (Repl) 60-63, 234-269.

Cases referred to in judgment

M'Naghten's Case (1843) 10 Cl & Fin 200, [1843-60] All ER Rep 229, 8 ER 718, 14 Digest (Repl) 60, 246.

- f* R v Alexander (1912) 107 LT 240, 76 JP 215, 7 Cr App Rep 110, 14 Digest (Repl) 285, 2605.

Cases also cited

Bratty v A-G for Northern Ireland [1961] 3 All ER 523, [1963] AC 386.

R v Charlson [1955] 1 All ER 859, [1955] 1 WLR 217.

- g* R v Kemp [1956] 3 All ER 249, [1957] 1 QB 399.

R v Price [1962] 3 All ER 957, [1963] 2 QB 1.

Appeal

- h* This was an appeal by May Clarke against her conviction at Leicester City Quarter Sessions on 10th June 1971 before the Assistant Recorder (E F Jowitt Esq QC) and a jury on a charge of theft. The appellant, who had changed her plea at the trial to one of guilty, had been conditionally discharged. The facts are set out in the judgment of the court.

H R Mayor for the appellant.

G M Cursham for the Crown.

j

Cur adv vult

7th December. **ACKNER J** read the following judgment of the court. On 9th June 1971 the appellant, a lady of 58 years, was tried at Leicester City Quarter Sessions for what is commonly known as shoplifting. There was nothing out of the ordinary either in relation to the facts of her case or in relation to the nature of her

defence. The only unusual feature was the course which the learned assistant recorder unhappily decided to take after the conclusion of the evidence. a

The facts are simple. It was common ground that on 2nd March 1971 the appellant went to the International Stores supermarket at Leicester. She there shopped with the aid of a wire basket provided by the store to enable her, not only to carry the goods of her choice, but also to keep them separate and apart from any other goods and thus enable the cashier readily to calculate the cost of the goods she had purchased from the store. While she was in the store the appellant selected various items, three of which consisted of a pound of butter, a jar of coffee and a jar of mincemeat. At some stage before she went to the check-out point the appellant transferred those goods out of the wire basket and into her own bag so that when she presented her basket those three items were no longer in the wire basket and were not therefore paid for. Understandably enough it was alleged that these goods were secreted into the appellant's own shopping bag with the object of stealing them and taking them out of the store without paying for them. b c

The appellant's defence was that she had no intention of stealing these goods. She had not been feeling well on the morning in question nor for quite some time. She suffers from sugar diabetes. In the previous year she had gone down with 'flu and on the Friday previous to that occurrence her husband had broken his collarbone. He had to look after her and was in fact, because of his own condition, off work for several months. What with one thing and another she had become very depressed. On a number of occasions she had been very forgetful; for example, she had put sugar in the refrigerator instead of in the cupboard and the sweeping brush in the dustbin and then put the dirt where the brush should have been put. In her own words 'everything seemed to get on top of me'. d

On the morning in question she woke up with a very bad head which persisted despite her taking her pills. Her husband rang up at about 11.00 am to say that he would be home for lunch late. She put their meal in the oven on a low flame and went out to fetch the groceries. She had no recollection of putting these three items into her shopping bag and as for the jar of mincemeat neither she nor her husband ever ate this. In short her defence was that she had no intention to steal these articles, but in a moment of absent-mindedness had put them in her own shopping bag. e f

Had the matter rested there, there would have been no complications and the assistant recorder would no doubt have directed the jury to consider her explanation and ask themselves whether they were satisfied beyond reasonable doubt that she had the necessary intent to sustain the charge. However, to support the validity of her explanation medical evidence was called. These witnesses were her general practitioner and a consultant psychiatrist. These two gentlemen both spoke to the fact that she was suffering from depression, which one of them accepted to be a minor mental illness. The general practitioner described the symptoms. The patient feels a lack of energy—he finds it difficult to concentrate—he may be short-tempered or absent-minded. The psychiatrist stated that it can produce states of absent-mindedness in which the patient would do things he would not normally do in periods of 'confusion and memory lapses'. All this evidence was entirely consistent with the appellant's story. g h

Unfortunately the medical witnesses were pressed to, what it seems to us, an unreasonable degree to explain the workings of this particular illness. The psychiatrist stated that what happens in these cases is 'that there is a patchy state of affairs, that the consciousness, if you like, goes off at times and comes on again, changing every few minutes and not in proper control of the patient'. i

The effect of this evidence on the assistant recorder was to convince him that the defence was in truth a defence of 'not guilty by reason of insanity' under the *M'Naghten* rules¹. He was undoubtedly influenced to this decision by the evidence that the

¹ See *M'Naghten's Case* (1843), 10 Cl & Fin 200, [1843-60] All ER Rep 229

a depression was an illness which he translated as meaning also a disease and by the fact that on the medical evidence, as he understood it, a possible explanation was that there had been a total lack of consciousness at the moment when the offence was committed. In order to sustain a defence under the *M'Naghten* rules it is necessary to show that the party accused was labouring under *such a defect of reason from the disease of the mind as not to know the nature and quality of the act he was doing* or if he did know, that he did not know that what he was doing was wrong.

b It may be that on the evidence in this case the assistant recorder was entitled to the view that the appellant suffered from a disease of the mind but we express no concluded view on that. However, in our judgment the evidence fell very far short either of showing that she suffered from a defect of reason or that the consequences of that defect in reason, if any, were that she was unable to know the nature and quality of the act she was doing. The *M'Naghten* rules relate to accused persons who
c by reason of a disease of the mind are deprived of the power of reasoning. They do not apply and never have applied to those who retain the power of reasoning but who in moments of confusion or absent-mindedness fail to use their powers to the full. The picture painted by the evidence was wholly inconsistent with this being a woman who retained her ordinary powers of reason but who was momentarily
d absent-minded or confused and acted as she did by failing to concentrate properly on what she was doing and by failing adequately to use her mental powers.

Because the assistant recorder ruled that the defence put forward had to be put forward as a defence of insanity, although the medical evidence was to the effect that it was absurd to call anyone in the appellant's condition insane, defending counsel felt constrained to advise the appellant to alter her plea from not guilty to guilty so as to avoid the disastrous consequences of her defence, as wrongly defined by the
e assistant recorder, succeeding. Thus the appellant in this case ultimately pleaded guilty solely by reason of the assistant recorder's ruling. Since in the view of this court the assistant recorder mis-stated the law this court has jurisdiction to quash the conviction: see *R v Alexander*². The conviction is accordingly quashed.

f *Appeal allowed.*

Solicitors: *Gardiner & Millhouse*, Leicester (for the appellant); *Arthur Headley & Co*, Leicester (for the Crown).

Jacqueline Charles Barrister.

g

Re Walley (deceased) National Westminster Bank Ltd v Williams and others

CHANCERY DIVISION

UNGOED-THOMAS J

20th OCTOBER 1971

Administration of estates – Estate duty – Direction for payment in testator's will – Direction to pay 'funeral and testamentary expenses . . . and all death duties' out of residue – Estate consisting of personalty only – Duty payable on pecuniary gifts inter vivos prior to death – Duty payable on nomination in respect of post office savings bank account – Nomination taking effect on testator's death – Reference to estate duty otiose unless referring to gifts outside ambit of will – Application outside the ambit of will limited to gift taking effect on testator's death – Duty on inter vivos gifts to be borne by donees – Duty on nomination payable out of estate.

By her will made in 1963, the testatrix gave, devised and bequeathed all her real and personal estate to her trustee, the fourth defendant, on trust to sell the same and out of the proceeds 'pay my funeral and testamentary expenses and debts and all death duties' and hold the net residue thereof on trust as to one-fifth share to each of the first three defendants, and, in the event which happened, the fourth defendant, and the fifth share to the fifth defendant for life and over. In 1964 she made a nomination of the moneys in her post office savings bank account in favour of the fourth defendant. During 1967 she made gifts of £3,208 each to the first five defendants. By a second codicil in June 1968 she appointed the plaintiffs' predecessors in title joint executors and trustees with the fourth defendant. She died in October 1968. Probate of her will and codicils was granted to the executors in January 1969. The post office savings bank nomination took effect on her death, the amount being £5,026. The net value of her estate, all of which was personalty, was £94,500. On the question whether, by reason of the reference in the will to payment of estate duty, the duty payable on the testatrix's death in respect of the five pecuniary gifts, and the nomination of the moneys in the post office savings bank account in favour of the fourth defendant, should be borne by the testatrix's estate or by the first five defendants and the fourth defendant respectively,

Held – Since the gifts in the will were all of personalty the reference to estate duty was otiose unless it applied to gifts made outside the ambit of the will; if it were not to be treated as otiose it should be given as limited an application to dispositions outside the will as avoided the reference being otiose; the post office savings bank nomination took effect on the testatrix's death whereas the inter vivos gifts took effect before her death; it was therefore possible to give the direction to 'pay . . . all death duties' a meaning which was not otiose but was limited to dispositions becoming effective on her death; accordingly the estate duty payable in respect of the inter vivos gifts was to be borne by the first five defendants whereas the duty payable in respect of the money in the post office savings bank account should be paid out of the estate in the due course of administration (see p 224 e to h, post).

Notes

For free of duty provisions and interpretation, see 16 Halsbury's Laws (3rd Edn), 384-388, paras 750-752, and for cases on the subject, see 21 Digest (Repl) 79-81, 355-368.

Cases cited in argument

Baxter, Re (1898) 42 Sol Jo 611.

- a* *Boyes v Cook* (1880) 14 Ch D 53.
Briggs, Re [1914] 2 Ch 413.
Charter v Charter (1874) LR 7 HL 364.
Nesbitt's Will Trusts, Re [1953] 1 All ER 936, [1953] 1 WLR 595.
Pimm, Re [1904] 2 Ch 345.
Sergie (dec'd), Re [1954] NI 1.

b **Adjourned summons**

- This was an application by originating summons dated 28th August 1970 by the plaintiffs, National Westminster Bank Ltd, one of the executors and trustees of the will dated 20th October 1963 and codicils dated respectively 1st October 1964 and 14th June 1968 of Sarah Elizabeth Gertrude Walley, who died on 15th October 1968. The defendants were (1) Mary Williams, (2) Margaret Walley, (3) John Ernest Walley, (4) Joseph Hanson Macfarlane, (5) Joseph Hanson Walley, (6) Anne Corcoran, (7) Alfred David Walley, (8) Susan Walley and (9) Lynn Walley, the first five defendants being the nieces and nephews of the testatrix and the sixth to ninth defendants the children of the fifth defendant. By this summons the plaintiffs sought the determination by the court of the following questions: (1) that it might be determined whether on the true construction of the will of the testatrix, and in the events which had happened, the estate duty payable on the death of the testatrix in respect of five inter vivos gifts of money made by the testatrix in 1967 to each of the first five defendants (a) ought to be borne in respect of each such gift by the respective recipients thereof or (b) ought to be paid out of the estate of the testatrix in the due course of administration; (2) that it might be determined whether on the true construction of the will and in the events which had happened the estate duty payable on the death of the testatrix in respect of money in the post office savings bank account to which the fourth defendant became entitled on her death as a result of a nomination made by her (a) ought to be borne by the fourth defendant or (b) ought to be paid out of the estate of the testatrix in the due course of administration. The facts are set out in the judgment.
- f* *David Iwi* for the plaintiffs.
R G Woolley for the first to third and the fifth to ninth defendants.
L L Ware for the fourth defendant.

- UNGOED-THOMAS J.** This summons raises the question whether, under the terms of the will of the testatrix, Sarah Elizabeth Gertrude Walley, the estate duties payable on certain dispositions made during her lifetime are payable out of the residue of her estate. By her will she directed payment of testamentary expenses and of death duties, and then disposed of the residue. In her lifetime she made gifts of £3,208 to each of five of the defendants, and also nominated one of them as donee of the moneys to her credit in her post office account. The nomination took effect on her death and resulted in the nominee obtaining £5,026 odd. The question is whether, by reason of the reference in the will to payment of estate duty, the estate duty payable on the testatrix's death in respect of the five pecuniary gifts and the money in the post office account which was the subject of the nomination should be borne by the testatrix's estate or by the inter vivos donees and the nominee.
- The will was made on 20th October 1963. By para 4 the testatrix gave, devised and bequeathed all her real and personal estate to her trustee on trust that he should sell, and out of the moneys thereby produced pay 'my funeral and testamentary expenses and debts and all death duties and shall hold the net residue thereof (hereinafter called "my Residuary Estate") upon trust': as to one-fifth share to each of the first three defendants, and, in the event that happened, the fourth defendant, and in the case of the fifth share, the fifth defendant for life and over. The will was followed by the post office savings bank nomination in August 1964. Then followed

a
a codicil which expressly confirmed the will, and later, in 1967, the pecuniary gifts of £3,208 which I have mentioned. They were followed, in 1968, by a second codicil, which did not, in express terms, confirm the will.

b
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d
The testatrix died on 15th October 1968, and probate was granted, in January 1969, to the plaintiffs' predecessors in title, the Westminster Bank Ltd and the fourth defendant, who were those nominated in the will and codicil as executors and trustees. The estate was, at the testatrix's death, valued at the sum of £94,500 net. It is common ground that estate duty on the gifts and the money from the nomination, would be borne by those to whom they were made unless the will provides otherwise. So the issue turns on the words which I have quoted, the direction to the executors and trustees to 'pay my funeral and testamentary expenses . . . and all death duties'. 'Testamentary expenses', subject to irrelevant exceptions, includes estate duty on personal property which a testator is incompetent to dispose of at the time of his death. So the direction in this will to pay estate duty out of residue is otiose unless it applies to property other than personal property which he is competent to dispose of at his death. But it seems to me that where a testator is simply providing for payment of estate duty out of residue (whether on true construction the provision is limited to personalty or extends to realty), he is doing so as part of the will which he is making and presumably and prima facie with reference to what falls within the ambit of his will, and thus providing prima facie for estate duty ancillary to the disposition which he makes in his will. Therefore, where there is a direction for payment of testamentary expenses and estate duty, the estate duty prima facie, in my view, refers to duty on gifts by will other than gifts of personal property.

e
f
The difficulty in this case is, to my mind, that the gifts in this will are all of personalty. The result is that the reference to estate duty is otiose unless it applies to gifts made outside the ambit of the will. But so to apply it is to my mind a substantial departure from the prima facie limitation to estate duty payable on dispositions made by the will. If the reference to payment of estate duty is not to be treated as otiose, it seems to me that it should be given as limited an application to dispositions outside the will as avoids the reference being otiose. In this case, the nomination to the post office account takes full effect and becomes operative at the testatrix's death by passing to the nominee the money standing to the credit of that account then, whereas the gifts inter vivos are gifts which have taken full effect and become operative before the death of the testatrix. It is therefore possible in this case to give the direction to 'pay . . . all death duties' a meaning limited to death duties payable on property whose gift becomes effective and operative on the testatrix's death and does not fall within the direction to 'pay . . . testamentary expenses'.

g
h
I have hesitated whether the testatrix or a draftsman, drawing a will containing such well-established common form phrases for payment of testamentary expenses and all death duties contemplated that death duties should be payable in respect of dispositions made in the testatrix's lifetime. But I have on the whole come to the conclusion on construction, in accordance with the approach established in these courts, that the direction to pay death duties should extend to payment of death duties in respect of the post office money.

Order accordingly.

Solicitors: Pierron Goodwin & Co, agents for Pedley, Timperley & Tomkinson, Crewe (for the plaintiffs, and the first, third and fifth to ninth defendants); Allan Jay & Co amalgamating with Gibson & Weldon, agents for Arthur J S Hall & Co, Crewe (for the fourth defendant).

Jacqueline Metcalfe Barrister.

Royal Bank of Canada v Inland Revenue Commissioners

CHANCERY DIVISION

MEGARRY J

25th, 26th, 27th, 28th, 29th OCTOBER, 1ST, 15th NOVEMBER 1971

- b* Income tax – Avoidance – Transfer of assets abroad – Information – Power of commissioners by notice to require information – Power to require such particulars as commissioners think necessary for specified purposes – Ordinary banking transactions between bank and customer – Sales of gilt-edged stocks by bank on behalf of company incorporated abroad – Notice by commissioners to bank requiring particulars of transactions and of persons representing or interested in company – Whether particulars that may be required confined to particulars of transactions in which addressee of notice engaged – Whether sales of stock ‘ordinary banking transactions’ – Income Tax Act 1952, s 414 (1), (3), (5).

By a notice dated 11th September 1969 (‘the 1969 notice’) given under s 414 (1)^a of the Income Tax Act 1952 the Commissioners of Inland Revenue required the plaintiff bank to give them particulars concerning certain transactions and persons. The transactions in question consisted of the sales of gilt-edged stocks carried out by the bank on behalf of a company incorporated in the Bahamas (‘the company’). Unknown to the bank, the transactions in question were of a type known as ‘bond-washing’, a device which was designed to make a relatively slender profit at the expense of the Revenue by means of purchasing gilt-edged stock ex dividend and promptly selling it cum dividend during the period within which transactions in such stocks might be either ex or cum dividend. The arrangement between the bank and the company under which the transactions were carried out was that the bank was to take delivery in their nominee’s name of gilt-edged stock purchased on behalf of the company, pay for it and then promptly sell it ‘at best’, i.e. cum dividend, thereby recouping themselves out of the proceeds. According to evidence given on behalf of the bank these transactions (disregarding their bond-washing aspect) were ‘common form transactions which the vast majority of bankers would carry out in the ordinary course of a day’s work without question’, but it was conceded that they were somewhat unusual in that the sales had to be effected through a specified jobber and the customer was resident outside the United Kingdom. It was also conceded that the nature of the transactions, whereby the bank received the stock, paid for it and sold it, all at a blow, were rather unusual and not an everyday occurrence. Under the 1969 notice the commissioners required the bank to furnish particulars under four heads: (1) particulars of the manner in which the instructions for each sale were received and the names and addresses of the persons giving the instructions and other persons acting on behalf of the company; (2) particulars of the agreement under which the transactions were carried out together with the names and addresses of ‘individuals concerned in such agreement’; (3) names and addresses of persons known or believed by the bank ‘or any officer, employee or agent’ of the bank to have control of, or a beneficial interest in, the company; (4) the name and address of the representative of the company who, at a certain interview, had discussions with a representative of the bank. It was contended by the bank that they were not bound to furnish any of the particulars required by the 1969 notice on the grounds (i) that the transactions in question were ‘ordinary banking transactions between the bank and a customer carried out in the ordinary course of banking business’ within s 414 (5)^b of the 1952 Act, and the bank were thus relieved from the obligation to supply the information required under heads (1) and (2) in the 1969 notice; (ii) that heads (3) and (4) were also bad in that, by virtue of s 414 (1) and (3)^c, the only

a Section 414 (1) is set out at p 230 f, post

b Section 414 (5) is set out at p 231 g, post

c Section 414 (3) is set out at p 230 h and j, post

particulars that could be required were particulars of transactions in which the addressee of the notice had been engaged; and (iii) that if any of the questions in the 1969 notice were questions that the bank could not be lawfully required to answer, the whole notice was bad.

Held – (i) The bank was bound to furnish all the particulars required by the 1969 notice for the following reasons—

(a) on its true construction s 414 (1) was wide enough in its terms to authorise all four heads of the 1969 notice; the particulars which the commissioners might require were expressly limited to those they thought ‘necessary for the purposes of’ the tax avoidance provisions of the 1952 Act and there were no grounds for reading into s 414 (1) a more restrictive limitation to particulars of such ‘transfers of assets’ or ‘associated operations’ as the addressee of the notice had been engaged in; furthermore s 414 (3) was not an exhaustive definition of the particulars that might be required since both the language and history of the subsection pointed against the word ‘include’ meaning ‘include and mean’; accordingly, since it had been accepted that the commissioners could and did think that the particulars specified in the 1969 notice were ‘necessary’ for the specified purposes, it followed that all the information sought by the notice was within the authority of s 414 (1) (see p 232 c to e and g and p 233 b, post);

(b) not every ‘common-form’ transaction by a bank was an ‘ordinary’ banking transaction nor did it follow that every transaction carried out by a bank was a ‘banking transaction’; having regard to the evidence as a whole the bank had failed to establish that, even if the transactions were ‘banking transactions’, they were ‘ordinary’ banking transactions within the meaning of s 414 (5) (see p 237 c and j to p 238 b, post).

(ii) Even if some of the questions in the 1969 notice had been questions which the bank could not have been lawfully required to answer, it did not follow that the notice as a whole was bad; although there was authority for the proposition that the inclusion of an unauthorised demand in a return that was one and indivisible, and where a penalty was imposed for failure to make ‘such return’, invalidated the requirement for making the return, in the present case there was no demand for the making of an indivisible return; the 1969 notice required the furnishing of particulars and even if the requirement in respect of certain particulars was unauthorised it did not follow that the requirement in respect of other particulars relating to separate matters was necessarily invalid (see p 239 e to h, post).

Dyson v A-G [1912] 1 Ch 158 distinguished.

Notes

For information required by the Inland Revenue regarding transfers of assets abroad, see 20 Halsbury’s Laws (3rd Edn) 593, para 1163, and for cases on the transfer of assets abroad, see 28 (1) Digest (Reissue) 439-445, 1579-1592.

For the Income Tax Act 1952, s 414, see 31 Halsbury’s Statutes (2nd Edn) 393.

In relation to the year 1970-71 and subsequent years of assessment s 414 of the 1952 Act has been repealed and replaced by the Income and Corporation Taxes Act 1970, s 481.

Cases referred to in judgment

Brunner v Greenslade [1970] 3 All ER 833, [1971] Ch 993, [1970] 3 WLR 891, Digest (Cont Vol C) 870, 2744a.

Dilworth v Stamps Comr, *Dilworth v Land and Income Tax Comr* [1899] AC 99, 79 LT 473, sub nom *Dilworth v New Zealand Stamps Comr* 68 LJPC 1, 19 Digest (Repl) 659, 348.

Dyson v A-G [1912] 1 Ch 158, 81 LJKB 217, 105 LT 753, 30 Digest (Repl) 168, 194.

McQuaker v Goddard [1940] 1 All ER 471, [1940] 1 KB 687, 109 LJKB 673, LT 232, 162 2 Digest (Repl) 327, 213.

- a *United Dominions Trust Ltd v Kirkwood* [1966] 1 All ER 968, [1966] 2 QB 431, [1966] 2 WLR 1083, Digest (Cont Vol B) 45, 283a.
Woods v Martins Bank Ltd [1958] 3 All ER 166, [1959] 1 QB 55, [1958] 1 WLR 1018, 3 Digest (Repl) 182, 324.

Adjourned summons

- b By an originating summons dated 16th October 1969 the plaintiff, the Royal Bank of Canada, sought the determination by the court on the question whether, on the true construction of the Income Tax Act 1952, s 414, they were bound to furnish all or any of the particulars required by the defendants, the Commissioners of Inland Revenue, by a notice dated 11th September 1969. The facts are set out in the judgment,

M P Nolan QC and J L Knox for the bank.

I Edwards-Jones QC and J P Warner for the commissioners.

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Cur adv vult

- 15th November. **MEGARRY J** read the following judgment. Under this originating summons, various questions arise on the construction and operation of the Income Tax Act 1952, s 414. These questions do not appear to be the subject of previous authority, although they are plainly of importance to banks and the Commissioners of Inland Revenue, and, through them, to others. It is common ground that the plaintiff, the Royal Bank of Canada, carries on the business of a bank; and I shall refer to it as 'the bank'. The defendants are the Commissioners of Inland Revenue, and I shall refer to them as 'the commissioners'. The basic question is how far, if at all, the bank is bound to comply with a notice dated 11th September 1969, which I shall call 'the 1969 notice'. This was served on the bank by the commissioners, and it required the bank to give the commissioners certain information about certain transactions and persons. The bank is perfectly willing to give the information sought by the 1969 notice insofar as that notice is valid and effective, but not otherwise. The bank has, of course, especial regard to its obligations of secrecy in respect of its customers, and in these proceedings the argument that the bank is not bound to comply with any of the requirements of the notice has accordingly been put forward by the bank.

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The 1969 notice reads as follows:

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'With reference to the sales of gilt-edged stocks listed in the Schedule to this Notice, being sales carried out by the Royal Bank of Canada (hereinafter referred to as "the Bank") on behalf of Poinsettia Investments Ltd., a company incorporated in the Bahama Islands, the Commissioners of Inland Revenue hereby require the Bank to furnish to them, on or before the 16th day of October, 1969, at the address shown above:—

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'1. Full particulars of the manner in which the instructions for each sale were received by or on behalf of the Bank (that is, whether orally or in writing or by cable or by a combination of two or more of those methods), and the names and addresses of all persons who (a) gave such instructions, or (b) in any way represented or held themselves out to the Bank or any officer, employee or agent of the Bank as representing Poinsettia Investments Ltd. in connection with the said sales or any of them or the disposal of any of the proceeds of the sales, or (c) acted as guarantors or sureties of Poinsettia Investments Ltd. in connection with the said sales or any of them.

j

'2. Full particulars of any agreement, arrangement or understanding pursuant to which in whole or in part the sales or any of them were effected and to which the Bank or any officer, employee or agent of the Bank was a party, including the names and addresses of the individuals concerned in such agreement, arrangement or understanding on behalf of each party.

'3. The names and addresses of the persons who are known or believed by the Bank or any officer, employee or agent of the Bank to have had at the time

of or since the sales or any of them control of or a beneficial interest in Poinsettia Investments Ltd.; and, if any such person is a company, similar information in respect of that company. a

'4. The name and address of the representative of Poinsettia Investments Ltd. with whom, at the interview thought to have taken place on the 28th January 1966, a representative of the Bank discussed a matter referred to in a letter dated the 25th January 1966 from the Governor of the Bank of England to the Chairman of the Bank bearing on the sales or any of them.' b

It will be observed that, put broadly, questions 1 and 2 require particulars of certain transactions, with the names and addresses of those concerned, while questions 3 and 4 merely require certain names and addresses. The schedule to the notice specifies 14 sales of gilt-edged stock at prices between 91 and 105, or thereabouts, carried out at dates between 1st June 1964, and 22nd June 1965, in nominal amounts ranging from £150,000 to £525,000. The heading of the schedule is: c

'Sales of gilt-edged stock carried out on behalf of Poinsettia Investments Ltd. since the 5th April 1961 on a cum dividend basis during the 21 day period preceding the ex dividend date of the stock.'

The summons asks two questions, the second having been added by consent during the hearing. The first is whether under s 414 the bank is bound to furnish 'all or any and, if only some, which of the particulars' required by the 1969 notice. The second question asks that if the answer to question 1 is that the bank is not bound to furnish any of the particulars, it may be determined whether any and if so which of the particulars were particulars which the commissioners were empowered to require the bank to furnish under s 414. d

Although the six days of argument before me opened up many prospects, the core of the bank's attack on the 1969 notice remained within the three heads that counsel for the bank helpfully postulated at the outset. First, he contended that the bank was relieved from the obligation of answering the first two questions by the terms of s 414 (5). Second, he said that the last two questions in the 1969 notice were bad in limine as they did not relate to 'transactions', and all that s 414 required was the giving of particulars of transactions in which the addressee of the 1969 notice had been engaged. Third, he argued that if any of the questions asked by the 1969 notice were questions which the bank could not lawfully be required to answer, the whole notice was bad. If the last two questions were bad, they accordingly invalidated the first two as well. Counsel for the bank did not contend that the commissioners lacked sufficient grounds on which they could in the circumstances of this case address a valid notice under s 414 to the bank; indeed, he accepted that there were adequate grounds on which some such notice could be given to the bank. But, he said, the notice that was in fact sent was bad. e

In those circumstances, I do not need to explore the complexities of s 412. Sections 412 to 414 inclusive constitute Chapter IV of Part XVIII of the Income Tax Act 1952; and the title of the chapter is 'Transactions Resulting in Transfer of Income to Persons Abroad'. The marginal note to s 412 is 'Provisions for preventing avoidance of income tax by transactions resulting in the transfer of income to persons abroad'; and s 413 contains supplementary provisions. The power of the commissioners to serve notices under s 414 is a power to require such particulars as the commissioners 'think necessary for the purposes of this Chapter'; but as there is, quite properly, no suggestion that the commissioners did not think the notice necessary for those purposes I need say no more about s 412. f

Before I turn to the terms of s 414, I must say something more about the transactions in question. It is common ground that they were all of the type known by the name of 'bond-washing', a somewhat convoluted cousin of dividend-stripping. Bond-washing is a device which makes a relatively slender profit at the expense of g

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a the Revenue by means of purchasing gilt-edged stock ex dividend and promptly selling it cum dividend within one of the 21 day periods during which transactions in these stocks may be either ex dividend or cum dividend. The *modus operandi*, which is of a considerable degree of complexity and sophistication, was patiently described to me by counsel for the commissioners, but I do not think it necessary to burden this judgment with it. It suffices to say that at all relevant dates bond-washing was a type of transaction which, although not illegal, was frowned on by b reputable persons and institutions (including the bank) as involving a misuse of arrangements which, properly employed, were of utility to those who dealt in the gilt-edged market. It is clear that at the relevant time the bank did not know that the transactions with which it was concerned formed part of bond-washing transactions.

c The only evidence before me consists of three affidavits filed on behalf of the bank, with their exhibits, coupled with the cross-examination of two of the three deponents. During the period of the transactions, Mr C F Stuart, the deponent who was not cross-examined, was assistant manager of the City office of the bank. The other two deponents were Mr J J Matheson, who was manager of the securities department of that branch of the bank, and Mr J F Smith who, during the time in question, was d manager of the branch. The hierarchy, so far as relevant, was that Mr Matheson was under Mr Stuart, who was under Mr Smith. It was Mr Stuart who was mainly concerned with the 14 sales in question; and his affidavit resorts to the convenient device of referring by fictitious names to those concerned whose identities may or may not have to be revealed, depending on the efficacy of the 1969 notice. I shall preface such fictitious names with the word 'Fictitious'.

e One important name, however, has for long been known to the commissioners, namely, Poinsettia Investments Ltd, which I shall refer to as 'Poinsettia'; indeed Poinsettia is referred to in the 1969 notice. As that notice states, Poinsettia was a company incorporated in the Bahama Islands, and the transactions in question were carried out on behalf of that company. When in October 1967 the commissioners began to make enquiries about certain 1965 transactions which ultimately were f included in the 1969 notice, the officers of the bank who were concerned with those enquiries did not know that on 22nd December 1966 Poinsettia had been struck off the register of companies in the Bahamas. The bank had previously been instructed by a representative of Poinsettia not to make disclosures, and so the bank at first refused to divulge that Poinsettia was concerned. However, after the officers concerned had discovered that Poinsettia was no more, the bank wrote to the commissioners in October 1968, disclosing both Poinsettia's name and the 14 transactions g which later became the subject of the 1969 notice. The bank had in fact received notice in 1966 of the resolution to wind up Poinsettia, but apparently this had been placed in another file. I should make it clear that throughout the hearing before me no attack whatever has been made on the integrity or good faith of the bank or its officers.

h The activities of the bank in relation to the 14 transactions were limited. The first contact between Poinsettia and the bank was in May 1964, when Mr Fictitious Coke telephoned Mr Stuart to say that Poinsettia was going to be advised on investments by Mr Fictitious Stock. At about the same time, the bank received a letter from Fictitious Doe Co, setting out the nature of the operations proposed. The letter, dated 22nd May 1964, and marked for the attention of Mr Stuart, reads as follows:

i 'Our clients, Poinsettia Investments Limited of P.O. Box 288, Nassau, Bahamas are desirous of making purchases on the Gilt Edged market from time to time, and would like you to act on their behalf in this connection.

'The stock will be purchased by Montreal Trust Company of your City, registered in your Nominee name and delivered to you against payment and for subsequent sale upon our instructions.

'In order to facilitate these operations, our clients propose to cable their instructions to you indicating the particular stock to be accepted from Montreal Trust Company against payment and to be sold in accordance with the code words enclosed with this letter and by figures representing units of £1,000 stock.

'Perhaps you would be good enough to confirm that these arrangements are satisfactory from your point of view.'

Poinsettia also applied to the bank for £500,000 credit for short term loans, and the bank referred this by cable to its head office in Montreal, recommending acceptance on the basis of the security offered and the standing of the principals. A substantial company guaranteed a margin of £25,000, and in carrying out the transactions the bank would, of course, have in the name of its nominee the gilt-edged securities purchased with the money lent. The proposed transactions were described as 'staggering new issues' and 'taking short term positions in gilt-edged market in London'. The head office of the bank agreed, and operations began soon afterwards. All that the bank had to do was to take delivery of stock already purchased and standing in the name of its nominee, pay for it, and then promptly sell it 'at best', that is, cum dividend, thus recouping itself the money advanced. This process in fact produced a modest profit for Poinsettia on each occasion. I shall not go further into the details of the transactions as I hope that I have said enough to make intelligible the questions I have to resolve.

I must now turn to s 414. The Income Tax Act 1952 is, of course, a consolidating Act, and so is presumed not to have changed the effect of the provisions that it consolidates. I shall therefore make some reference to the sources of the various subsections. I take the section in the amended form in which it stood when the 1969 notice was served. By sub-s (1):

'The Commissioners of Inland Revenue or, for the purpose of charging tax at the standard rate, an inspector may by notice in writing require any person to furnish them within such time as they may direct (not being less than twenty-eight days) with such particulars as they think necessary for the purposes of this Chapter.'

This subsection has been in the forefront of the argument. It is all that remains of what was originally para 6 of Sch 2 to the Finance Act 1936, a schedule which was appended to s 18 of that Act, the precursor of s 412 of the Income Tax Act 1952. Para 6 had within it a defence of reasonable excuse, and provisions for a penalty not exceeding £50; and these later became, in a generalised form, the Finance Act 1960, ss 63 (2) and 46 (1) respectively. The original s 414 (2) of the Income Tax Act 1952, drawn from the Finance Act 1936, Sch 2, para 7, authorised estimated assessments, and was later replaced by the general provisions of the Income Tax Management Act 1964, s 5 (1), (2): I do not think I need mention it further.

Section 414 (3) of the Income Tax Act 1952, on the other hand, is an important provision. It runs as follows:

'The particulars which a person must furnish under this section, if he is required by a notice from the Commissioners of Inland Revenue or, for the purpose of charging tax at the standard rate, an inspector so to do, include particulars—
(a) as to transactions with respect to which he is or was acting on behalf of others; and (b) as to transactions which in the opinion of the Commissioners of Inland Revenue or, for the purpose of charging tax at the standard rate, an inspector it is proper that they should investigate for the purposes of this Chapter notwithstanding that, in the opinion of the person to whom the notice is given, no liability to tax arises under this Chapter; and (c) as to whether the person to whom the notice is given has taken or is taking any, and if so what, part in any, and if so what, transactions of a description specified in the notice.'

- a* This subsection had no counterpart in the Finance Act 1936, but was brought in by the Finance Act 1939, s 17 (1).

There is then s 414 (4) of the Income Tax Act 1952. This has not been directly in issue, though it has been relied upon as throwing light on other provisions. It is as follows:

- b* 'Notwithstanding anything in subsection (3) of this section, a solicitor shall not be deemed for the purposes of paragraph (c) thereof to have taken part in a transaction by reason only that he has given professional advice to a client in connection with that transaction, and shall not, in relation to anything done by him on behalf of a client, be compellable under this section, except with the consent of his client, to do more than state that he is or was acting on behalf of a client, and give the name and address of his client and also—(a) in the case of anything done by the solicitor in connection with the transfer of any asset by or to an individual ordinarily resident in the United Kingdom to or by any such body corporate as is hereinafter mentioned, or in connection with any associated operation in relation to any such transfer, the names and addresses of the transferor and the transferee or of the persons concerned in the associated operations, as the case may be; (b) in the case of anything done by the solicitor in connection with the formation or management of any such body corporate as is hereinafter mentioned, the name and address of the body corporate; (c) in the case of anything done by the solicitor in connection with the creation, or with the execution of the trusts, of any settlement by virtue or in consequence whereof income becomes payable to a person resident or domiciled out of the United Kingdom, the names and addresses of the settlor and of that person. [The subsection concludes with the words:] The bodies corporate mentioned in the preceding provisions of this section are bodies corporate resident or incorporated outside the United Kingdom which are, or, if resident in the United Kingdom would be, close companies, but not trading companies, within the meaning of Part IV of the Finance Act, 1965.'

- f* This subsection had its origin in the Finance Act 1939, s 17 (2).

Finally, there is s 414 (5) of the Income Tax Act 1952; and on this the bank has placed much reliance. It provides as follows:

- g* 'Nothing in this section shall impose on any bank the obligation to furnish any particulars of any ordinary banking transactions between the bank and a customer carried out in the ordinary course of banking business, unless the bank has acted or is acting on behalf of the customer in connection with the formation or management of any such body corporate as is mentioned in paragraph (b) of subsection (4) of this section or in connection with the creation, or with the execution of the trusts, of any such settlement as is mentioned in paragraph (c) thereof.'

- h* This too had its origin in the Finance Act 1939, as s 17 (3) of that Act.

- i* I begin with the phrase 'such particulars as they think necessary for the purposes of' the tax avoidance provisions of s 18 of the Finance Act 1936, or Chapter IV of Part XVIII of the Income Tax Act 1952. This seems to me an expression that is wide in its meaning, both in itself and in its context. Counsel for the bank contended on a number of grounds that its scope was somewhat restricted. He urged that the word 'particulars' posed the question, 'Particulars of what?', and that this question must then receive the answer of the matters dealt with in the relevant tax avoidance provisions. These provisions are drafted in terms of 'transfers of assets' and 'associated operations', and so the particulars that could be required were particulars of those transfers and operations but of nothing else, even though it formed part of some prelude or sequel. The particulars were limited to particulars of such transactions as

the addressee of the notice had been engaged in, and did not extend to other transactions, nor to any other information, such as the ownership of shares apart from any transaction: the power was a power to require particulars of dynamics, and did not extend to particulars of statics. Counsel for the bank also relied on s 414 (3). This provides that the particulars which must be furnished under sub-s (1) 'include particulars' as to the two types of 'transactions' set out in paras (a) and (b), and as to whether the person to whom the notice was addressed took or was taking part in 'transactions' of a description specified in the notice: see para (c). Counsel for the bank accepted, of course, that the word used is 'include' and not 'means', and that 'include' is very generally used to enlarge the meaning of a phrase or avoid doubts, or both; but he contended that the word 'include' was used here in the sense of 'mean and include', and he relied for support on the well-known passage in Lord Watson's judgment in *Dilworth v Stamps Comr*¹.

I do not think that these contentions are sound. First, the statutory phrase is 'such particulars as they think necessary' for the purposes specified. Parliament did not think it requisite to confine the word 'particulars' in terms by stating of what the particulars must be. The word 'particulars' is quite capable of standing on its own in the sense of items or details or points, and the scope of the particulars is in terms limited by the words 'as they think necessary' for the specified purpose. This express delimitation seems to me at least in some degree inconsistent with the existence of some further implied limitation. If the commissioners think it necessary to obtain certain particulars for the specified purposes, then I think Parliament intended them to be able to obtain that information without being met with the answer 'The only particulars you can have are particulars of transfers of assets, associated operations and other transactions, and not particulars of anything else, even though you think them necessary for the specified purposes'. I find it difficult to see why Parliament, in conferring powers to obtain information to prevent certain forms of avoidance of income tax, and in terms limiting those powers only by reference to what the commissioners think necessary for the purpose, should nevertheless intend, by some covert and implied limitation, to prevent the commissioners from obtaining part of the information that they think necessary. Furthermore (although this was not relied on in argument), it may be observed that where Parliament wishes to confine its use of the word 'particulars' to particulars of some specified matter, Parliament seems quite capable of stating this in terms: see s 414 (5), where the phrase is 'particulars of any ordinary banking transactions', and so on.

As for sub-s (3), both its language and its history seem to me to point against the word 'include' meaning 'include and mean'. Initially, in the Act of 1936, there was no ancestor of sub-s (3): para 6 of Sch 2 used the word 'particulars' without any explanation. The precursor of sub-s (3) was s 17 (1) of the Finance Act 1939, and this was drafted in the form of 'It is hereby declared that the particulars which a person must furnish . . . include particulars— . . .'. In the process of consolidation, the words 'It is hereby declared' have disappeared, though this change will be presumed not to have affected the construction. Furthermore, the first category of particulars which under sub-s (3) a person must furnish is particulars '(a) as to transactions with respect to which he is or was acting on behalf of others'. If sub-s (3) were truly defining, and not extending or merely removing doubt, it is remarkable that the primary category does not consist of transactions in which the person concerned is acting on his own behalf and not on behalf of others. Indeed, it is not clear to me under which head at least some cases of a person acting on his own behalf could be brought. Counsel for the bank relied on sub-s (3) (c), but this seems to me to be an oblique and imperfect instrument for his purpose. Furthermore, sub-s (3) (b), requiring particulars to be given 'notwithstanding that, in the opinion of the person to whom the notice is given, no liability to tax arises under this Chapter',

a seems to me to be essentially the type of provision which is inserted for the removal of doubt and the stopping up of possible loopholes, rather than for the purpose of primary definition.

b From what I have said it follows that in my judgment s 414 (1) of the Income Tax Act 1952 is on its true construction wide enough in its terms to authorise all four heads of the 1969 notice. Once it is accepted (as it has been) that the commissioners could and did think the particulars specified in the notice 'necessary' for the specified purposes, then all the information sought by the 1969 notice seems to me to be within the authority given by the subsection. In particular, I can see nothing in the language of the subsection, construed in its context, to draw any distinction between the particulars of the transactions sought under questions 1 and 2 of the notice and the names and addresses sought under questions 3 and 4, as well as under questions 1 and 2. Furthermore, I observe that sub-s (4) provides that a solicitor is not, in relation to anything done by him on behalf of a client, to be 'compellable under this section' (except with the client's consent) to do 'more than state that he is or was acting on behalf of a client, and give the name and address of his client'; and para (a), (b) and (c) make further provision for names and addresses. This, it will be seen, is cast in the form not of imposing a positive obligation to give the names and addresses but of an exemption from the obligations of the section to give the particulars which the commissioners think necessary, which exemption is not to extend to the names and addresses mentioned. In other words, the assumption of sub-s (4) is that names and addresses are or may be included in the particulars which under the main provisions of the section the commissioners may require to be given, and sub-s (4) is doing no more than preventing the exemption which it confers from interfering with that obligation to give names and addresses.

e Accordingly, in my judgment questions 3 and 4 are authorised by s 414. At the same time I cannot refrain from observing on the width of question 3. This requires the names and addresses of persons known or believed 'by the Bank or any officer, employee or agent of the Bank' to have had at the time of the sales or subsequently 'control of or a beneficial interest in' Poinsettia. The question is framed in terms which relate to the bank generally, and not merely the branch in question, and I do not know what is the total number of the officers, employees and agents of the bank. But it is plain that a wholehearted attempt to comply with the requirements of this question might well involve the bank in a very considerable burden of enquiry among its staff. I need not pursue this point since counsel for the bank founded no argument on it; it was counsel for the commissioners who had the burden of meeting somewhat pointed comment on the matter from the bench. I shall say no more than that it seems to me that the wider the powers that Parliament confides to the commissioners, the more important it is that the commissioners should not exercise those powers in an unduly burdensome or oppressive way. A question asked in September 1969, which requires the bank to ascertain whether any of its officers, employees or agents, wherever they may be in the world, knows or believes that any person had on 1st June 1964 or subsequently any beneficial interest in Poinsettia is of an amplitude which, if repeated, may hereafter attract to itself robust judicial criticism.

j Counsel for the commissioners contended that the words 'officer, employee or agent' in the 1969 notice meant merely any officer, employee or agent who properly appeared to the bank to be potentially able to give the information sought; but no such limiting words appear in the 1969 notice, and counsel for the commissioners had no real explanation why they were not, if that was what the question really meant. The recipient of such a notice ought not to be driven to his lawyer to find out (if, indeed, his lawyer can tell him) precisely what words of restriction are to be implied, when the commissioners could so easily have inserted those words if they had in truth been intended. I shall only add that for my part I should be slow to read s 414 (1) of the Income Tax Act 1952, or any similar section supported by penal sanctions, as if the

phrase 'such particulars as they think necessary for the purpose of this Chapter' were followed by words such as 'however burdensome or oppressive this may be'. Nor do I think that it suffices to point to the provisions as to 'reasonable excuse' in the Finance Act 1960, s 63 (2), as a cure for any excessive demands made by a notice such as that before me. At the same time, let me say that I am not suggesting that in this case there was any deliberate unreasonableness or oppression; I am sounding a warning for the future. a

I turn, then, to the contention that s 414 (5) of the Income Tax Act 1952 relieves the bank from any obligation of answering questions 1 and 2. No point of any substance has arisen on the concluding words of the subsection. The issue has been that of the ambit of the words which prevent the section from imposing on the bank the obligation 'to furnish any particulars of any ordinary banking transactions between the bank and a customer carried out in the ordinary course of banking business'. Before I turn to the contentions put before me, let me say at the outset that this seems to me to be a strictly limited provision. The limitations may be ranged under four heads. First, the protection is given not to particulars at large but only to particulars of certain transactions: if the particulars sought are particulars not of any transaction but of the name and address of some person, unrelated to anything that could fairly be called a transaction, then they are outside the protection. Second, there is a limit as to the type of transaction: no transaction will suffice unless it falls within the expression 'ordinary banking transactions'. Third, there is a limit by reference to the parties: only transactions 'between the bank and a customer' qualify. Fourth, there is a limitation as to the circumstances in which the transaction is carried out, namely, that it was 'carried out in the ordinary course of banking business'. This language seems to me to be carefully guarded, having regard to the use of the words 'ordinary' and 'banking' twice over, and the cumulative limiting effect of all the phrases used. For the purposes of analysis, I may add, it is usually convenient to look separately at the constituent parts of a compound expression; but, of course, what must be construed is the expression read as a whole. b

As I have mentioned, the subsection first came into the legislation as s 17 (3) of the Finance Act 1939. As it stood then, it provided that 'Nothing in this section' was to impose the obligation of disclosure on the bank; and this is perhaps a little odd because at that time the general obligation of disclosure was imposed not by s 17 of that Act but by para 6 of Sch 2 to the Finance Act 1936. What s 17 did, inter alia, was to declare, by sub-s (1), that the particulars that must be furnished under para 6 of Sch 2 to the Finance Act 1936 included particulars as to transactions with respect to which the person on whom the notice was served was acting on behalf of others. In other words, reading the section literally, all that the bank was protected against was such extensions of the obligation under the Finance Act 1936, as were made by s 17 of the Finance Act 1939. However, when the statutes came to be consolidated in the Income Tax Act 1952, the opening words of the bank provision remained 'Nothing in this section', but there was included in the section not only what had been in s 17 of the Finance Act 1939, but also the basic obligation that para 6 of Sch 2 to the Finance Act 1936 had created. As a matter of language, the words of protection remained unchanged, but the ambit of the obligation to which those words related was enlarged. The point is curious, but I doubt whether it has any real significance; and certainly it does not dispense me from considering the meaning of the words of exemption in question. c

Counsel for the commissioners laboured for some while to persuade me that it was a matter of law and of judicial notice whether any particular transaction fell within the words of exemption; but I remained unconvinced. No doubt the meaning of the statutory language is a question of law. No doubt the bounds of judicial notice are at times surprisingly wide. But the word 'ordinary', if nothing else, seems to me to stand in the path of counsel for the commissioners. I cannot see how questions as to what transactions are 'ordinary banking transactions' and which of d

a them are 'carried out in the ordinary course of banking business' can possibly be matters of such notoriety that the courts will take judicial notice of them. If banking transactions and banking business, why not the manifold processes of manufacture or science, for example? Is the court to be treated as taking judicial notice of all the processes of science or manufacture, and also of which of these are 'ordinary'? Counsel for the commissioners relied on the camel case, *McQuaker v Goddard*², and especially on some language of Clauson LJ³; but I do not think that this supported him. It is one thing to say that the courts will take judicial notice of the ordinary course of nature, though evidence is admissible to aid the judge in the matter despite the complete knowledge of it that he is supposed to have; it is quite another to say that the court will take judicial notice of the ordinary course of all the artifices of man (many of which are extremely complex and obscure), whether they be banking, manufacture, scientific endeavour or otherwise. I may perhaps be permitted to observe that when I asked counsel for the commissioners for an explanation of the process of bond-washing, his answer took little less than an hour. I think counsel for the bank was right when he said that it was a question of mixed law and fact whether or not the matters in question before me fall within the statutory phrase. The question before Salmon J in *Woods v Martins Bank Ltd*⁴ was quite different, but I respectfully agree with his statement that 'the limits of a banker's business cannot be laid down as a matter of law'.

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I was naturally referred to *United Dominions Trust Ltd v Kirkwood*⁵. In that case the main question was whether the plaintiffs, the well-known finance house that I shall call 'UDT', were excluded from the statutory definition of moneylenders by virtue of an exception for 'any person bona fide carrying on the business of banking'. The Court of Appeal was unanimous that it had not been shown that UDT's business had the usual characteristics of banking; but by a majority it was held that its reputation for carrying on the business of banking sufficed. The court described the usual characteristics of banking at the time, and it is plain that the transactions before me in this case do not fall within this description. However, the question in that case was entirely different from the question in the present case. Here, it is common ground that the plaintiff is a bank; the issue is not the status of the plaintiff but the nature of particular transactions. There, the whole issue was the status of the plaintiff and not the nature of individual transactions. To define the usual characteristics of banking today helps, of course, where the questioned transactions fall within those limits; but I do not think that there is any suggestion in this case that transactions outside those limits cannot be usual banking transactions. A statement of the essentials of a business does not seem to me, without more, to be exhaustive of all that is ordinary in that business. Accordingly, while of course I pay due attention to what was said in the *UDT* case⁵, I do not think it solves the problem before me.

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Questions as to the ambit of the term 'ordinary banking transactions' are not made easier by the circumstance that at least on some views there are many different types of bank. According to one classification⁶, the two main groups are savings banks, such as the various trustee savings banks and the Post Office Savings Bank (now the National Savings Bank), and commercial banks. The latter may be classified as deposit banks (which include those commercial banks which are best known to the public as 'banks'), merchant banks, and industrial bankers. A transaction that to one type of bank may be ordinary may to another type be exceptional. Whether all these types of bank fall within what the law recognises as being a bank may indeed be a difficult question to resolve; the traditional view has been, and may well still be,

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2 [1940] 1 All ER 471, [1940] 1 KB 687

3 [1940] 1 All ER at 478, [1940] 1 KB at 700

4 [1958] 3 All ER 166 at 172, [1959] 1 QB 55 at 70

5 [1966] 1 All ER 968, [1966] 2 QB 431

6 See J M Holden, *Banker and Customer*, 1970, Vol 1, pp 3-8

that the payment of cheques drawn on the bank is of the essence of being a bank: see, for example the *UDT* case⁷. However, as I have mentioned, it is accepted that the plaintiff in the present case is a bank, and so falls within the words 'any bank' in sub-s (5). I therefore do not think that I need attempt to consider these difficulties except insofar as they throw any light on the particular transactions here in question in relation to the statute. I further bear in mind that this bank is a foreign bank with its headquarters in Canada, and also that the branch in question is in the heart of the City of London.

There is one other matter that I should mention in relation to sub-s (5). Many types of confidential relationship are, of course, generally recognised today. The powers given to the commissioners by s 414 appear to enable them to invade all such relationships save insofar as the section provides some protection. The only forms of protection so provided are in respect of solicitors, by sub-s (4), and in respect of banks, by sub-s (5). When one reads those subsections it becomes plain that Parliament has not only refrained from protecting every confidential relationship but also has not made the statutory protection coterminous with the cloak of confidentiality. A bank's duty of secrecy to its customers is not, as I understand it, confined to ordinary banking transactions, but would extend to any banking transaction which it effected for a customer, ordinary or extraordinary. Accordingly, in determining the ambit of sub-s (5) one cannot obtain much, if any, assistance from a consideration of the ambit of the banker's duty of secrecy, for the bounds of the duty and of the statutory protection are plainly not coincident.

It will be seen that there are thus a number of considerations which provide me with little direct assistance, though in differing degrees they make their contributions to the background of what I have to decide. I must now turn to consider the evidence that has been put before me. As I have already indicated, the only evidence consisted of the affidavits of three employees of the bank, Mr Smith, Mr Matheson and Mr Stuart, all filed on behalf of the bank, together with the cross-examination of the first two of these deponents, which occupied about a day in all. The commissioners adduced no evidence, and there was no independent evidence before me to assist me on the scope of banking, or on what was ordinary or extraordinary. I have to do the best I can on the evidence in fact before me. Counsel for the commissioners asserted and counsel for the bank accepted that the bank bore the burden of establishing that the case fell within sub-s (5), and so I must examine the evidence, particularly (though by no means exclusively) in relation to the statutory phrase 'ordinary banking transactions'.

Mr Smith's affidavit is mainly concerned with explaining the questions that have arisen, and describing various factual occurrences. But para 8 of his affidavit reads as follows:

'The receipt from customers of the Bank of instructions to take delivery of stock and to sell it is an event of very frequent occurrence. The Bank has maintained a Securities Department for very many years and one of the services which the Bank in common with practically every other bank known to me in the City of London offers to its customers is that of taking delivery of securities against payment and of giving instructions to brokers. In my considered opinion the transactions intended to be described in Mr. Stuart's said Affidavit disregarding for the moment questions of bond-washing are common form transactions which the vast majority of bankers would carry out in the ordinary course of the day's work without question. I should perhaps add that it is not uncommon for gilt edged securities to be dealt in in such substantial amounts as are mentioned in the [1969 notice] even though the person or company buying has not the resources to make such purchases without financial assistance. The gilt edged market would lose a great deal of its efficiency if it were not so.'

a Naturally much attention was given to the third sentence of this paragraph which, Mr Smith said in his oral evidence, was still his view today. He made, however, one qualification, namely, that in expressing that view he was, in addition to disregarding bond-washing, also disregarding an instruction given by Poinsettia that all sales had to be effected through a specified jobber. Under cross-examination he could not recollect any cases in which instructions such as these had been given. (I may here *b* interpose that the jobber appears to play an important part in bond-washing, though it has not been suggested that this ought to have made the bank suspect bond-washing.) The fact that the customer was resident outside the United Kingdom also made the transaction in some degree less usual; but what made the real difference was the specification of a particular jobber. It may also be observed that the words in Mr Smith's affidavit are 'common form transactions which the vast majority of bankers would carry out in the ordinary course of the day's work without question', whereas *c* the question before me is whether they are 'ordinary banking transactions'. Not every common form transaction by a bank is an ordinary banking transaction. Thus it is said in 2 Halsbury's Laws (3rd Edn) p 151, note (g):

d '... Numerous other functions are undertaken at the present day by banks, such as the payment of domiciled bills, custody of valuables, discounting bills, executor and trustee business or acting in relation to stock exchange transactions, and banks have functions under certain financial legislation, e.g. by delegation under the Exchange Control Act, 1947 . . . , or as authorised dealers under that Act and subordinate legislation; see title MONEY. These functions are not strictly banking business . . .'

e Counsel for the commissioners strenuously sought to demonstrate that Mr Smith, a Canadian banker, had had too little experience of English banking to be a reliable guide in English banking matters; but I do not think he succeeded.

Mr Matheson's affidavit was short. The most material part of it was para 5. This states:

f 'The sale transactions in themselves were not exceptional for my Department to handle. It is one of the prime functions of this Department to deal on the Stock Exchange through brokers on behalf of the Bank's customers. Instructions for dealing are received in a wide variety of ways by post telephone or personal call and sometimes are received direct from customers and sometimes from their agents or other branches of the Bank. Purely by way of illustration my *g* Department received instructions to sell securities on behalf of customers on 35 occasions during the last eighteen working days before this Affidavit was sworn. Equally it is a common experience for my Department to receive instructions on behalf of a customer to accept securities from a named person or institution against payment. Such instructions were received on 68 occasions during the last eighteen working days.'

h Cross-examined on this paragraph, however, Mr Matheson agreed that the transactions here in question, whereby the bank was to receive the stock, pay for it and sell it, all at a blow (as distinct from instructions merely to sell, or instructions merely to accept securities and pay for them), were rather unusual and not an everyday occurrence. This, it seems to me, does much to negate the idea of 'ordinary banking transactions'.

j On the standards appropriate to civil cases, the result of applying the sum total of the evidence, the judicial notice that I may properly ascribe to myself, and the law as I understand it, is to leave me far from satisfied that these transactions were 'ordinary banking transactions'. They were transactions, and they were carried out by a bank; but I certainly do not accept that every transaction lawfully carried out by a bank is a 'banking transaction'. Furthermore, even if they were 'banking transactions',

I cannot regard them as being 'ordinary' banking transactions. I do not think it is for counsel for the commissioners to establish that they were 'unusual' or 'extraordinary' or whatever is the appropriate antithesis to 'ordinary': it is for counsel for the bank to show that they were 'ordinary'. If there is any no-man's-land between 'ordinary' on the one hand and 'extraordinary' or 'unusual' on the other hand, a transaction in that no-man's-land would thus not avail counsel for the bank: nothing will suffice him save a sufficient demonstration of ordinariness. In my judgment, there has been no such demonstration.

In the result, the answer to question 1 of the summons is that the plaintiff bank is bound to furnish all of the particulars required by the 1969 notice. Question 2 accordingly does not arise. Nor does there arise the question whether, if some of the particulars required by the notice are unauthorised by the statute and others are authorised, the presence of the unauthorised particulars invalidates the entire notice. However, the point has been fully argued, and it may be helpful if I say something about it. If one adopts the classification that I ventured in *Brunner v Greenslade*⁸, what I say now will be neither of the ratio nor merely obiter dicta, but what for want of a better term may be called judicial dicta. Counsel for the bank's contention that the answer to the question was Yes was founded on *Dyson v A-G*⁹, where the Court of Appeal held that the invalidity of a single question in a notice requiring certain returns to be made under the Finance (1909-10) Act 1910 invalidated the entire notice. In that case, six forms were served on the plaintiff, relating to six properties. The unauthorised question was worded so that it had to be answered only 'if the person making the return is also the occupier'; and for five of the properties this was not the case. In those five cases the presence of the unauthorised question did not invalidate the notice. It was only in the sixth case, where the owner was also the occupier, that the unauthorised question was held to invalidate the entire notice. The contention before me was that this sixth case applied in its essentials to the present case.

It seems to me that the respective statutory provisions are somewhat different. What is before me is a statute authorising the commissioners, 'by notice in writing', to require a person to furnish them, within a stated time, 'with such particulars as they think necessary', and so on; and the notice before me follows this language. The response to the statutory requirement is thus to be the furnishing of the particulars within the time. There is no form to be filled up, no requirement that all the particulars are to be supplied simultaneously, and no other formal requirement. The only question is whether the person concerned has or has not furnished the particulars within the time stated. The penalty is imposed by the Finance Act 1960, s 46 (1), if the person 'fails to comply with the notice'.

That may be contrasted with the Finance (1909-10) Act 1910, s 26 (2). The power was for the commissioners to require a person, 'by notice from the Commissioners', to 'furnish to the Commissioners a return containing such particulars as the Commissioners may require' as to the matters stated; and there was a penalty for failure 'to make such a return' within the time specified. The notice sent by the commissioners required a return to be made on the form accompanying the notice; and copies of what was called 'Form 4' were enclosed. This form contained a declaration that the particulars were 'in every respect fully and truly stated to the best of my judgment and belief', and referred to the penalty for 'failure to make a due return'. In those circumstances it is not surprising that in the *Dyson* case¹⁰ Sir Herbert Cozens-Hardy MR said:

'The requirement is for a return containing an answer to all the particulars, including (i), and that is not authorized. The penalty is imposed for failure to make "such a return" as the Commissioners require. The return is one and

8 [1970] 3 All ER 833 at 839, [1971] Ch 993 at 1003

9 [1912] 1 Ch 158

10 [1912] 1 Ch at 166

a indivisible. No penalty could be exacted for omitting to make an unauthorized return. I decline to read the notice as requiring a return of the particulars so far and so far only as they can lawfully be required by the Commissioners.'

Fletcher Moulton LJ said¹¹:

b 'But seeing that the demand is for the whole of the information and that the declaration which the plaintiff has to sign relates to the whole, and moreover contains words which are intended to refer expressly to this part of the notice, the presence of this unauthorized inquiry renders the whole demand bad. It certainly renders untrue the statement that there is a penalty for not making the return demanded.'

c Farwell LJ said¹²:

d 'The duty imposed by the Act on owners is to make such a return as is required by the Commissioners under a penalty of 50*l*. The duty and the penalty for disobedience are both one and indivisible and are co-extensive, and if the Commissioners frame their requisition with so little care as to exceed their powers, the whole demand and not merely the ultra vires portion becomes unenforceable. [He added:] It is impossible to split the requisition into good and bad, and hold that the demand may be good so far as the requisitions are good; the Act speaks of a return, not of part of a return, and gives a penalty for not making "such return" . . .'

e The *Dyson* case¹³ is thus authority for the proposition that the inclusion of an unauthorised demand in a return that is one and indivisible and has been demanded under statutory powers invalidates the entire requirement for making the return. The indivisible nature of the return is at the heart of all three judgments on this point. In the present case, there is no demand for the making of an indivisible return; instead, there is a requirement for the furnishing of 'particulars', and this seems to me to be distributive rather than unitary in its import. If the commissioners
f seek particulars of more than they are entitled to, I do not in principle see why their requirement should not be bad merely as to the excess. It may well be that if the excess is so entwined with the valid as to be separable from it only with difficulty, then the whole of the requirement will be bad: the subject ought not to be required to perform delicate feats of surgery on what is in substance a single requirement. But where, as here, the requirements are contained in a notice divided into numbered
g paragraphs dealing with different matters, and the attack is made on one or more of such paragraphs, I do not see why the invalidity of those paragraphs, if established, should infect the other paragraphs, or why the notice should not be good as to the good paragraphs and bad as to the bad. Accordingly, had it been necessary to decide the point, I should have held that even if questions 3 and 4 in the notice were invalid, this would not invalidate questions 1 and 2. But as it is, the only answer that I make to
h the originating summons is, as I have already indicated, to say "All" to question 1.

Ruling accordingly.

Solicitors: Ashurst, Morris Crisp & Co (for the bank); Solicitor of Inland Revenue.

R W Farrin Esq Barrister.

11 [1912] 1 Ch at 170

12 [1912] 1 Ch at 171, 172

13 [1912] 1 Ch 158

Montague v Babbs

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND BRIDGE JJ

16th, 17th NOVEMBER 1971

Harbour – Pilot – Pilotage district – Unlicensed pilot piloting ship after offer by licensed pilot – Ship being moved for purpose of changing from one mooring to another – Ship not navigating by virtue of pilotage district byelaws – Whether ship being 'piloted' by unlicensed pilot if not navigating – Pilotage Act 1913, ss 30, 32 – London Pilotage District Bye-Laws, Part IX, byelaw 2.

Harbour – Pilot – Pilotage district – Unlicensed pilot piloting ship after offer by licensed pilot – Offer – Communication of offer – Offer to be communicated in relation to particular movement of ship – General offer to all masters requiring pilots that pilots available not sufficient – Pilotage Act 1913, s 30 (3).

The appellant, a waterman licensed by the Port of London Authority but not a pilot licensed for the London pilotage district, piloted a vessel of about 3,647 tons gross from moorings at Erith buoys to her discharge berth at Ford's jetty, a distance of less than 2 nautical miles. Erith buoys and Ford's jetty lay within the London pilotage district. The Trinity House pilot station at Gravesend, which displayed a sign saying 'Pilots' and a metal pilot flag, was some 9 nautical miles down river from Erith buoys and thus could not be seen from a vessel moving from Erith buoys to Ford's jetty. At that pilot station there were at the material time licensed pilots available, ready and willing to pilot the vessel. The appellant knew of the existence of the pilot station and of the availability of licensed pilots but licensed watermen, including the appellant, had for many years piloted ships in similar circumstances. The appellant was charged with contravening s 30 (3)^a of the Pilotage Act 1913. The appellant contended (i) that s 30 (3) did not apply since the effect of the provision in byelaw 2^b of Part IX of the London Pilotage District Bye-Laws (made under s 32^c of the Act) that a vessel 'being moved for the purpose of changing from one mooring to another mooring . . . in the part of the District between London Bridge and Gravesend shall not be deemed to be navigating in the District, and shall . . . be exempt from Compulsory Pilotage', was to release an unlicensed pilot from the obligation under s 30 to give way to a licensed pilot; (ii) that the sign and the flag displayed at the pilot station did not constitute an offer of pilotage for the purposes of s 30 (3). The justices, having accepted, *inter alia*, the respondent's contention that byelaw 2 was inapplicable on the basis that it was concerned only with exemption from compulsory pilotage and not with a licensed pilot's right to supersede an unlicensed pilot, convicted the appellant. On appeal,

Held – The appeal would be allowed and the conviction quashed for the following reasons—

^a Section 30 (3) provides: 'If in any pilotage district a pilot not licensed for the district pilots or attempts to pilot a ship after a pilot licensed for that district has offered to pilot the ship, he shall be liable to a fine not exceeding fifty pounds.'

^b Byelaw 2 is set out at p 243 c, post

^c Section 32, so far as material, provides: '(1) A ship while being moved within a harbour which forms part of a pilotage district shall be deemed to be a ship navigating in a pilotage district, except so far as may be provided by byelaw in the case of ships being so moved for the purpose of changing from one mooring to another mooring or of being taken into or out of any dock: Provided that a byelaw shall in every case be made for the purpose aforesaid in any pilotage district where any class of persons other than licensed pilots were in practice employed at the date of the passing of this Act for the purpose of changing the moorings of ships or of taking ships into or out of dock.'

- a (i) an unlicensed pilot conducting a vessel on a movement exempted by a byelaw made under s 32 was protected by that section from prosecution under s 30; no question of a vessel being under the control of a pilot, whether licensed or unlicensed could arise at a time when a vessel was deemed not to be navigating (see p 243 h, p 244 a b d and f, and p 245 a and b, post);
- b (ii) a global offer of pilotage, such as that made by the licensed pilots at the Gravesend pilot station, was not a sufficient offer to provide pilotage for the purposes of s 30 (3); for the purposes of that subsection it was essential that a specific offer should be made or communicated in relation to the particular movement of the vessel in question (see p 244 h and p 245 a b and d, post).
- Babbs v Press* [1971] 3 All ER 654 applied.

Notes

- c For unlicensed persons acting as pilots and offences by pilots, see 35 Halsbury's Laws (3rd Edn) 582, 583, paras 855, 857, and for cases on the subject, see 42 Digest (Repl) 1054, 8744, 8745.
- For excepted and exempted ships for compulsory pilotage, see 35 Halsbury's Laws (3rd Edn) 586, 587, para 864, and for cases on the subject, see 42 Digest (Repl) 1060-1062, 8798-8805.
- d For the Pilotage Act 1913, ss 30 and 32, see 31 Halsbury's Statutes (3rd Edn) 501, 502.

Case referred to in judgments

Babbs v Press [1971] 3 All ER 654, [1971] 1 WLR 1739.

e Cases also cited

Muller (W H) & Co v Trinity House (Deptford Strood) [1925] 1 KB 166, [1924] All ER Rep 706.

Smith v Cocking [1959] 1 Lloyd's Rep 88.

Case stated

- f This was an appeal by way of case stated by justices acting in and for the petty sessional division of Beacontree in the North East London Area in respect of their adjudication as a magistrates' court sitting at Barking on 24th May 1971.
- On 23rd November 1970 an information was preferred by the respondent, Edward Babbs, against the appellant, Raymond Frank Montague, charging that he on 7th June 1970 not being a pilot licensed for the district piloted the motor vessel Minster from Erith buoys to Ford's jetty, Dagenham, within the limits of the London pilotage district after a pilot licensed for the district had offered to pilot the ship contrary to s 30 (3) of the Pilotage Act 1913.
- g The following facts were found. The Minster was a motor vessel of about 3,647 tons gross and at all material times was still laden with her cargo of coal. The appellant was a waterman licensed by the Port of London Authority. On 7th June 1970 the appellant piloted the Minster from moorings at Erith buoys to her discharge berth at Ford's jetty, Dagenham, where she moored. Erith buoys and Ford's jetty, Dagenham, were situated between Barking Creek and Gravesend and were geographically within the London pilotage district. The distance between Erith buoys and Ford's jetty, Dagenham, was less than 2 nautical miles. At all material times there was a Trinity House pilot station at Royal Terrace Pier, Gravesend. The pilot station was at all material times clearly marked by a sign saying 'Pilots' and by a metal pilot flag.
- j At all material times there were available at the pilot station licensed pilots who were ready, able and willing to pilot the Minster from Erith buoys to Ford's jetty as aforesaid. The pilot station was some 9 nautical miles down-river of Erith buoys and in the circumstances could not be seen from vessels moving from Erith buoys to Ford's jetty, Dagenham. At all material times the appellant knew of the existence of the pilot station and of the availability of licensed pilots.

Licensed watermen including the appellant had for many years piloted ships in circumstances similar to those in the present case. a

It was contended on behalf of the appellant: that s 30 (3) of the Pilotage Act 1913 was inapplicable because of byelaw 2 of Part IX of the London Pilotage District Bye-Laws which provides:

‘A ship while being moved for the purpose of changing from one mooring to another mooring or of being taken into or out of any dock in the part of the District between London Bridge and Gravesend shall not be deemed to be navigating in the District, and shall accordingly be exempt from Compulsory Pilotage provided that between Barking Creek and Gravesend the above exemption shall not apply to ships which are being moved for a distance exceeding two nautical miles.’ b

if the byelaw did not have the effect of making s 30 (3) inapplicable in cases such as the present the byelaw would confer no benefit at all on licensed watermen and watermen would never be able to shift vessels when there had been an offer of pilotage; that the sign and flag did not and could not constitute an offer of pilotage for the purposes of s 30 (3). c

It was contended on behalf of the respondent: that the byelaw was inapplicable as it was only concerned with exemption from compulsory pilotage and not with a licensed pilot's right to supersede an unlicensed pilot; that in any event the byelaw only applied to vessels being moved between the completion of an inward voyage and before the commencement of an outward voyage and not to a case such as this where a ship had moored just short of her point of discharge; that the sign and flag constituted an offer of pilotage for the purposes of s 30 (3). d

The justices accepted the contention of the respondent and convicted the appellant. e

R F Stone QC and Geoffrey Brice for the appellant.

Gerald Darling QC and N Bridges-Adams for the respondent.

LORD WIDGERY CJ. This is an appeal by case stated from justices of the petty sessional division of Beacontree sitting at Barking in respect of their adjudication on 24th May 1971. By their adjudication they convicted the appellant of an offence under s 30 (3) of the Pilotage Act 1913, the information against him charging that he on 7th June 1970 not being a pilot licensed for the district piloted the motor vessel *Minster* from Erith buoys to Ford's jetty, Dagenham, within the limits of the London pilotage district after a pilot licensed for the district had offered to pilot the ship contrary to the section to which I have referred. f

The facts found were these: the *Minster* was a motor vessel incoming with a cargo of coal, and at the material time her cargo of coal was still on board. She had in fact been unable to reach her final destination, which was Ford's jetty, Dagenham, owing to the berth being full, and she had secured at Erith buoys short of her destination on that account. The appellant is a waterman licensed by the Port of London Authority. Erith buoys, at which the ship tied up, and her ultimate destination at Dagenham, are both situate between Barking Creek and Gravesend and thus geographically within the London pilotage district. The distance between Erith buoys and the jetty at Dagenham is less than 2 miles, and at all material times there was a Trinity House pilot station at Gravesend. This pilot station was displaying a sign saying 'Pilots' and a metal pilot flag, and the justices found: g

‘At all material times there were available at the said Pilot Station licensed pilots who were ready, able and willing to pilot the “Minster” from Erith Buoys to Ford's Jetty as aforesaid. The said Pilot Station is some 9 nautical miles downriver of Erith Buoys . . .’ h

j

a And in the circumstances, the justices give us a glimpse of the obvious by stating that the station cannot be seen from a vessel moving from Erith Buoy to Ford's jetty. Finally they state: 'At all material times the Appellant knew of the existence of the said Pilot Station and of the availability of licensed pilots' but nevertheless piloted the ship to Ford's jetty.

b It was contended on behalf of the appellant before the justices that s 30 (3) of the Pilotage Act 1913 was inapplicable to this movement, and did not impose on him the obligation of giving way to a licensed pilot, by virtue of byelaw 2 of Part IX of the London Pilotage District Bye-Laws. That I should read, because it has some considerable relevance. It provides:

c 'A ship while being moved for the purpose of changing from one mooring to another mooring or of being taken into or out of any dock in the part of the District between London Bridge and Gravesend shall not be deemed to be navigating in the District, and shall accordingly be exempt from Compulsory Pilotage provided that between Barking Creek and Gravesend the above exemption shall not apply to ships which are being moved for a distance exceeding two nautical miles.'

d The argument for the appellant was that this movement of the Minster came within the exemption provision of that byelaw, and that as a consequence, in the appellant's submission, his obligation to give way to a licensed pilot under s 30 did not arise.

e The respondent contended that the byelaw was not applicable first, on a broad submission that s 30 is independent of the rest of the Act and is not affected by exemptions conferred by the byelaws, and secondly, on a more limited ground that even if that argument were wrong the movement of the ship from Erith buoys to Dagenham was not a movement within the byelaw, the respondent relying on authority to the effect that a ship which has not yet reached her destination, but has stopped short for some reason, is not within the terms of the byelaw when she makes the final and concluding move to her destination.

f The justices accepted the contention of the respondent; in so doing, of course, they accepted that the existence of the pilot station at Gravesend, managed in the manner which they described, was a sufficient offer of a licensed pilot to satisfy the requirement of s 30 and they then accordingly convicted the appellant.

g The justices' decision was given before these matters were debated in this court in *Babbs v Press*¹. I gave the leading judgment in *Babbs v Press*¹, and I do not find it necessary or appropriate to repeat now in detail everything which I said on that occasion. I take the liberty of hoping that anyone reading this present judgment will realise that he must read it in the light of *Babbs v Press*¹.

h On that footing three matters have been canvassed before us which require some individual consideration. First of all I should say that in *Babbs v Press*¹ this court rejected the first argument of the respondent to which I referred a few moments ago. In that earlier decision we held that a movement within the terms of the exempting byelaw was a movement to which the restrictions of s 30 did not apply. For my part I would regard myself as bound by the decision in *Babbs v Press*¹, but in any event, notwithstanding such argument as there has been on the point today, I adhere to that view. I say 'notwithstanding such argument as there has been' because there has been virtually no argument on this point, the court taking the view that it should regard itself as bound by *Babbs v Press*¹.

j I would wish to add a few words only on this point in order to deal somewhat more fully with a point made by counsel for the appellant in that case, to which I fear I did not do justice in the judgment in *Babbs v Press*¹. It is this: s 32 of the Pilotage Act 1913, under which the byelaw is made, provides first of all in general terms that a ship being moved within a harbour shall be deemed to be navigating

in the pilotage district except so far as byelaws may be made exempting such movements where a ship is changing from one mooring to another or being taken into or out of any dock. The section goes on to provide:

'Provided that a bye-law [on these lines] shall . . . be made . . . in any pilotage district where any class of persons other than licensed pilots were in practice employed at the date of the passing of this Act for the purpose of changing the moorings of ships or taking ships into or out of dock.'

I read that (and indeed read that in the course of argument in *Babbs v Press*²) as being a provision for the protection of certain classes of men employed on the river who had before 1913 been in the habit of conducting ships in movements of this kind.

The importance of the point is this, that where a movement of a ship comes within the exempting byelaw it is agreed on all hands that what are familiarly called the compulsory pilotage provisions of s 11 of the Act do not apply. Accordingly, where a movement of a ship comes within the exempting byelaw a licensed pilot who presents himself and offers to take over the ship and who is rejected by the master does not give occasion for prosecution of the master under s 11, because the offence there created, which can be described in general terms as allowing a ship to be moved by an unqualified man after offer by a licensed pilot, cannot arise.

If the argument of the respondent in *Babbs v Press*² that these considerations do not apply to s 30 is right, then it seems to me that the protection of s 32 will be wholly nugatory because a waterman conducting the vessel on a movement exempted by the byelaw may be protected from prosecution, as may be the master of the ship, so far as s 11 is concerned, but he will be liable to prosecution under s 30. Counsel for the respondent has been unable to provide any illustration of a movement of a ship in which the protection of s 32 could extend to an unlicensed pilot having regard to his interpretation of s 30. I wish to make it clear that my somewhat brief reference to this point in *Babbs v Press*² is really based on that consideration, as it seems to me highly unlikely that Parliament would have given on the one hand in s 32 only to take away with the other hand in s 30.

The second point which arises in the present case is the argument of counsel for the respondent that even if the byelaw exemption is relevant to this kind of prosecution at all, it is not significant in the present instance as the movement from Erith buoys to Dagenham cannot have been a movement within the terms of the byelaw. This raises an interesting point and one which may give rise to further discussion another day, but having regard to the view which I take on the third and final point, I find it unnecessary to say anything more about it.

The third point, on which in any event in my judgment this appeal must succeed, is again a point which was raised and dealt with, albeit obiter, in *Babbs v Press*³. It arises in this way. The offence charged against the appellant under s 30 (3) is committed only if a licensed pilot has offered his services and the unlicensed pilot nevertheless continues to handle the ship. Accordingly, if the respondent is right on his construction of the Act, it is still necessary in order that he may succeed, for him to show that the justices were right in the view which the justices took that an offer by a licensed pilot had been made in the circumstances found in this case. I content myself by saying that I would repeat everything which I said obiter in *Babbs v Press*³ on this point. For the reasons which I there gave and which I do not find it necessary to repeat, I am of the opinion that the global offer made by the assembled pilots at the Gravesend pilot station is not an offer within the meaning of s 30 (3) for the purposes of the movement of this ship which is in question in this case. In my judgment that concludes the matter in any event in favour of the appellant, whatever the result of the argument on the other points may be, and I would accordingly allow the appeal and quash the conviction.

² [1971] 3 All ER 654, [1971] 1 WLR 1739

³ [1971] 3 All ER at 661, [1971] 1 WLR at 1746

a **ASHWORTH J.** I agree; I would only say that on the question whether there was an offer to pilot the ship within the meaning of s 30 (3) of the Pilotage Act 1913 I have felt perhaps more doubt than Lord Widgery CJ and Bridge J, but I agree with the result and with the order which Lord Widgery CJ proposes.

b **BRIDGE J.** I also agree. Counsel for the respondent's argument that an offer of the services of a pilot by a global advertisement of the location and availability of pilots is effective for the purposes of s 30 (3) of the Pilotage Act 1913 as an offer to all who are de facto aware of it, seems to me to be contrary to the scheme of the 1913 Act. Lord Widgery CJ pointed out in his obiter observations on this point in *Babbs v Press*⁴ the distinction which is drawn in s 30 (4) between the position of the master of a ship employing an unlicensed pilot on an outward bound voyage which will constitute an offence by him if he has not taken reasonable steps to obtain a licensed pilot, c and his position on an inward voyage in which he will only commit an offence by employing an unlicensed pilot if he has previously had the offer of a licensed one. For my part I find it impossible to understand how that distinction can validly be drawn if counsel for the respondent's argument is right.

d I find further support for the conclusion, as Lord Widgery CJ put it in *Babbs v Press*⁵, that an offer for the purposes of sub-s (3) must be an offer made or communicated in relation to the particular movement of the vessel which is in question, in the provisions of ss 43 and 44. Section 43 (1) places on the master of the ship the obligation—

'when navigating in circumstances in which pilotage is compulsory under this Act, [to] display a pilot signal, and keep the signal displayed . . .'

e indicating that he requires a pilot. Section 44 envisages how the services of a pilot are to be offered to him. I need not read the section; it contemplates a visual signal being made, possibly from a shore station, more likely from a pilot cutter, to a ship which is navigating and displaying the appropriate signal. When the master of the ship has received such a signal he is then to facilitate the pilot getting on board the f ship. What is quite clearly not contemplated, to my mind, is the means of offer and acceptance envisaged by counsel for the respondent's argument, namely an offer by an advertisement which is known to the master of the ship and the unlicensed pilot and acceptance by a telephone message. I agree that this appeal should be allowed on the ground that there was no offer.

g *Appeal allowed. Conviction quashed. The court certified under s 1 (2) of the Administration of Justice Act 1960 that a point of law of general public importance was involved, ie (i) whether under s 30 of the Pilotage Act 1913 a pilot licensed for the district might supersede any pilot not so licensed who was employed to pilot a ship in the district notwithstanding the provisions of a byelaw made under s 32; (ii) whether for the purposes of offering to pilot a ship under s 30 (3) a pilot licensed for the district could rely on a general offer of pilotage within the district or had to make a specific offer in relation to the particular ship in question, and granted leave h to appeal to the House of Lords.*

Solicitors: Ingledew, Brown, Bennison & Garrett (for the appellant); Freshfields (for the respondent).

N P Metcalfe Esq Barrister.

j ⁴ [1971] 3 All ER 654 at 661, [1971] 1 WLR 1739 at 1746

⁵ [1971] 3 All ER at 661, [1971] 1 WLR at 1746

Note

Crouch v McMillan

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND BRIDGE JJ

16th NOVEMBER 1971

Harbour – Pilot – Pilotage district – Unlicensed pilot piloting ship after offer by licensed pilot – Ship being moved for purposes of changing from one mooring to another – Ship not navigating by virtue of pilotage district byelaws – Whether ship being 'piloted' by unlicensed pilot if not navigating – Pilotage Act 1913, ss 30 (3), 32 – London Pilotage District Bye-Laws, Part IX, byelaw 2.

Notes

For unlicensed persons acting as pilots and offences by pilots, see 35 Halsbury's Laws (3rd Edn) 582, 583, paras 855, 857, and for cases on the subject, see 42 Digest (Repl) 1054, 8744, 8745.

For the Pilotage Act 1913, ss 30 and 32, see 31 Halsbury's Statutes (3rd Edn) 501, 502.

Case referred to in judgment

Babbs v Press [1971] 3 All ER 654, [1971] 1 WLR 1739.

Case stated

This was an appeal by way of case stated by the justices acting in and for the petty sessional division of Dartford in respect of their adjudication as a magistrates' court sitting at Dartford on 12th May 1971.

On 26th February 1971 an information was preferred by the respondent, Daniel Ivor McMillan, against the appellant, William James Crouch, charging that he on 24th October 1970 on board the ship Wadhurst lying at Littlebrook power station in the parish of Stone in the county of Kent, during and after the departure of the ship from Littlebrook power station did pilot the ship after a licensed pilot for the district had offered to pilot the ship contrary to s 30 (3) of the Pilotage Act 1913.

The justices heard the information on 12th May 1971. The case came before them as a test case. The material facts were not in dispute. They were as follows. The Wadhurst was at all material times a ship of about 3,900 tons gross. The respondent and a witness, Maxwell Lamont Brown, were both duly licensed Trinity House river pilots, licensed to pilot vessels in that part of the River Thames with which this case was concerned. The appellant was a waterman licensed by the Port of London Authority. The part of the river within which the Wadhurst was moved on 24th October was geographically wholly within the London Pilotage District which was a district where (subject to certain exceptions) pilotage of vessels was compulsory, and that it was geographically between Barking Creek and Gravesend. At or about 16.15 hours on 24th October 1970 the respondent and the pilot Brown both being in uniform boarded the Wadhurst as she lay moored alongside the jetty at Littlebrook power station and the respondent offered to the master to pilot the Wadhurst from her moorings at Littlebrook power station to moorings at Cory's wharf (a distance of about $\frac{3}{4}$ mile); at or about 16.50 hours the appellant boarded the ship and was made aware of the offer. The offer was not accepted by the master of the Wadhurst having been instructed by his owners to take the services of the appellant. The respondent and pilot Brown left the vessel. From the jetty at Littlebrook power station the respondent and pilot Brown saw the vessel depart from the jetty and saw and heard the appellant giving the requisite helm and engine orders for moving the vessel to Cory's wharf where she was again moored. At no time when the vessel was moved as aforesaid was a licensed Trinity House river pilot on board her.

a It was contended on behalf of the appellant that by reason of byelaw 2^a of certain byelaws, Part IX relating to the London pilotage district, the appellant was entitled to move the vessel as and when he did despite the respondent's offer of his services and that s 30 (3) of the Pilotage Act 1913 had no application to such a situation.

b It was contended on behalf of the respondent that the aforementioned byelaws related according to the heading thereof only to exemptions from compulsory pilotage and that this case was concerned, not with compulsory pilotage, but with the right of a licensed pilot to supersede an unlicensed pilot once an unlicensed pilot had been taken.

c It was contended on behalf of the appellant that byelaw 2 dealt with an entirely different class of exemption from byelaw 1^b and that if a licensed pilot could always supersede an unlicensed pilot (e.g. a licensed waterman) then byelaw 2 would be wholly ineffective.

c It was contended on behalf of the respondent that this interpretation was not correct because a master in a situation coming within byelaw 2 could move his ship without the necessity in law of taking a pilot. If however he did choose to take a pilot when he need not, and that pilot was unlicensed then a licensed pilot had a right to supersede him.

d The justices accepted the contentions of the respondent and convicted the appellant accordingly.

R F Stone QC and Geoffrey Brice for the appellant.

Gerald Darling QC and N A Phillips for the respondent.

e **LORD WIDGERY CJ.** This is an appeal by case stated from justices acting in and for the petty sessional division of Dartford in respect of their adjudication as a magistrates' court sitting at Dartford on 12th May 1971, whereby they convicted the appellant of an offence under s 30 (3) of the Pilotage Act 1913, the terms of the information against the appellant being these:

f 'On the 24th day of October 1970 on board the ship "WADHURST" lying at Littlebrook Power Station in the Parish of Stone in the County of Kent, during and after the departure of the said ship from Littlebrook Power Station did pilot the said ship after a Licensed Pilot for the district had offered to pilot the ship contrary to sub-section (3) of Section 30 of the Pilotage Act 1913.'

g The case has obviously been prepared as a test case, and the essential matters of fact were found by the justices. They are that two pilots duly licensed by Trinity House approached the master of the ship Wadhurst at a time when the ship was about to be moved a distance of three-quarters of a mile in the London pilotage district of the River Thames. The offer of pilotage given by these two gentlemen was rejected by the master of the ship on instructions from his owners, and the ship was moved down the river by the appellant, who was not a licensed pilot.

h The case has not been argued in any detail before us, because it is agreed by counsel on both sides that if this court considers that it should follow its own decision in *Babbs v Press*¹ that decision wholly disposes of the argument in the present case. On *Babbs v Press*¹ this court reached a conclusion on the construction of the Pilotage Act 1913 which would produce a result different from that achieved by the Dartford justices in the instant case. We think we should follow our decision in *Babbs v Press*¹, and consequently have no alternative but to say that the justices were wrong; to allow the appeal, and to quash the conviction.

j a See byelaw 2 of the London Pilotage District Bye-Laws, Part IX, which is set out at p 243 c, ante

b Byelaw 1, so far as material, provides: 'Ships of the following classes, when not carrying passengers, are exempt from Compulsory Pilotage in the District, viz:—(i) ships of less than 3,500 tons gross tonnage trading coastwise; (ii) Home Trade Ships of less than 3,500 tons gross tonnage trading otherwise than coastwise . . .'

i [1971] 3 All ER 654, [1971] 1 WLR 1739

ASHWORTH J. I agree. a

BRIDGE J. I agree.

Appeal allowed. Conviction quashed.

The court certified under s 1 (2) of the Administration of Justice Act 1960 that a point of law of public general importance was involved in the decision, i.e. whether under s 30 of the Pilotage Act 1913 a pilot licensed for a district may supersede any pilot not so licensed who is employed to pilot a ship in the district notwithstanding the provisions of a byelaw made under s 32 of the Act, and granted leave to appeal to the House of Lords. b

Solicitors: Ingledew, Brown, Bennison & Garrett (for the appellant); Holman, Fenwick & Willan (for the respondent). c

N P Metcalfe Esq Barrister.

Re Hopkins's Lease Caerphilly Concrete Products Ltd v Owen d

COURT OF APPEAL, CIVIL DIVISION
RUSSELL, SACHS AND STAMP LJ
5th, 6th OCTOBER, 5th NOVEMBER 1971

Landlord and tenant – Lease – Renewal – Perpetual right of renewal – Lease for five years with option to renew for further period of five years on the same terms 'as are herein contained (including an option to renew such lease for the further term of five years at the expiration thereof)' – Whether lease perpetually renewable – Law of Property Act 1922, Sch 15, para 5. e

The defendant was the lessee of industrial land of which he had been tenant since 1949 under successive five year leases each containing an option to renew for a further five year term. In 1957 he let the land to the plaintiffs on a weekly oral tenancy at a rental of 30s per week. On 6th May 1963 the lessor granted the defendant a further five year term from 1st January 1963. In 1966 the plaintiffs purchased the freehold of the land from the lessor, subject to the 1963 lease. The 1963 lease contained an option to renew (cl 4 (3)) in the following terms: '... the landlord will on the written request of the tenant made six months before the expiration of the term hereby created and if there shall not at the time of such request be any existing breach or non-observance of any of the covenants on the part of the tenant hereinbefore contained ... grant to him a lease of the said demised land for the further term of five years from the expiration of the said term hereby granted at the same rent and containing the like covenants and provisos as are herein contained (including an option to renew such lease for the further term of five years at the expiration thereof)...'. The defendant not having given the plaintiffs six months' notice of his intention to exercise the option the plaintiffs notified him that they were treating the lease as at an end and that they did not intend to pay any further rent under the sub-tenancy. f

Held – (i) The words in brackets in the covenant made it plain that the phrase 'the same or like covenants and provisos' was intended to include in the second five year term an option to renew; if the second lease repeated the words of the covenant without the words in brackets, the second lease would not be carrying out the requirement of the first lease, i.e. would not be granting an option for a further lease containing 'the like covenants ... as herein contained'; accordingly the second lease must also contain the covenant in cl 4 (3) and therefore the terms of the first lease were such g
h
i

- a as to create a perpetually renewable lease within Sch 15, para 5^a, to the Law of Property Act 1922 (see p 251 f to h and p 254 a and d, post).
- (ii) It followed that notice to exercise the option was unnecessary since the lease, being perpetually renewable, took effect as a demise for 2,000 years.
- Re Greenwood's Agreement* [1950] 1 All ER 436 applied.

b Notes

For covenants for perpetually renewable leases, see 23 Halsbury's Laws (3rd Edn) 627, 628, para 1330, and for cases on the subject, see 31 Digest (Repl) 79-82, 2322-2346.

For the Law of Property Act 1922, Sch 15, see 18 Halsbury's Statutes (3rd Edn) 441.

Cases referred to in judgments

- c *Baynham v Guy's Hospital* (1796) 3 Ves 295, [1775-1802] All ER Rep 536, 30 ER 1019, 31 Digest (Repl) 80, 2328.
- Green v Palmer* [1944] 1 All ER 670, [1944] Ch 328, 113 LJCh 223, 171 LT 49, 31 Digest (Repl) 79, 2323.
- Greenwood's Agreement, Re, Parkus v Greenwood* [1949] 2 All ER 743, [1950] Ch 33; *rvsd* CA [1950] 1 All ER 436, [1950] Ch 644, 31 Digest (Repl) 79, 2327.
- d *Moore v Foley* (1801) 6 Ves 232, 31 ER 1027, 31 Digest (Repl) 80, 2329.
- Swinburne v Milburn* (1884) 9 App Cas 844, 54 LQB 6, 52 LT 222, 31 Digest (Repl) 76, 2302.

Cases also cited

- Browne v Tighe* (1834) 8 Bli NS 272.
- Gray v Spyer* [1922] 2 Ch 22.
- e *Hare v Burges* (1857) 4 K & J 45, [1843-60] All ER Rep 650.
- Northchurch Estates Ltd v Daniels* [1946] 2 All ER 524, [1947] Ch 117.
- Wynn v Conway Corp'n* [1914] 2 Ch 705, [1914-15] All ER Rep 199.

Appeal

- f This was an appeal by the plaintiffs, Caerphilly Concrete Products Ltd, from an order of Foster J dated 22nd March 1971 refusing the plaintiffs' application by originating summons for a declaration that the defendant tenant, Frederick William Owen, was not entitled to a perpetually renewable lease of the demised land under Sch 15, para 5, to the Law of Property Act 1922. The defendant was the original lessee of the land but the plaintiffs were not the original lessors. The facts so far as relevant were as follows. A lease of the land in question for 99 years from 1894 had become vested in one Hopkins on 18th March 1947. On 23rd February 1949 he sublet the land to the defendant for five years at a yearly rent of £10 payable by one payment of £50, with a covenant to renew on the same terms for a further five years. Further subleases for five years from 1st July 1953 contained the same option. On 23rd July 1955 Mr Hopkins purchased the freehold and merged the lease; the sublease, therefore, became the headlease. In 1957 the defendant orally sublet the land to the plaintiffs at a weekly rental of 30s. On 1st February 1958 Mr Hopkins granted the defendant a further five years lease on the same terms with an option to renew on the same terms. Final renewal was on 6th May 1963 when Mr Hopkins granted a new lease to the defendant. On 8th February 1966 the plaintiffs purchased the freehold from Mr Hopkins subject to the 1963 lease. The defendant not having given the
- j a Schedule 15, para 5, so far as material, provides: 'A grant, after the commencement of this Act, of a term . . . with a covenant or obligation for perpetual renewal, which would have been valid if this Part of this Act had not been passed, shall (subject to the express provisions of this Act) take effect as a demise for a term of two thousand years . . . to commence from the date fixed for the commencement of the term . . . free from any obligation for renewal or for payment of any fines, fees, costs, or other money in respect of renewal.'

plaintiffs notice of their intention to renew under the terms of the 1963 lease the plaintiffs informed him that his lease was ending and that they would not pay any further rent under the sub-tenancy. It appeared that after the plaintiffs had informed the defendant that the lease was at an end the defendant's solicitor sent to the plaintiffs a cheque for £50 which sum was acknowledged by someone in the accounts section of the plaintiffs' company. The defendant claimed that the lease was perpetually renewable in which case no notice was necessary as, under the provisions of the Law of Property Act 1922, the term had been converted into a term of 2,000 years.

Bruce Griffiths QC and T Hywel Moseley for the plaintiffs.
Raymond Walton QC and Hywel ap Robert for the defendant.

Cur adv vult

5th November. The following judgments were read.

RUSSELL LJ. This appeal from Foster J raises the question whether the terms of a lease are such as to create a perpetually renewable lease, and consequently by force of the Law of Property Act 1922, Sch 15, para 5, confer on the tenant a 2,000 year term.

The lease in question is dated 6th May 1963. One Hopkins was the lessor and the defendant Owen the lessee. It was for a term of five years from 1st January 1963 at a rent of £10 yearly payable in advance in one sum of £50. The premises were an area of 4,800 square feet in an industrial area in Caerphilly. The defendant had been previously lessee of the property from Mr Hopkins under a succession of leases in similar terms, and in 1957 had sublet the premises to the plaintiffs at a weekly rental of 30s. In 1966 the plaintiffs bought the freehold of the premises; and the plaintiffs contend that on the expiration of the five year term they are no longer since January 1968 liable to pay the 30s weekly rental to the defendant. The defendant admittedly had at least an option for another five years from January 1968, but had failed to give due notice exercising that option; but the defendant contends that the lease of 1963 was perpetually renewable, in which case notice was not necessary because of the 2,000 year term. I add that there is a secondary point that arises if there was no perpetually renewable lease and, therefore, no 2,000 year term because of a payment of £50 by way of rent for a period after January 1968, apparently accepted as such by the plaintiffs. This may prevent the plaintiffs in any event from contending that they ceased to be the lessees of the defendant at 30s weekly in January 1968; but that point is in any event not now for decision.

The 1963 lease contained a number of covenants, provisos and conditions which do not I think call for special notice. I am not sure at what stage in the history of the Hopkins to the defendant leases a shed was erected on the premises by the defendant, but presumably it was before 1957, thus justifying a weekly rent of 30s charged in the subletting by the defendant to the plaintiffs. The crucial clause is cl 4 (3) which was in the following terms:

'The landlord hereby covenants with the tenant as follows: . . . (3) That the landlord will on the written request of the tenant made six months before the expiration of the term hereby created and if there shall not at the time of such request be any existing breach or non-observance of any of the covenants on the part of the tenant hereinbefore contained at the expense of the tenant grant to him a lease of the said demised land for the further term of five years from the expiration of the said term hereby granted at the same rent and containing the like covenants and provisos as are herein contained (including an option to renew such lease for the further term of five years at the expiration thereof) the tenant on the execution of such renewed lease to execute a counterpart thereof.'

Here then is the short point. When the time comes for the grant of the second five year term, is that grant to include cl 4 (3) including the parentheses? In that case

a we have a perpetually renewable lease. Or is it to include cl 4 (3) without the parentheses or an option in some other terms, in which case there is provision in the 1963 lease for three periods of five years and no more. The approach to the question whether a lease is perpetually renewable is not in doubt. The language used must plainly lead to that result; although the fact that an argument is capable of being sustained at some length against that result does not of course suffice.

b As a matter of history, when a covenant by a lessor conferred a right to renewal of the lease, the new grant to contain the same or the like covenants and provisos as were contained in the lease, the courts refused to give literal effect to that language, which if taken literally would mean that the second lease would contain the same covenant (or option) to renew, totidem verbis, and so on perpetually. The reference to the same covenants was construed as not including the option covenant itself.
c This limited the tenant's right to one renewal. In order, therefore, to make it plain that the covenants to be contained in the second lease (to be granted under the exercise of the option to renew) were to include also the covenant to renew, draftsmen were accustomed to insert phrases such as 'including this covenant', so as to achieve a perpetually renewable lease. As I have indicated, if they did not do this, the second lease would not contain any option clause. The operation of the words of inclusion
d was not limited to requiring the second lease to contain a covenant to renew once more only, which would have been the outcome if the words of inclusion had been omitted in the second lease. This was because the words of inclusion could not properly be construed as requiring the second lease to contain the same covenants other than the covenant to renew but additionally to include an option to renew once more only—a total of three terms. The words of inclusion defined or explained
e what was meant by 'the same covenants', that is to say, as including the covenant to renew. Consequently in the second lease, in order to comply with the words of definition or explanation, the covenants referred to therein to be contained in the second lease must contain the same wording including the inclusion.

In the present case the brackets make it abundantly plain that the parties are explaining that 'the same or like covenants and provisos' is a phrase intended to embrace an option. That is to say that the covenants and provisos contained in the
f first lease which the first lease requires the second lease to contain are not to be construed as a reference to those covenants and provisos other than an option to renew, but as a reference to all those covenants including an option to renew. But what covenant in the first lease (to be repeated in the second) can be regarded as such except cl 4 (3)? The second lease must contain the cl 4 (3) covenant. When the
g cl 4 (3) covenant speaks of 'the like covenants and conditions' it defines them as including an option to renew. If the words of cl 4 (3) are repeated in the second lease without the words in parentheses the second lease will not be carrying out the requirement of the first lease; it will not be granting an option for a further lease containing 'the like covenants . . . as herein contained'.

It was argued that if this was intended the draftsman would have used the well-known phrase '(including this covenant)'. It is true that he might have done so, and that on this view he may be accused of verbosity. But on the other view the draftsman would be guilty of including the option in the like covenants when he simply meant the second lease to contain an option to renew, and further of failing adequately to define the terms and conditions for the exercise of this independent second and last option.

j In my judgment the only reasonable construction of the language of cl 4 (3) is such as to lead to a perpetually renewable lease, and accordingly in my view the appeal fails.

SACHS LJ. The question for determination in this appeal is whether the lease of 6th May 1963 is, on a proper construction of cl 4 (3), a perpetually renewable lease. That clause, so far as relevant, provides:

'That the landlord will on the written request of the tenant made six months before the expiration of the term hereby created . . . at the expense of the tenant grant to him a lease of the said demised land for the further term of five years from the expiration of the said term hereby granted at the same rent and containing the like covenants and provisos as are herein contained (including an option to renew such lease for the further term of five years at the expiration thereof) . . .'

I, too, emphasise the words in brackets. It is trite to say that when construing a document such as a lease it is the prime purpose of the courts to seek to adopt a meaning that conforms to the intentions of the parties. Not even the most impeccable conveyancing logic, however neatly expressed, can convince me that in the instant case it was the mutual intention of the parties that the lease should be perpetually renewable. So far as the landlord is concerned it seems to me highly unlikely that he really intended that this particular lease could or should be 'for ever'. My doubts on this question of intention extend also to the tenant—for I would acquit him of any intent to lay a trap through the operation of the words enclosed in the brackets, which we know to have been added to the draft at the very last moment by his solicitors. It is difficult, indeed, at any rate so far as I am concerned, to think that two businessmen would be talking in terms of five years if both—or indeed either—of them truly meant that a lease should be granted which went on ad infinitum. Were I in a position to give effect to the views just expressed, that would result in the landlord succeeding in this appeal; but it is necessary to consider whether the authorities which were so fully and so helpfully cited to us permit such a result.

An examination of the relevant decisions discloses an area of law in which the courts have manoeuvred themselves into an unhappy position. On the one hand in judgment after judgment, for instance, in *Baynham v Guy's Hospital*¹, *Moore v Foley*², and *Swinburne v Milburn*³, it has been proclaimed that the courts lean against holding that a lease is to that extent renewable. On the other hand, by strict adherence to precedent relating to the phrase 'including the present covenant' when following a covenant conferring a right to renewal on the like covenants and provisos as are contained in the first lease, they appear to have bound themselves to hold that the use of a certain set of words (to which I will refer as 'the formula') causes the lease to be perpetually renewable, even when no layman—at least if he has some elementary knowledge of business—would dream of granting such a lease and if aware of the meaning of the technical effect of the particular phraseology would almost certainly be aghast at its devastating effect and refuse to sign. One reason for the courts so binding themselves is said to be that the formula is one the effect of which is well known to trained conveyancers, and that this is advantageous, however much of a trap it may constitute for others.

As already mentioned, the prime purpose of the courts when construing a lease is to interpret it according to the true intentions of the parties. Already 20 years ago judicial unease at having to determine those intentions in cases of the instant type by a blinkered approach is reflected in the judgments in *Re Greenwood's Agreement*, *Parkus v Greenwood*⁴, both at first instance and on appeal. At first instance it fell to Harman J to discuss the decision reached in *Green v Palmer*⁵. There Uthwatt J had declined to hold that the formula produced a perpetually renewable lease when the original

¹ (1796) 3 Ves 295 at 298

² (1801) 6 Ves 232 at 235, 236

³ (1884) 9 App Cas 844 at 850

⁴ [1949] 2 All ER 743, [1950] Ch 33, on appeal [1950] 1 All ER 436, [1950] Ch 644

⁵ [1944] 1 All ER 670, [1944] Ch 328

a tenancy had been for six months and related to furnished premises. In his judgment Harman J not unnaturally said⁶ of that earlier case:

'That was an instance of a furnished tenancy for six months, and the improbability that the parties had thought of creating a 2,000 years' term was very high.'

b He made a similar observation with regard to the lease he was himself considering, which was for three years with a renewal covenant for a further three years phrased in a way that accorded with the formula, saying⁷:

c 'It is said that [the plaintiff], as assignee under these two documents of the term of three years, has got, not a three years term, but a 2,000 years term in the property. If that be the result in law, it is one not contemplated by the parties when they made the original agreement, for it is clear that, if people wish to create a term of 2,000 years, they are very unlikely to do it by creating a term of three years with a right to renew.'

This view he implemented by holding that the use of the formula in relation to that lease did not result in it being perpetually renewable.

d On appeal his judgment was reversed and that of Uthwatt J⁸ was in substance disapproved. Sir Raymond Evershed MR, however, at the outset of his judgment said⁹:

e 'HARMAN, J., came to the conclusion that there was sufficient material to be found in the language of the document (and the intention of the parties which he discerned from the document) to avoid a conclusion which plainly, I think, he felt to involve almost an absurdity; and I confess that I feel sympathy with the learned judge.'

f Having referred later in his judgment to the formula as a long established 'matter of conveyancing machinery' and having related that logical march of case law which Russell LJ has so clearly recited, he spoke¹⁰ of the inclination of judges 'to avoid a result which on the face of it would appear unlikely to have been contemplated by the parties'. He spoke specifically of *Green v Palmer*⁸ as being a case where that inclination would have been even stronger than in the one with which he was dealing. Nonetheless, despite the qualms thus expressed, he felt bound to come to the conclusion that the lease was 'having regard to the formula a perpetually renewable lease'. In essence it was thus held that on the issue of the intentions of the parties the law had become the prisoner of the machinery.

g The judicial unease of 1950 is by now, so far as I am concerned, increased by two factors. Firstly, more and more leases over the two succeeding decades have tended to come from pens not fully trained in the art of conveyancing. Secondly, over the same period the value of the pound sterling has been decreasing rapidly, thus making it even more unlikely that a man of business in the course of a normal transaction would knowingly part 'for ever' with his rights over land in return for a static rent. h Moreover, when residential property is concerned a landlord could, indeed, now find himself in the position of having to relinquish a freehold when the document which he signed appeared on the face of it to be a lease for relatively short periods of years.

j In those circumstances I, too, have great sympathy with the line of approach adopted by Uthwatt J⁸ and Harman J⁷. I could wish that the courts had followed the apparent preference of Lord FitzGerald in *Swinburne v Milburn*¹¹ for confining interpretations of perpetual renewability to leases where words such as 'for ever' or 'from time to time for ever hereafter' or some equivalent were used in the relevant

6 [1949] 2 All ER at 746, [1950] Ch at 37
7 [1949] 2 All ER at 745, [1950] Ch at 35
8 [1944] 1 All ER 670, [1944] 1 Ch 328

9 [1950] 1 All ER at 437, [1950] Ch at 647
10 [1950] 1 All ER at 441, [1950] Ch at 652
11 (1884) 9 App Cas at 855

document. This approach would have avoided that sort of path by which good logic can on occasion make bad law, and would have been in accord with the aphorism that at times 'logic is only the art of going wrong with confidence'.

Having, however, examined the authorities, I feel bound in this court to say that the matter is concluded by them in that the words in brackets, as inserted at the last moment, have in law the same effect as those considered in *Re Greenwood's Agreement*, *Parkus v Greenwood*¹².

I may add that until towards the very end of submissions of counsel for the defendant when for the first time it emerged that there were those brackets round the relevant words, I was disposed to say—and doubt if I was alone in my disposition—that this was a case in which it would be possible not to extend the decision in that case to phraseology which might be distinguished from that in the fettering formula. However, whilst I feel the force of the submission of counsel for the plaintiffs that it is unfortunate that a case may turn to any material extent on the existence or non-existence of brackets, I yet feel unable to do other than concur in the dismissal of this appeal.

STAMP LJ. I agree, for the reasons given by Russell LJ, that it is clear from the terms of the lease that when the time came for the grant of the second five year term the new grant was to include the provisions of cl 4 (3), including the parentheses. I share the view expressed by Foster J that the case cannot be distinguished from *Re Greenwood's Agreement*, *Parkus v Greenwood*¹². In the absence of some statutory provision requiring or enabling the court to disregard the clear expression of the parties' intention it must follow that the lease was expressed to be perpetually renewable and so conferred on the tenant a 2,000 year term.

One of the purposes of the Law of Property Act 1922 in converting a purported perpetually renewable lease into a long term of years, was, according to the learned editors of Wolstenholme and Cherry's *Conveyancing Statutes*¹³ to discourage the creation of such leases; and to the extent that it has not done so this is a matter for the legislature.

I, too, would dismiss the appeal.

Appeal dismissed.

Solicitors: *Theodore Goddard & Co*, agents for *L Michalovich*, Caerphilly (for the plaintiffs); *Milners, Curry & Gaskell*, agents for *Granville-West, Chivers & Morgan*, Newbridge, Mon (for the defendant).

Mary Rose Plummer Barrister.

¹² [1950] 1 All ER 436, [1950] Ch 644

¹³ (12th Edn), Vol 1, p 100

Department of Health and Social Security v Wayte

COURT OF APPEAL, CIVIL DIVISION

DAVIES, KARMINSKI AND ROSKILL LJJ

b 19th OCTOBER 1971

c *National insurance – Contributions – Recovery – Recovery following prosecution – Payment to National Insurance and Industrial Injuries Funds – Liability of directors in event of company failing to pay – Liability of person ceasing to be director before order for payment made but after period in which contributions should have been paid – National Insurance Act 1965, ss 8 (2), 95 (8).*

d On 8th October 1970 a company which had gone into liquidation on 23rd June 1970 was convicted under s 8 (2)^a of the National Insurance Act 1965 of failing to pay national insurance contributions within the time prescribed and an order was made under s 95 (3) of that Act for payment of a sum equal to the total of all the contributions under the 1965 Act and under the National Insurance (Industrial Injuries) Act 1965 which were proved to have been unpaid by the company in the period 1st September 1969 to 21st June 1970 and remained unpaid. The company failed to comply with that order. An action was thereupon brought under s 95 (8)^b of the National Insurance Act 1965 against the defendant who had been the managing director of the company until it went into liquidation. The defendant contended, inter alia, that s 95 (8) did not apply to him as at the time the order was made he had ceased to be a director.

e **Held** – A person who was a director of a company at the time when the weekly contributions ought to have been paid and were not was not exempt by reason of ceasing to be a director before an order was made against the company under s 95 (3) from the liability imposed by s 95 (8) on a director; accordingly s 95 (8) applied to the defendant (see p 257 f, p 258 h and j and p 259 a e and h, post).

Notes

For the recovery of national insurance contributions on prosecution, see 27 Halsbury's Laws (3rd Edn) 706, para 1286, and for cases on the subject, see 25 Digest (Repl) 803, 8-10.

g For the National Insurance Act 1965, ss 8 and 95, see 23 Halsbury's Statutes (3rd Edn) 262, 363.

Interlocutory appeal

h This was an appeal by the defendant, William Guy Alexander Wayte, from an order of Chapman J made in chambers on 17th May 1971, affirming an order of Master Bickford Smith made on 29th January 1971 that judgment should be entered for the plaintiff, the Department of Health and Social Security, for £9,216 and that the defendant's leave to defend as to the balance of the plaintiff's claim for £21,177 12s 7d from the defendant under s 95 (8) of the National Insurance Act 1965 should be conditional on payment of the £9,216 and that in default judgment should be entered for the plaintiff for the balance. The facts are set out in the judgment of Davies LJ.

j *J H Hames* for the defendant.

R E Jack for the plaintiff.

^a Section 8 (2) is set out at p 256 j, post

^b Section 95 (8) is set out at p 257 b, post

DAVIES LJ. This is an appeal by the defendant from an order of Chapman J made in chambers on 17th May 1971 when the learned judge affirmed an order of Master Bickford Smith made on 29th January. The master had before him an application under RSC Ord 14 for summary judgment for the sum of £21,177 12s 7d. The master, affirmed by the judge, made an order that judgment be entered for the plaintiff for a sum of £9,216, part of the claim, and further ordered—

‘that if within 28 days that sum is so paid, the Defendant may defend the action as to the balance of the said claim . . . and that in default of payment of that sum . . . the Plaintiff may enter judgment for the balance of the claim with costs to be taxed or agreed.’

I can explain in a couple of sentences how the sum of £9,216 was reached. The total claim, as I have said, was £21,177 odd; but early in May 1970 the plaintiff had served a notice under s 223 (a) of the Companies Act 1948 on the company called Trade and Industrial Press Ltd, of which at all material times the defendant was managing director, claiming the sum of £11,961. And the £9,216 is the amount of the claim, £21,177, less the amount contained in the notice under s 223 (a) of the Companies Act 1948.

The matter arises in this way. The defendant, as I have said, was the managing director of this company, and apparently he is concerned, according to his affidavit, with many other businesses and companies. This particular company publishes a lot of magazines and so on and he, according to his affidavit, was at all times very busy indeed and also sometimes ill. From correspondence that has been exhibited to an affidavit by Mr Jenkins, who is an officer of the plaintiff department, it is plain that the company have, so far as concerns their national insurance contributions and national injuries contributions, been in arrear for a considerable time. I need not refer to the letters in detail. But we have letters of 13th November, 21st November, 23rd December 1969 and 20th February 1970, all signed by the defendant acknowledging serious arrears of contributions and making promises—and sometimes carrying them out at any rate in part—to pay off these very large sums indeed of contributions which were due by this company and had not been paid. When and to what extent they ever stuck stamps on the cards of their employees, who numbered some 130, I do not know. But things were difficult then, and the present claim for the £21,000 odd covers the period from 1st September 1969 to 21st June 1970, i.e. two days before this company went into liquidation.

The claim is framed in this way. I think I might read the particulars of claim, which are admirably clear:

‘On the 8th day October 1970, [the company], a body corporate, was convicted in the Bingham Magistrates’ Court of an offence under section 8 (2) of the National Insurance Act 1965, and in addition an order was made under section 95 (3) of the National Insurance Act 1965 for payment of the sum of £21,177 12s. 7d. (£21,177-63), being a sum equal to the total of all the contributions under the National Insurance Act 1965 and the National Insurance (Industrial Injuries) Act 1965 which were proved to have been unpaid by the said body corporate in the period from the 1st day of September 1969 to the 21st day of June 1970 and which remained unpaid . . .’

In consequence of the default by the company, this action was brought against the defendant as the previous managing director of the company, under s 95 (8) of the National Insurance Act 1965. Section 8 (2) of the Act provides:

‘If any employer or insured person fails to pay at or within the time prescribed for the purpose any contribution which he is liable under this Act to pay, he shall be liable on summary conviction to a fine not exceeding ten pounds.’

a As appears from the statement of claim endorsed on the writ, on 8th October 1970 the company were prosecuted and convicted and an order was made under s 95 (3) of the Act for the payment of that large sum of money. Then this action was brought under s 95 (8). That section provides:

b 'If the employer being a body corporate, fails to pay to the National Insurance Fund or the Industrial Injuries Fund any sum which the employer has been ordered to pay under this section, that sum, or such part thereof as remains unpaid, shall be a debt due to the National Insurance Fund or the Industrial Injuries Fund, as the case may be, jointly and severally from any directors of the body corporate who knew, or could reasonably be expected to have known, of the failure to pay the contribution or contributions in question.'

c The first point taken by counsel for the defendant is that since the company went into liquidation on 23rd June and, consequently, the defendant ceased to be managing director by that liquidation, the section has no application, since he was not a director at the time when the order was made by the court of summary jurisdiction on 8th October. And, says counsel for the defendant, that means that he is entirely exempt from liability because he was not a director at the time when the order was made against the company; therefore he cannot be said to have failed to satisfy the order made by the justices. This argument is reinforced by the proposition that of course if he had been a director at the material time then he could have used his powers as such to cause the company to comply with the justices' order but that, as he was not such a director at the material time and as the affairs of the company were in the hands of the liquidator, he had no such power; and it is suggested, possibly correctly, that he would have no right of recourse against the company. Whether he had such a right or not does not matter very much, as the company, according to the figures that have been put before us, is in a very parlous financial plight.

e I find it impossible to accept that contention. It is perfectly true that the justices' order crystallises and, as it were, quantifies the amount of the unpaid contributions. But the contributions were payable from time to time—weekly. And it seems to me, subject to the second point of counsel for the defendant, that it is perfectly plain f that the order made by the justices coupled with the provisions of s 95 (8), imposes a liability to satisfy the order on anyone who was a director at the time when the contributions ought to have been paid and were not, even though he had ceased to be a director by the time that the justices' order was made.

g I thought that counsel for the plaintiff made an extremely good point, if I may respectfully say so, in his first observation in his address to this court. He pointed out that if the contention of counsel for the defendant is correct, never mind the liquidation, if a man who was a director or managing director of a company was aware that proceedings were pending under the section, a prosecution against the company, as he would be aware when the company had received the summons, he could escape and evade any liability under the section by resigning from his directorship on the very morning of the day appointed for the hearing before the justices. h That cannot, in my judgment, be correct, and I think that that is one excellent point in addition to the considerations I have thought fit to advance.

The second point is again on the words of the section. This is a question of fact. Counsel for the defendant says that in the circumstances it is clear—or at any rate it is arguable, perhaps that is a fairer way of putting it—that the defendant during the period from September 1969 to June 1970 did not know and could not reasonably be expected to have known of the failure to pay the contributions in question. As I say, j that is a question of fact.

There is a good deal of controversy on this issue. The evidence on behalf of the plaintiff consisted of an affidavit by Mr Jenkins, an officer of the department. I am not going to read that; but Mr Jenkins states that on a number of occasions, going back to January 1967, the defendant was interviewed, and a Miss Lewis, who was

the company's secretary, was interviewed. With regard to Miss Lewis he says that on one occasion she said that she had repeatedly asked the defendant for money to purchase stamps but she did not get the money. He says that in August 1967 the secretary stated, 'there was no shortage of money as far as she was aware but the defendant simply would not meet the requests for payment'. On another occasion the secretary said that she 'had been unable to obtain the necessary money from the defendant to purchase the stamps'. And when told the amount the defendant said, 'Is it as much as that?'. There is no doubt at all that over the years the defendant himself had been not only, as I have said, corresponding with the department but had had various interviews with the department as to this continued failure punctually to pay the appropriate contributions under the Act. a

Miss Lewis has sworn an affidavit in which she denies those three interviews referred to in Mr Jenkins's affidavit to which I have alluded; and a Mr Campbell, who was apparently manager of the appropriate office in the company, has sworn an affidavit saying that really the defendant had very little to do with this, that in effect it was the responsibility of himself and Miss Lewis to see that the stamps were properly stuck on and that the contributions were made. Indeed they go further and they say that they were given blank cheques by the defendant—I suppose company's cheques—and given strict instructions, at any rate from January 1970, that the contributions should be punctually paid. b

That was the state of the evidence as it was before Chapman J. But we have had another affidavit from the defendant today, to which he exhibits a letter from this Mr Campbell. It is to be observed that Mr Campbell has not condescended to swear an affidavit to support that letter. It was a letter written to Messrs Rubinstein, Nash & Co, who are acting for the defendant. Without reading it in detail, what Mr Campbell says is that monthly accounts were supplied to the defendant by him and Miss Lewis, that in those monthly accounts there appeared an item each month for the cost of stamps, and that from January on, those accounts showed an entry (I take, for example, the penultimate one that we have had, for March 1970) 'Total stamps £1,012. 1s. 3d.', and that is added to the wages for March, showing a total paid of £16,000. What Mr Campbell says in his letter to the solicitors is that, despite the orders that he and Miss Lewis had received to buy stamps and keep the payments up to date, they made those false entries in the return which they gave monthly to the defendant and that they had not in fact paid any money for stamps at all but found that they could more usefully use the money which they were drawing on these cheques to pay wages, general outgoings, and the general expenses of running the company. c

I do not think it would be right for me to express an opinion as to the conduct of Mr Campbell and Miss Lewis in this regard or to say whether I believe that story or not. If the defendant is able to make the payment into court and, consequently, able to defend the rest of the claim, no doubt that may be a matter to be carefully investigated. But what I do say, and what I am absolutely satisfied about on the facts of this case, is that from the past history, the constant arrears in payment of stamps, the interviews, and the correspondence that he had had with the Ministry, it seems to me perfectly plain that during the period in question the defendant could reasonably be expected to have known that the contributions were not being properly and regularly paid. d

I am sorry to say I cannot accept the submission of counsel for the defendant that on this second point, the point of fact, there is a triable issue. I think that the learned judge—whose judgment we have not seen, whatever reasons he may have given—was perfectly right in the conclusion to which he came, and I would dismiss the appeal. e

KARMINSKI LJ. I agree, and I desire to express my explicit agreement with what has fallen from Davies LJ on his construction of s 95 (8) of the National Insurance f

a Act 1965. On the facts I entertain no doubt that the defendant here has failed completely so far as I am concerned to show a possible defence or a triable issue. Davies LJ has dealt with the surprising admissions now made by Mr Campbell in two letters and I desire to make no comment on the present state of the evidence other than to say that as at present advised I find it very difficult indeed to accept it.

b The defendant was the managing director of this company and although no doubt, as he says, he had many duties elsewhere, including certain editorial duties away from the head office of the company in Nottinghamshire, he must have been in touch with the company's financial affairs. He now says, it seems to me for the first time, that he thought that the stamps were being paid, and paid at the rate of something like £1,500 a month on the average. He now says that, trusting his subordinates, he believed them and now realises that he was being grossly deceived. I assume that the accounts were audited and the usual returns made. The auditors, no doubt c examining the books and checking payments, whether by cash or by cheques, were investigating these matters and presumably the defendant saw the returns and saw the auditors' reports. I repeat that I do not think there is a triable issue in this case, and I think that the learned judge was absolutely right in making the order which he did.

d **ROSKILL LJ.** This appeal can only succeed if the defendant can show one or more triable issues. Counsel for the defendant has sought to show that there are two triable issues, the first on the construction of s 95 (8) of the National Insurance Act 1965, and the second on the facts of the case as alleged to be contained in various affidavits and a letter (which was put before us but which was not before the learned e judge), dated 30th June 1971, from Mr Campbell.

f As to the first point I have nothing to add to what Davies LJ has said. As to the second, counsel for the defendant sought to persuade us that the existence of this subsection was very little known. Whether or not that is so I do not know. But the subsection provides quite plainly that in the circumstances, if the Department of Health and Social Security cannot get the money due to it from a company in respect of stamps which ought to have been bought but which have not been bought, they can pursue the directors for it if the director or directors concerned knew or could reasonably be expected to have known of the failure to pay the contribution or contributions in question.

g As this action may still go to trial if the payment ordered to be made into court by the learned judge is made, perhaps the less that is said about the facts the better. All that I would say is this. The defendant was the managing director of the company. The company had no finance director. The evidence relating to the antecedent period showed that he was closely involved in a dispute with the department over repeated non-payment of contributions, and it seems to me that, whether or not he knew what was happening during the relevant period, it is quite unarguable that he could not reasonably be expected to have known. For that reason, on the second h point I do not think there is a triable issue.

I think that the learned judge was absolutely right and that this appeal should be dismissed.

Appeal dismissed.

Solicitors: Rubinstein, Nash & Co (for the defendant); Solicitor, Department of Health and Social Security.

Harold J Hughes Esq · Barrister.

Northern Ireland Trailers Ltd v County Borough of Preston

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND BRIDGE JJ

19th NOVEMBER 1971

Nuisance – Statutory nuisance – Abatement notice – Failure to comply – Complaint to justices – Procedure – Initiation of proceedings – Information laid by local authority – Jurisdiction of justices – Whether failure to comply with abatement notice an ‘offence’ – Whether laying of information proper method of initiating proceedings – Public Health Act 1936, s 94 (1), (2) – Magistrates’ Courts Act 1952, s 42.

Nuisance – Statutory nuisance – Appeal to quarter sessions – Nuisance order made by justices on failure to comply with abatement notice – Appeal a rehearing – Circumstances relating to the offence at date of ‘hearing of the complaint’ – Whether circumstances at date of hearing before justices or at date of hearing of appeal to be considered – Public Health Act 1936, s 94 (2).

A notice of abatement under the Public Health Act 1936 and the Noise Abatement Act 1960 was served on the appellants requiring them to abate a nuisance by noise emanating from their premises. The appellants failed to comply with the notice and an information was laid on behalf of the respondent authority before the justices who made a nuisance order under s 94 (2)^a of the 1936 Act. The appellants appealed to quarter sessions contending that the justices had no jurisdiction to make the nuisance order, and a fortiori quarter sessions had no jurisdiction to hear the case, as the proceedings had been initiated by information and not, as provided by s 94 (1)^b of the 1936 Act, by complaint. The appellants further contended that, if quarter sessions had jurisdiction to rehear the case, they were bound to look at the circumstances relating to the alleged offence as they existed not at the date of the hearing before the justices (which was several months earlier) but at the date of the appeal on the ground that the hearing of the appeal was, within the meaning of s 94 (2), a ‘hearing of the complaint’.

Held – (i) Both the justices and quarter sessions had jurisdiction to hear the information; on the true construction of s 94 non-compliance with a notice of abatement was an ‘offence’, and so, notwithstanding the use of the word ‘complaint’ in that section, by virtue of s 42^c of the Magistrates’ Courts Act 1952 the proper way of initiating proceedings was by way of information (see p 263 f and g, p 264 c, p 265 h and p 266 d and e, post).

(ii) On considering an appeal against the making of a nuisance order quarter sessions had to rehear the case as in the same state of affairs as that in which the justices below had heard it; accordingly the relevant date for considering the circumstances of the alleged offence was the date of the original hearing (see p 265 f g and h and p 266 d, post).

Rugman v Drover [1950] 2 All ER 575 followed.

Notes

For complaints and nuisance orders, see 31 Halsbury’s Laws (3rd Edn) 375-377, paras 552, 553.

For the Public Health Act 1936, s 94, see 26 Halsbury’s Statutes (3rd Edn) 272.

For the Magistrates’ Courts Act 1952, s 42, see 21 Halsbury’s Statutes (3rd Edn) 223.

^a Section 94 (2), so far as material, is set out at p 262 g, post

^b Section 94 (1) is set out at p 262 e, post

^c Section 42 is set out at p 263 e, post

Cases referred to in judgments

- a* *Brown v Allweather Mechanical Grouting Co Ltd* [1953] 1 All ER 474, [1954] 2 QB 443, [1953] 2 WLR 402, 117 JP 136, 39 Digest (Repl) 280, 175.
- Mellor v Denham* (1880) 5 QBD 467, 49 LJMC 89, 42 LT 493, 44 JP 472, 14 Digest (Repl) 28, 9.
- Rugman v Drover* [1950] 2 All ER 575, 114 JP 452, sub nom *Drover v Rugman* [1951] 1 KB 380, 33 Digest (Repl) 282, 1092.
- b* *R v Whitchurch* (1881) 7 QBD 534, 50 LJMC 99, 45 LT 379, 46 JP 134, 14 Digest (Repl) 29, 11.

Case also cited

R v County of London Quarter Sessions Appeals Committee Justices [1946] KB 176.

Case stated

- c* This was an appeal by Northern Ireland Trailers Ltd by way of case stated by the Lancashire County Quarter Sessions in respect of certain decisions made by them sitting at Preston.

On 26th August 1970 an information was laid on behalf of the respondents, Preston Corpn, before the Preston borough magistrates stating that on 6th February 1970 a notice under the provisions of the Public Health Act 1936 and the Noise Abatement Act 1960 dated 5th February 1970 requiring the abatement of a certain statutory nuisance arising from excessive noise emanating from the appellants' premises was duly served on the appellants, the occupiers thereof, and that the appellants had made default in complying with the requirement of the notice, i.e. within 21 days of the service of the same to abate the nuisance and to take such steps as might be necessary for that purpose. A summons was issued on 7th September 1970. The

- e* information was heard by the Preston borough magistrates on 9th and 23rd November 1970 and on the latter date they adjudged that the complaint was true (sic) and made a nuisance order under s 94 (2) of the Public Health Act 1936. The appellants by notice of appeal dated 1st December 1970 gave notice of appeal against the order. The appeal came on for hearing before quarter sessions on 6th April 1971 and at the outset a preliminary point was taken on behalf of the appellants that inasmuch as those proceedings were commenced by information when as a matter of law they could only be begun by complaint the magistrates' court had had no jurisdiction to make the nuisance order appealed against and that a fortiori quarter sessions had no jurisdiction to hear the matter. Quarter sessions were of opinion that the appellants' contentions on the preliminary point were ill-founded.
- f*

- The appeal proceeded expressly without prejudice to the appellants' aforesaid contentions on 7th and 8th April 1971. It became apparent in the course of the evidence that the appellants were seeking to rely on the state of affairs existing at that time and not at the time of the hearing before the justices; on enquiry it was agreed on behalf of the appellants that this was indeed so. It was contended by the appellants that a prerequisite for the making of a nuisance order under s 94 (2) of the Public Health Act 1936 was that it should be proved that 'upon the hearing of the complaint the alleged nuisance exists' and that albeit this appeal was a rehearing it was nonetheless a 'hearing of the complaint' so that the relevant date for this purpose and also for the purpose of the statutory defence under s 1 (3) of the Noise Abatement Act 1960 was the date of hearing of this appeal. Quarter sessions were of opinion that the appellants' contentions on that point were ill-founded.
- h*

- At that stage the appellants sought and were granted an adjournment so that they might consider and if thought fit seek a review of the two judgments of quarter sessions referred to above. On 16th April 1971, at the appellants' request, a case was stated for the opinion of the High Court as it appeared that much time and money might be saved if these matters were determined.
- j*

R J H Collinson for the appellants.

M Kershaw for the respondents.

LORD WIDGERY CJ. This is an appeal by case stated from the Lancashire County Quarter Sessions in respect of two decisions which have been described, not inaptly, as interlocutory proceedings, reached by them when sitting at Preston on 6th-8th April 1971. a

The situation which presented itself to the quarter sessions on 6th April was this. On 26th August 1970 an information, and I stress the word 'information', was laid on behalf of the respondents, Preston Corpn, before the Preston borough magistrates alleging— b

'that on the 6th February, 1970 a notice under the provisions of the Public Health Act 1936 and the Noise Abatement Act 1960 dated the 5th February 1970 requiring the abatement of a certain statutory nuisance arising from excessive noise emanating from the Appellants' premises namely the compound situate on the Preston Dock Estate on the southern perimeter of Riversway in the said Borough was duly served on the Appellants the Occupier thereof and that the Appellants made default in complying with the requirement of the said notice namely within 21 days of the service of the same to abate the said nuisance and to take such steps as might be necessary for that purpose.' c

A summons consequent on the information was issued on 7th September 1970. d

I think it is not unhelpful to look at the legislation and see the circumstances in which the notice was served. Section 94 (1) of the Public Health Act 1936 provides:

'If the person on whom an abatement notice has been served [there having been prior provision for the service of such a notice] makes default in complying with any of the requirements of the notice, or if the nuisance, although abated since the service of the notice, is, in the opinion of the local authority, likely to recur on the same premises, the authority shall cause a complaint to be made to the justice of the peace, and the justice shall thereupon issue a summons requiring the person on whom the notice was served to appear before a court of summary jurisdiction.' e

That is exactly what happened in this case, save only for the fact that the nuisance alleged was a noise nuisance, and the authority for using what one might call s 94 procedure in respect of a noise nuisance is to be found in the Noise Abatement Act 1960. f

I will read s 94 (2) of the 1936 Act before proceeding further with the case:

'If on the hearing of the complaint [and I stress again the word "complaint"] it is proved that the alleged nuisance exists, or that although abated it is likely to recur on the same premises, then, subject to the provisions of subsections (4) and (5) of this section the court shall make an order (hereafter in this Act referred to as "a nuisance order") for either, or both, of the following purposes . . . ' g

Then the purposes are set out, one being to require the defendant to comply with the notice, the other being to prohibit a recurrence of the nuisance; then are added these words, 'and may also impose on the defendant a fine not exceeding five pounds', a phrase which again is of some relevance in this matter. h

When the matter came before the Preston borough magistrates on 9th November 1970, and later on 23rd November, the justices adjudged that the information was correct; they found in other words the existence of the nuisance, they found the service of the notice and failure to comply with the notice, and they accordingly made a nuisance order under s 94 (2). They could have imposed a fine of up to £5: they did not impose a fine of any amount. i

The matter was then appealed to quarter sessions, and as I have already said the case came on before sessions on 6th April 1971. Two points were taken. The first point taken by the appellants was one going to jurisdiction. It was contended that

a whereas s 94 contemplates that proceedings of this kind shall be initiated by complaint, in fact the initiation of the proceedings was by information. It is clear as a fact that that is so, and that an information was used and not a complaint as required by the literal terms of s 94.

b It was then contended that that was a fundamental defect in the jurisdiction, that the magistrates had no jurisdiction to make the nuisance order which they had purported to make and, although logically the proper remedy may well have been an application to this court for certiorari to quash the order, it was agreed between the parties that if the quarter sessions upheld the contention, a convenient course would be to allow the appeal. The quarter sessions did not uphold the contention, and we have had the advantage of reading a very careful, and if I may say so very helpful, judgment delivered by the chairman. I have had great assistance in reaching a conclusion on this case by considering the chairman's judgment, but I do not propose to try and traverse all the ground which he covered.

c Briefly in my view this preliminary point should be disposed of as follows. It is perfectly true that the word 'complaint' is used in s 94 to describe the nature of the proceedings on which this application is to be based, and, as was pointed out in argument, at the time when this Act was passed there was a measure of confusion in various statutory provisions of this kind, between the use of 'information' and the use of 'complaint' respectively as the initiating course. In 1952 when the Magistrates' Courts Act of that year was passed, this distinction was made very much clearer, because it is quite clear under the 1952 Act that, in general, criminal matters are initiated by information and civil matters by way of complaint; but that distinction was not as clearly made in the Acts passed before that year. One finds in s 42 of the Act of 1952 this provision:

e 'In any enactment conferring power on a magistrates' court to deal with an offence, or to issue a summons or warrant against a person suspected of an offence, on the complaint of any person, for references to a complaint there shall be substituted references to an information.'

f In my judgment there really can be no doubt but that the effect of that section is to say that an information should be used in preference to or in substitution for a complaint notwithstanding that the earlier statute uses the word 'complaint', provided of course that the matter being dealt with is an offence.

g Argument on this preliminary point thus really turns on whether the failure to comply with the nuisance notice under s 94 gave rise to an offence which was to be enforced by the local authority. If it was an offence, then notwithstanding that a complaint is described in s 94 as the correct initiating procedure, it would in my judgment mean that an information was proper by virtue of s 42 of the Act of 1952. In deciding whether or not that which was done by the appellants is an offence for the present purposes, I think considerable importance should be attached to the fact that a fine is a possible consequence of failure to comply with the abatement notice. h The word 'fine' is characteristic of a penalty for a criminal act, and the fact that Parliament used the word 'fine' to describe the penalty which can be imposed in these circumstances is in my judgment a powerful indication that that which is committed as a result of failure to comply with the notice is an offence for the present purposes.

i But I am much reinforced in that view by the judgment of Lord Goddard CJ in *Brown v Allweather Mechanical Grouting Co Ltd*¹. That dealt with an infringement of the Vehicles (Excise) Act 1949, the infringement being the showing of one particular type of licence on a vehicle when the vehicle was of a character which required a different type of licence. The point raised in this case was whether a breach of the licensing regulation carried out in that way was a criminal offence which would

make the owner of a vehicle liable to prosecution as an aider and abetter of the driver. The facts thus were considerably distant from those of the present case, but there is a statement of principle which I would adopt. Lord Goddard CJ there said²:

'I do not think the mere fact that the word "offence" is used there shows that it is to be regarded as a criminal offence. A failure to do something prescribed by a statute may be described as an offence although Parliament imposes in respect of it, not a criminal sanction, but a mere pecuniary sanction which is recoverable as a civil debt.'

I would apply that reasoning to the construction of s 42 of the Act of 1952, and would hold that the word 'offence' in that section is appropriately used for a failure to do something prescribed by an Act. Accordingly, whether or not it is in fact a criminal offence, in my judgment the failure to comply with the notice is an offence for present purposes, and that is really an end of the matter as far as the preliminary point is concerned.

I ought, however, in deference to the argument of counsel for the appellants to refer to another provision from which he draws considerable force in the course of his argument. It is the Public Health (Recurring Nuisances) Act 1969. This Act, which has to be read as one with Part III of the Public Health Act 1936, introduces an additional form of remedy available in the course of recurring public health nuisances. It introduces a new form of remedy in the form of a prohibition notice which, on disregard of its contents, gives rise to the hearing of a complaint under s 2 of the Act. Counsel for the appellants argues that the fact that Parliament as late as 1969 is referring to a complaint as being the appropriate method of initiation of what one might call 'public health nuisance cases' is indicative of the fact either that s 42 of the Magistrates' Courts Act 1952 should not have the effect which I have already said in my opinion it has; or alternatively should be regarded as having been to that extent repealed. His contention is that Parliament would not have used the word 'complaint' in an Act of 1969 if it had known that by virtue of the earlier legislation, 'complaint' was to be read as 'information'.

I find very little support for counsel for the appellants' argument in this aspect of the matter because it seems to me entirely logical and normal drafting that when a new Act is to be read as one with an earlier, it should use the same language as the earlier, in other words, should use words in the same sense as they were used in the earlier. It is as though the provisions of the 1969 Act had appeared as part of the 1936 Act.

Against counsel's argument on this point, on the other hand, I find some considerable reinforcement in the terms of the Criminal Justice Act 1967, which by s 92 makes certain upward adjustments in fines for a wide range of offences. Those offences are illustrated in Sch 3 to the Act of 1967, and one finds amongst the offences so listed, failure to abate or remove a danger or recurring nuisance under s 94 of the Public Health Act 1936. One there finds Parliament in 1967 regarding a failure to comply with an abatement notice under s 94 as an offence. Accordingly in my judgment the sessions were entirely right to reject the preliminary point and to proceed with the hearing of the appeal.

The second point, which is quite independent of the first, arises in this way: there had, as I had already indicated, been a substantial interval of time between the date when the justices made the nuisance order on 23rd November 1970, and the date when quarter sessions considered the appeal on 6th April 1971. It was not disputed below or before us that when the matter was before the magistrates' court it was essential for the respondents to show that the alleged nuisance still existed at that time. The phrase in s 94 (2) is: 'If on the hearing of the complaint it is proved that

² [1953] 1 All ER at 476, [1954] 2 QB at 447

a the alleged nuisance exists', and accordingly when the matter was before the magistrates' court, proof was directed to the existence of the nuisance at that date. However, when the matter was opened before quarter sessions it became apparent at an early stage that counsel for the appellants was proposing to relate his argument on the appeal to the situation then prevailing in April 1971. The learned chairman was invited to give a ruling whether that was the correct approach to this case, and he ruled that it was not; in other words he ruled that on the hearing of the appeal the issue for quarter sessions was whether or not the nuisance had existed on 23rd November 1970, the date when the matter was before the magistrates' court. Counsel challenges that conclusion, and says that the fact that the proceedings at quarter sessions are a rehearing means, in the context of s 94, that one looks to the circumstances prevailing at the date of the rehearing in order to see whether the nuisance exists for present purposes.

c For my part I think that the ruling of the chairman to the effect that the relevant date was the date of the hearing before the justices is entirely correct, and is fully supported by another judgment of Lord Goddard CJ in *Rugman v Drover*³. This was a case in which a girl had been sent to an approved school at a time when she was under 17 years of age; there was an appeal and at the date of the appeal she was over 17 years of age. It became relevant, therefore, to consider whether the date on which the decision of the court turned was the earlier date or the later. Lord Goddard CJ, having referred to the quarter sessions' acceptance of the proposition that the later date was relevant, said⁴:

e 'That seems to me to be completely wrong. An appeal to quarter sessions is an appeal by way of re-hearing, but that is only a procedural matter, there being no formal record of proceedings in a justices' court. When a case goes to quarter sessions it is re-heard and the person seeking an order must prove the case over again. That means that the appeal committee takes the place of the petty sessions, but it is none the less an appeal, and the order appealed from was properly made so far as jurisdiction was concerned at the time it was made. Quarter sessions have to re-hear the case as in the same state of affairs as those in which the justices below heard it. If the matter could be made any clearer, it seems to me it is only necessary to look at the Summary Jurisdiction (Appeals) Act, 1933.'

f Then Lord Goddard CJ set out the terms of that section.

g I consider that that is a statement of general application, that when appeals are brought to quarter sessions under the general appellate machinery, the quarter sessions have to consider the appeal in the light of the circumstances prevailing at the time when the order appealed from was made. I think that, as I have already indicated, the chairman's view on this second point was the right one, and I would simply dismiss this appeal.

h **ASHWORTH J.** I agree. I would only add on the first point that it seems to me that the use of the word 'fine' in s 94 (2) of the Public Health Act 1936 goes a long way to establishing the proposition relied on by the respondents here. This is not the first time that this subject has come before the courts, although in the earlier cases it was the Public Health Act 1875. I note from *R v Whitchurch*⁵, which counsel for the appellants referred to, that there was provision in that case for the imposition of a fine, although in fact none was imposed. In the course of the argument counsel for the justices, who were seeking to support the decision below argued⁶:

3 [1950] 2 All ER 575, [1951] 1 KB 380

4 [1950] 2 All ER at 576, [1951] 1 KB at 382

5 (1881) 7 QBD 534

6 (1881) 7 QBD at 535

'It is true that they might have fined the defendant; but they have adopted the alternative remedy and have simply ordered him to abate the nuisance. a

'BRETT, L.J. Suppose that a fine had been imposed by the justices; could this case have been distinguished from *Mellor v. Denham*?' b

That was an earlier authority to which we have been referred and there was no answer. Accordingly it was there made quite plain that in respect of a nuisance order under the Public Health Act 1875 the wrongdoing which led to the order could properly be regarded as an offence and a criminal matter so long as there was a possibility of imposing a fine. But to complete the matter, in the same case to which Lord Widgery C.J. has referred, I cite from Lord Goddard C.J.'s judgment from *Brown v Allweather Mechanical Grouting Co Ltd*⁸ where he said:

'It is true that, if the word "penalty", as distinct from the word "fine", is used in a section, the general rule is that the penalty must be sought and recovered as a debt in a civil court, whereas a fine is a penalty imposed by a criminal court, and a fine always goes to the Crown.' c

I have no doubt that the preliminary point taken by counsel for the appellants was rightly rejected and I agree with the result proposed by Lord Widgery C.J. d

BRIDGE J. I agree on both points. On the second point I wish to add nothing. On the first point I am persuaded by the same considerations as have been referred to by Ashworth J that an offence in contravention of s 94 (2) of the Public Health Act 1936 is indeed a criminal offence. For my part I think that s 42 of the Magistrates' Courts Act 1952 applies only to criminal offences. The Act of 1952 makes a clear distinction between criminal jurisdiction and procedure on the one hand, and civil jurisdiction and procedure on the other, treating of the first in Part I of the Act and the second in Part II. The criminal jurisdiction of the Magistrates' Courts Act 1952 is invoked by information, as s 1 makes clear at the beginning of Part I; the civil jurisdiction is invoked by complaint as s 43 makes clear at the beginning of Part II. Section 42 of the Act is found at the conclusion of Part I, and when the section provides that in any enactment conferring power on a magistrates' court to deal with an offence on the complaint of any person, for references to a 'complaint' there shall be substituted references to an 'information', I cannot avoid the conclusion that the section is dealing only with criminal offences. e

Appeal dismissed. f

Solicitors: Vizards, agents for Backhouse, Isherwood, Bennett & Scholes, Blackburn (for the appellants); W E E Lockley, Preston (for the respondents). g

Francesca Durley Barrister. h

⁷ (1880) 5 QBD 467

⁸ [1953] 1 All ER 474 at 475, [1954] 2 QB 443 at 446

Jaglom v Excess Insurance Co Ltd and another

QUEEN'S BENCH DIVISION

DONALDSON J

10th, 11th, 26th MAY 1971

Insurance – All risks – Policy covering property whilst in bank – Extension of cover given for period when property not in bank subject to prior advice to broker of intention to remove from bank custody — Policy covering jewellery – Broker knowing jewellery not in bank at inception of policy – Loss of jewellery – Underwriters' liability – Whether necessary for jewellery first to be placed in bank before underwriters on risk – Whether prior advice deemed to have been given to broker.

Insurance – Broker's slip – Underwriters' liability – Effect of amendments made to slip by subsequent underwriters – Basis on which underwriters agreeing to take a line.

The plaintiff's husband, J, wished to renew the all risks insurance cover on his wife's jewellery, which expired on 24th April 1968. He was informed by his broker that he could only obtain cover for the jewellery at a premium of 50s per cent. J agreed to the renewal of the cover on those terms but asked his broker to see if he could obtain improved terms. The broker saw J on 4th June and suggested that an overall saving in premium might be effected if the jewellery, which to his knowledge was not in the bank, was kept there and only taken out when required for use; whilst the jewellery was in the bank only a nominal premium would be payable; a premium in excess of 50s per cent per annum would however be required for the period when the jewellery was out of the bank. J instructed the broker to make further enquiries along those lines. The broker prepared a slip for the insurance of the plaintiff's jewellery against all risks 'whilst in the assured's bank' at a premium of 3s 6d per cent. The slip further provided for the extension of cover for items 'taken out of the Bank' at a much higher premium. A line was accepted by the leading underwriters, the first defendants, on 10th June. While the slip was going round the market and lines were being written by various other underwriters (the last accepting a line on 9th July), certain amendments were made to the slip. In particular the extension of cover for items taken out of the bank was amended by the qualifying words 'sub prior advice to [broker] only'. On 10th July J was informed by the broker that the all risks cover for his wife's jewellery had been rearranged retrospectively as from 4th June and that the jewellery was covered at 3s 6d per cent per annum whilst in the bank but at a much higher rate 'in respect of items taken out of the bank subject to immediate notice of removal being given to [the broker]'. On that same day a piece of jewellery valued at £11,250 was stolen from the plaintiff. The plaintiff claimed against the first defendants an indemnity under the slip, and in the alternative against the second defendant, the broker, £11,250 damages for failure to obtain adequate cover. The issues arose (i) whether the first defendants were bound by the terms of the slip as subsequently varied by succeeding underwriters, (ii) whether, under the terms of the slip, before the first defendants came on risk the jewellery had first to be placed in the bank, and (iii) whether, if the words 'taken out of the bank' meant 'being out of the bank', prior notice had been given to the broker.

Held – (i) An underwriter who agreed to take a line was making and not accepting an offer on the terms of the slip at the time when he saw it, but he retained the right to modify that offer to accord with different terms inserted by underwriters taking subsequent lines; once the slip had been fully subscribed however it constituted a contract and all the underwriters were deemed to have offered to accept the risk

for their respective proportions on the terms of the slip in the finally amended form, whether or not they knew of subsequent amendments. Thus the first defendants had agreed to provide cover in the terms of the slip in its amended form (see p 271 e to g and p 272 b and c, post). a

Thompson v Adams (1889) 23 QBD 361 and *Grover & Grover Ltd v Mathews* [1910] 2 KB 401 considered.

(ii) It was not a requirement of the cover that the jewellery had first to be delivered into the custody of the bank before it could be said to have been 'taken out of the Bank' (see p 273 h, post). b

(iii) The requirement that prior advice had to be given to the broker was satisfied if the broker knew that the insured property was leaving or at the inception of the policy, as in the present case, was outside the custody of the bank (see p 274 c and d, post). c

(iv) It followed that the first defendants were, in the circumstances, liable for the loss (see p 274 g, post).

Notes

For all risks insurance cover against loss of property, see 22 Halsbury's Laws (3rd Edn) 330, 331, paras 676, 677.

For effect of insurance slips, see 22 Halsbury's Laws (3rd Edn) 209, para 394, and for cases on the subject, see 29 Digest (Repl) 456, 3318-3321, 474-476, 3408-3421. d

Cases referred to in judgment

De Maurier (Jewels) Ltd v Bastion Insurance Co Ltd and Coronet Insurance Co [1967] 2 Lloyd's Rep 550.

Grover & Grover Ltd v Mathews [1910] 2 KB 401, 79 LJKB 1025, 102 LT 650, 29 Digest (Repl) 475, 3415. e

Thompson v Adams (1889) 23 QBD 361, 29 Digest (Repl) 94, 413.

Action

This was an action by the plaintiff, Judith Jaglom, against the first defendants, the Excess Insurance Co Ltd ('Excess'), claiming an indemnity under a Lloyd's insurance policy in respect of the insurance of certain jewellery valued at £11,250, and in the alternative against the second defendant, Oliver Brian Gilbert-Smith, trading as Geo H Fryer & Co, a firm ('the brokers') claiming £11,250 damages for breach of his contractual duty towards her on the ground that he had failed to arrange adequate insurance cover for her from the first defendants. The facts are set out in the judgment. f

M Waters QC and *P Solomon* for the plaintiff.

Adrian Hamilton for Excess.

Brian Davenport for the brokers. g

Cur adv vult

26th May. **DONALDSON J** read the following judgment. Mr and Mrs Jaglom live in a part of Hampstead which in 1968 was as attractive to burglars as it was to the residents. Indeed, they themselves had suffered a burglary in the previous year. When, therefore, Mr Jaglom came to renew their domestic insurances in March/April 1968, the second defendant, his broker, wrote gloomily that he expected underwriters to require a new rate of premium on all risks cover in the region of 35s to 40s per cent. This compared very unfavourably with the old rate of 25s per cent. When the broker made more detailed enquiries, he found that the situation was even worse than he had thought, for many of the underwriters refused to renew on any terms and others were only prepared to write a smaller line. By 18th April he had been able to obtain agreement to cover the whole of the Jagloms' all risks h

a insurance on £38,000 worth of jewellery, furs and personal effects, but only at a premium of 50s per cent. As this premium amounts to not much short of £1,000 per annum, Mr Jaglom was somewhat less than delighted. However, the existing policy was due to expire on 24th April and obviously he could not afford to be uninsured. It was, therefore, agreed that an insurance should be effected on these terms and that during the next few weeks, whilst Mr and Mrs Jaglom were abroad, the broker should see what could be done to obtain improved terms. The Excess
b Insurance Co Ltd ('Excess') wrote 15 per cent of the risk under this policy.

On Mr Jaglom's return, he asked Mr Dunkley of the brokers to call on him in order to discuss ways and means of reducing this premium. This meeting took place on 4th June 1968. Mr Dunkley's suggestion was that the jewellery should be deposited with Mr Jaglom's bank and only taken out when it was required for use. The premium
c applicable whilst the jewellery was in the bank would be little more than nominal and whilst it would be more than 50s per cent per annum in respect of any period when it was out of the bank, there should be an overall saving. Mr Jaglom asked how this would work in practice and explained that some items, for example his gold watch, could not be kept in the bank. He wanted to know what would happen when he and his wife went to the theatre and his wife needed some of the jewellery.
d Mr Dunkley replied that there would be no problem. Mr Jaglom would simply get the jewellery from the bank when it was needed and once a month the brokers would make a declaration to underwriters of what jewellery had been withdrawn from the bank and for how long. This declaration procedure was familiar to Mr Jaglom who had for years operated it in conjunction with the brokers in respect of goods pledged to the merchant bank with which he was associated. Accordingly,
e he thought that this might well be a practical solution, provided that it would produce a worthwhile saving in premium. Mr Dunkley said that he would have to make further enquiries and would in due course report back to Mr Jaglom who could then decide whether to maintain the 50s per cent policy or to change to a policy on the lines suggested.

At no time during the interview did Mr Dunkley ask where the jewellery was
f at that moment and at no time did Mr Jaglom tell him. However, Mr Dunkley rightly appreciated that it was not in the bank, for a possible change to keeping it in the bank was the whole basis of the discussion. In fact the watch was being worn by Mr Jaglom and the remainder was either being worn by Mrs Jaglom or was in the wall safe at the Jaglom's house.

Nothing further occurred so far as the Jagloms were concerned until 10th July 1968. On the morning of that day Mr Jaglom received by hand a letter from Mr
g Dunkley saying that the all risks insurance had been rearranged as from 4th June 1968. Under this new arrangement the jewellery was covered whilst in the bank at a premium of 3s 6d per cent per annum, but this cover was extended at much higher rates 'in respect of items taken out of the Bank subject to immediate notice of removal being given to Geo. H. Fryer & Company' (the name under which the
h brokers carried on business). The letter continued:

'Unfortunately Underwriters are not prepared to accept this part of the policy on a Monthly Declaration basis . . . I trust that these arrangements are satisfactory to you, and if you have any points which you wish to raise please do not hesitate to contact me. Unless I hear from you to the contrary I shall issue our Debit Notes on this basis in a few days time.'

j It seems to me that on a fair reading of this letter Mr Jaglom was being told that the insurance had been rearranged retrospectively, but that it was still open to him to object or to suggest some different arrangement. Nothing else can explain the last sentence of the letter and in any event the brokers had no authority to bind him to such a rearrangement in the light of the fact that Mr Dunkley had promised to report back to enable Mr Jaglom to reach a decision, but had not done so.

Simultaneously in another part of London Mrs Jaglom was on her way to a jewellers in order to have a diamond drop repaired. It must have been a very fine piece for it was worth £11,500. She carried it in her handbag. There is no suggestion that anyone knew that she would visit the jewellers or when she would do so, but no sooner had she arrived and put her handbag on the counter than three men burst in and snatched the handbag. At about the same time these men committed similar crimes in other parts of London. Mrs Jaglom at once telephoned her husband, who informed the brokers.

When Mrs Jaglom left her home that morning carrying the jewel, both she and her husband had every reason to believe that it was insured against all risks. If it was not, it was the fault of the brokers. In such circumstances, it would have been more in accord with the deservedly high reputation of the London insurance market that Mr and Mrs Jaglom should have been paid promptly, without prejudice to whether the ultimate liability was that of underwriters under the 50s policy, of underwriters under the new policy or of the brokers and their underwriters. It is most regrettable that this did not happen and that the Jagloms were left to decide for themselves who was liable. Ultimately Mrs Jaglom sued Excess as the leading underwriter under the new policy with an alternative claim against the brokers. Excess, if liable at all, were only on risk to the extent of 19.7 per cent of the loss, but, to their credit, they did not wish Mrs Jaglom to be involved in suing all the Lloyd's syndicates and the companies concerned and agreed that, if they were liable for their proportion, they would pay 100 per cent and recover from their co-insurers. This attitude has, I regret to say, not received its just reward for one of the co-insurers was the Vehicle and General, who have gone out of business since Excess agreed to accept full liability, but Excess have not, of course, sought to resile from their agreement.

Less meritorious has been the attitude of the brokers. It was for them and their underwriters to see that the Jagloms were paid at once and to make what recovery they could in the name of the Jagloms. This they did not do. Even when the action came on for trial and they were asked how the Jagloms could possibly fail against both defendants, their admission of liability, contingent on Excess not being liable, was qualified by a proviso that Mrs Jaglom should not have failed against Excess solely because her advisers had failed to plead the right point. This was quite reasonable in itself, but it left Mrs Jaglom with a risk of being paid by no one, which she should not have been expected to bear. In the circumstances I had no hesitation in allowing extensive reamendments to the points of claim, without close enquiry whether they were necessary, so that the only real issue—that between Excess and the brokers—could be tried on its merits.

No policy has ever been issued and the only contractual document is the brokers' slip. As originally prepared by the brokers it read:

'All Risks—"R" Form—12 months. Noon 24th April, 1968. £35,591.5s.od., on Jewellery, as per specification, against All Risks whilst in the Assured's Bank situated, [and then there is a blank]. Excess £50 each and every loss. Premium 3s. 6d. per cent—20 per cent [which is in fact a reference to commission] a/c Mrs. J. Jaglom, [and it gave her home address].

'It is agreed to extend this policy in respect of items taken out of the Bank in accordance with the rates on the attached schedule. It is further agreed that Underwriters accept Monthly Declarations in respect of items out of the Bank to be agreed by the leading Underwriter only.'

This slip went the rounds of the companies and of Lloyd's underwriters and, over a period of about a month, lines were written which eventually totalled 101.5 per cent, as a result of which all lines were subsequently scaled down pro rata to produce 100 per cent. One underwriter initialled his line on 15th July 1968, five days after the loss had occurred, but I fully accept the explanation that this line had been promised

a at an earlier point of time and that the initialling was merely confirmation of an existing commitment. Excess, who were the leading underwriters, accepted a line of 20 per cent on 10th June 1968. Two companies and a Lloyd's syndicate accepted lines on 9th July, and others accepted parts of the risk on various dates in between. During this process the slip was amended, but by whom and when and by what stages is wrapped in mystery. Suffice it to say that the commencement date was changed from 24th April 1968 to 'to b.s.l/u.' (which being interpreted means 'to be agreed with leading underwriter') and then further changed to 4th June 1968. The blank after 'in the Assured's Bank situated' was completed by the addition of 't.b.a l/u.' and the scheduled rates for jewellery taken out of the bank were also qualified by the words 'or t.b.a.l/u.' Last, and by far the most important, the extension of cover for items taken out of the bank was qualified by the words, 'Sub prior advice to L/UW only' which in turn was amended to read 'Sub prior advice to G H Fryer only'.

b These amendments led at the hearing to some discussion on whether individual underwriters might not have become bound on different terms, the basis of this suggestion being that a slip is an offer which is accepted by the underwriter taking a line. It would follow that each underwriter was bound on the terms of the slip as at the moment when he accepted his line and could not, without the consent of the broker on behalf of the assured, vary the terms of his contract to accord with different terms insisted on by subsequent underwriters. It would also follow that if, for example, only Excess had been prepared to write the risk and that only for 20 per cent the assured could be compelled to accept a policy for only this percentage, despite the fact that in the absence of 100 per cent cover, he might well wish to make quite different arrangements.

c These absurd consequences leave me in no doubt that the underlying legal analysis is fallacious. The true analysis is that each underwriter who agrees to take a line is making and not accepting an offer. That offer is on the terms of the slip at the time he sees it, but he retains the right to modify that offer to accord with different terms inserted by underwriters taking subsequent lines, the intention being that, in the absence of special agreement to the contrary, all the offers ultimately evidenced by the initialled slip shall be on identical terms. The extent to which an amendment by an underwriter involves the broker in a duty to resubmit the slip to an underwriter who has previously taken a line without the amendment is a matter to be determined in accordance with the practice of the market, but all underwriters are to be deemed to have offered to accept the risk for their respective proportions on the terms of the slip in its finally amended form, whether or not they know of subsequent amendments. Market practice and discipline can be relied on to protect their interests. Leaving on one side nice points founded on the ancient doctrine of consideration which I am sure that the market would disdain to take, the offers remain open to acceptance by the assured until the risk is fully subscribed or the assured through his broker resiles from the transaction or the assured through his broker affirms the transaction although not fully subscribed, whichever first occurs.

d Since the conclusion of the argument, I have had an opportunity of looking at the decision of Mathew J in *Thompson v Adams*¹ and of Hamilton J in *Grover & Grover Ltd v Mathews*², both of which are cited in Ivamy's General Principles of Insurance Law³ in support of the following paragraph in the text:

i "The initialling of the "slip" by the underwriter is the acceptance of the assured's proposal. He thereby binds himself to sign a policy in accordance with the "slip", when tendered to him for signature, and he cannot refuse to do so except upon grounds which call in question the validity of the acceptance. The signing of a

1 (1889) 23 QBD 361

2 [1910] 2 KB 401

3 2nd Edn, 1970, p 85

policy is, however, a mere formality; it may take place even after loss, and the underwriter cannot refuse to sign the policy on the ground that the broker failed to tender it within a reasonable time after the initialling of the "slip". The contract is complete upon the initialling of the "slip", and, if there is no formal policy in existence, the underwriter may be sued upon the "slip". The "slip" is not a mere honorary undertaking to issue a policy; it constitutes in itself a binding contract of insurance.

These cases do, I think, justify the text, but they were not concerned with the status of a slip between the time when an individual underwriter first takes a line and the time when the risk is fully subscribed. Once it is fully subscribed, I accept that it constitutes a contract, but before that moment is reached I think that business efficacy requires that it be treated as an offer by the underwriters. This has no bearing on the contra proferentem rule of construction which treats the slip as having been proffered by the assured (see *De Maurier (Jewels) Ltd v Bastion Insurance Co Ltd and Coronet Insurance Co Ltd*⁴) insofar as he or his broker is the author of its wording or puts it forward. It follows that in my judgment the terms of any risk insured by Excess fall to be determined by reference to the slip in its finally amended form.

It occurred to me that if, as the letter of 10th July implied, it was open to Mr Jaglom to accept or reject the proposed new insurance, it must follow that Excess were not on risk under the new insurance at the time of the loss, but were on risk under the pre-existing 50s per cent policy whose cancellation was clearly contingent on the conclusion of a new contract. However, both Excess and the brokers seemed to be agreed that this was not the case and that from some date which they could not define more precisely than that it preceded the loss, the 50s per cent policy was cancelled and the new cover substituted, both retrospectively to 4th June 1968.

One further fact should be mentioned. The slip called for monthly declarations and on 6th August nearly a month after the loss and two months after the date on which the cover retrospectively came into operation, the brokers sought to declare all the jewellery as being out of the bank for a period of three months from 4th June. This was a very odd procedure as the declaration was out of time for the earlier part of the period and premature for the latter part. It may, however, have been in time for the period in which the loss occurred. Fortunately it is not necessary to explore this further, because, whilst it was not accepted by Excess or any other underwriter, counsel for Excess does not wish to take any point on this aspect of the problem.

The argument of counsel for Excess proceeds by the following stages. First, the primary cover is against all risks whilst in the custody of the assured's bank. This, he submits, is plain on the face of the slip. He takes no point on the fact that no particular bank was ever agreed on with the leading underwriter. Secondly, the secondary or extended cover only applies in respect of individual items which are taken out of the custody of the bank. This, also, he submits, is clear on the face of the slip for, as a matter of plain English, jewellery which has never been in the custody of the bank during the currency of the risk, cannot be taken out of its custody. I am not sure that the language necessarily requires that the jewellery shall have been in the custody of the bank during the currency of the risk, but this does not matter on the facts of the present case for there is no evidence that the jewellery was ever in the custody of any bank. Thirdly, bearing in mind that the assured was retrospectively giving up a largely unrestricted all risks cover at 50s per cent per annum for cover which, if the jewellery was not in the bank, was potentially much more expensive, underwriters were entitled to assume that the jewellery was in fact in the bank when the slip was proffered. The presence of the jewels in the bank at that time was therefore the basis of the policy. Fourthly, whether or not underwriters would be entitled in strict law to say that the whole policy was void, Excess

a did not seek to do this, but submitted only that they did not come on risk until the jewellery had been taken into the custody of the bank. Thereafter, if the appropriate advice was given before the jewellery was taken out of the bank's custody, the extended cover would apply. Fifthly, if, contrary to these submissions, 'taken out of the bank' can be construed as 'being out of the bank', no prior advice was given to the brokers within the meaning of the policy. There were two independent grounds for this submission. First 'advice' in this context means 'information given' b and imports an express communication by the assured to the broker. It is not the same as the broker in fact having knowledge or notice of the fact that the jewellery is out of the bank, still less inferring or assuming this fact. Second, on 4th June, which was the latest date on which the broker could have received advice of the position of the jewellery, the slip was not in existence and he was not the broker c under the cover or authorised by underwriters to receive advice for the purposes of the cover.

Counsel for the brokers submits that when retrospective cover is arranged, each underwriter undertakes the same obligation as he would have undertaken if he had initialled the slip immediately before the time from which the cover is agreed to take effect—in this case noon on 4th June 1968. It follows that unless one is to under- d take a fine analysis involving minutes rather than hours, the brokers were retrospectively authorised to receive advice for the purposes of the cover on 4th June. Turning to the earlier submissions, he says that there is no magic about the use of the word 'extend' in the slip. This is pure market jargon. The reality and the intention of the parties was that there should be two alternative degrees of cover with appropriately e different premiums. There is no underwriting merit in the suggestion that the jewellery has first to have been in the custody of the bank before the higher degree of risk can be impressed on underwriters, because the fact that previously the jewellery has been subject to a lesser degree of risk, incidentally attracting a lower premium, in no way affects the degree or nature of the risk, or the amount of the premium, f for the period when it is not in the custody of the bank. Prior advice must indeed be given for the protection of the underwriters, but this only means that the broker must know that the jewellery is out of the bank and can, therefore, be relied on to account to underwriters, and extract from the assured, a premium appropriate to that risk for the whole of the relevant period.

In substance I prefer the argument for the brokers as according more with common sense and the commercial realities. Underwriters were accepting alternative risks in consideration of alternative premiums, it being entirely at the assured's option g which risk applied at any time and for how long it applied. Mrs Jaglom could, if she wished, have placed the jewellery in the bank for the whole period of the insurance and paid the 3s 6d rate. Alternatively she could have kept the jewellery out of the bank for the whole period and paid an appropriate additional premium which might well have been as high as 80s per cent. In the further alternative she could have opted for any combination of these risks, paying the appropriate additional h premiums. Subject to their plea that they are not on risk at all until the jewellery comes into the custody of the bank, all this is admitted by Excess. But what possible underwriting point is there in a formal delivery into the custody of the bank and an immediate return of the jewellery to Mrs Jaglom? Yet that would satisfy underwriters' requirements. It is, in my judgment, complete nonsense and was not a requirement of the cover. If underwriters really wanted this they could have required i a warranty that the jewellery was in the custody of the bank at some stated time or date. They did not do so. The wording of the slip on which counsel for Excess placed such reliance does not advance underwriters' case. The use of the word 'extend' in the context of this slip means no more than that underwriters are accepting a second risk in addition to the first. The use of the words 'taken out of the bank' does no more than reflect the fact that the bank custody risk comes first on the slip and that it was no doubt contemplated that the jewellery would be more in the

bank than out of it. If the risk has been written the other way round so that the 'extended' risk came first, the reference to the bank custody risk would have no doubt been in terms of a 3s 6d rate 'in respect of jewellery put into the bank'. a

There is slightly more substance in counsel for Excess's argument based on 'prior advice to G H Fryer', in that this reflects a real business point. In any policy of this nature it is essential that the assured shall be unable to have the benefit of cover in respect of a greater risk whilst only paying the lower premium unless and until a loss occurs. This is the case however honest the assured may be and no one suggests that Mrs Jaglom is other than completely honest and respectable. On the other hand, underwriters do not want to be bothered with information concerning every minor excursion of every item of jewellery. The practical answer to this dilemma is to provide that the broker shall be advised of all movements of jewellery before they take place and that he, having no financial interest in minimising the premium, shall be responsible for accounting to underwriters on a monthly basis in arrear. This practical solution is fully met if the broker knows that the jewellery is leaving or, at the inception of the policy, is outside the custody of the bank. In such circumstances the broker is obliged to account for the higher premium and the assured cannot refuse to reimburse him. No business purpose is served by any more formal requirement. On 4th June both Mr Jaglom and Mr Dunkley knew that the jewellery was not in the custody of the bank. Is it seriously to be suggested that Mr Dunkley should then or thereafter have said to the Jagloms, 'You must advise me that the jewellery is not in the bank?' Counsel for Excess said that Mr Dunkley should never have agreed to the backdating of the new policy until 4th June 1968, if the jewellery was outside the bank, because the relevant premium under the new policy was then higher than the old. It may well be that Mr Dunkley should not have done this if he could have avoided it, but that would be a breach of his duty as a broker and would not affect the underwriters' liability. As things were Mr Dunkley involved Mrs Jaglom in a liability to pay the higher rate of premium from 4th June, until such time as the jewellery was put into the custody of the bank and the brokers learnt of this fact. 'Prior advice' in this contract has no technical meaning. If the underwriters wanted such formality as they now claim, they should have written in 'subject to prior notice in writing by assured to Geo H Fryer'. If necessary, I would hold that these words being an amendment by underwriters, although possibly not by Excess, fall to be construed *contra proferentem*, namely, against underwriters as a whole. No authority to the contrary has, so far as I know, been concerned with an underwriters' amendment to a slip prepared by a broker. However I do not think it is necessary to rely on this rule and that the meaning of the words in their business context is clear and unambiguous. b
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There will be judgment for the plaintiff against the first defendants.

Judgment for the plaintiff against the first defendants for £11,250.

Solicitors: *Bennett & Seigal* (for the plaintiff); *Barlow, Lyde & Gilbert* (for Excess); *Ince & Co* (for the brokers). h

Janet Harding Barrister.

Ingleton v Dibble

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND BRIDGE JJ

15th, 16th NOVEMBER 1971

- b** *Criminal law – Obstructing constable when in the execution of his duty – Obstruction – Positive act constituting obstruction – Act not per se unlawful – Accused suspected by constable of driving with excessive quantity of alcohol in blood – Accused required to take a breath test – Accused drinking from bottle of whisky prior to test – Purpose and effect of drinking whisky to prevent subsequent laboratory test revealing whether he was driving with excessive quantity of alcohol in blood – Whether constituting obstruction – Police Act 1964, s 51 (3).*

- c** The accused who was driving his car at night without proper lights was stopped by a police constable. Smelling alcohol on the accused's breath the constable, in exercise of his powers under s 2 of the Road Safety Act 1967, required the accused to provide a specimen of breath for a breath test. Since the accused had drunk his last alcoholic drink only some five minutes previously, it was necessary to wait some time before the breath test could be properly administered. Whilst waiting the accused asked to go to the lavatory at his brother's house nearby. On the way he met a man who had been a passenger in the car and who was carrying a bottle of whisky. The accused took the bottle and drank from it. The purpose and effect of doing this was to make it impossible to ascertain from a laboratory test of a specimen which he might subsequently provide under s 3 of the 1967 Act, whether he had been driving with an excessive quantity of alcohol in his blood. On a charge of wilfully obstructing a constable in the execution of his duty contrary to s 51 (3)^a of the Police Act 1964 the accused contended that the act relied on by the prosecution as constituting the obstruction must, in addition to being an act which made it more difficult for the police to carry out their duty, be unlawful per se, i.e. unlawful as contravening some law independently of the law which prohibited the obstruction of police officers, and that his act in drinking the whisky was not per se unlawful.

- e** **Held** – Although a refusal to act could not amount to obstruction under s 51 (3) unless the accused was under a legal obligation to act in the manner requested by the police officer, there was no ground for saying that where the obstruction consisted of a positive act it must be unlawful independently of its operation as an obstruction of a police officer under s 51 (3). The act of the accused in drinking the whisky with the object and effect of frustrating the procedure under ss 2 and 3 of the 1967 Act was clearly a wilful obstruction of the police constable (see p 279 f to p 280 b, post).

Rice v Connolly [1966] 2 All ER 649 explained and distinguished.

Notes

- h** For resisting or obstructing a police officer, see 10 Halsbury's Laws (3rd Edn) 634, 635, para 1207, and for cases on the subject, see 15 Digest (Repl) 852-854, 8194-8219.

For the power of a constable to require a breath test under the Road Safety Act 1967, s 2, see Supplement to 33 Halsbury's Laws (3rd Edn), para 1061A, 3, and for cases on the subject, see Digest (Cont Vol C) 928-937, 322c-322hh.

- j** For the Police Act 1964, s 51, see 25 Halsbury's Statutes (3rd Edn) 364, and for the Road Safety Act 1967, ss 2 and 3, see 28 *ibid* 462, 465.

Cases referred to in judgment

Bastable v Little [1907] 1 KB 59, 76 LJKB 77, 96 LT 115, 71 JP 52, 15 Digest (Repl) 853, 821f.

- a** Section 51 (3), so far as material, provides: 'Any person who . . . wilfully obstructs a constable in the execution of his duty . . . shall be guilty of an offence . . .'

Betts v Stevens [1910] 1 KB 1, 79 LJBK 17, 101 LT 564, 73 JP 486, 15 Digest (Repl) 854, 8216. a

Director of Public Prosecutions v Carey [1969] 3 All ER 1662, [1970] AC 1072, [1969] 3 WLR 1169, 134 JP 59, Digest (Cont Vol C) 936, 322aa.

Hinchliffe v Sheldon [1955] 3 All ER 406, [1955] 1 WLR 1207, 15 Digest (Repl) 854, 8217.

Rice v Connolly [1966] 2 All ER 649, [1966] 2 QB 414, [1966] 3 WLR 17, 130 JP 322, Digest (Cont Vol B) 191, 8219b. b

Rowlands v Hamilton [1971] 1 All ER 1089, [1971] 1 WLR 647.

Cases also cited

R v Durrant [1969] 3 All ER 1357, [1970] 1 WLR 29.

Donnelly v Jackman [1970] 1 All ER 987, [1970] 1 WLR 562.

Erskine v Hollin [1971] RTR 199.

Wright v Brobyn [1971] RTR 204. c

Case stated

This was a case stated by the deputy recorder of Folkestone (Mark Smith Esq) in respect of his adjudication on 5th April 1971 whereby he allowed an appeal by the respondent, Alan Alexander Dibble, against his conviction on 9th February 1971 by the justices for the borough of Folkestone in respect of an information preferred by the appellant, Roy Dennis Ingleton, a chief inspector of police, for having wilfully obstructed a constable in the execution of his duty contrary to the Police Act 1964, s 51 (3). The facts are set out in the judgment of Bridge J. d

Brian Clapham for the appellant.

F J M Marr-Johnson for the respondent. e

BRIDGE J delivered the first judgment at the invitation of Lord Widgery CJ. This is an appeal by case stated from a decision of Folkestone Borough Quarter Sessions given by the learned deputy recorder on 5th April 1971. On 9th February 1971 the respondent, Alan Alexander Dibble, was convicted by a magistrates' court of wilfully obstructing a police constable in the execution of his duty. The respondent appealed from that conviction to quarter sessions. At the hearing before quarter sessions and at the close of the evidence called for the prosecution a submission was made on his behalf that the evidence disclosed no offence in law and that submission was upheld by the deputy recorder, who accordingly allowed the appeal against the conviction by the justices. From that decision the appellant prosecutor now appeals to this court. f

The facts disclosed by the evidence called for the prosecution are these. On 15th October 1970 in the early hours of the morning Pc Tully was on duty in uniform in Folkestone when he saw the respondent driving a motor car which was not showing proper lights. He stopped the respondent and immediately smelled alcohol on his breath, whereupon in the exercise of his powers under s 2 of the Road Safety Act 1967 he required the respondent to provide a specimen of breath for a breath test. Pausing there, no point is taken as to the propriety of that requirement under the Act. g

The respondent got out of his car, which was moved away presumably by another police officer. The respondent then told Pc Tully that he had had his last alcoholic drink only about five minutes before, whereupon the officer appreciated that it would be necessary to wait some time before the provision of a specimen of breath for a test. That necessity to wait arose from the circumstance, now widely known, that the manufacturer's directions issued with the Alcotest device used by the police in this country, as approved by the Secretary of State, for taking breath tests, indicate that a specimen given within twenty minutes of the last consumption of alcohol may give a false reading on the device because of alcohol in the mouth. The respondent agreed to wait, but after a little while he asked if he could go to the lavatory. h

i

a The police constable agreed. They went to a nearby public lavatory which was found to be in a dirty condition. The respondent then suggested that he should go to his brother's house which was nearby and use the lavatory there. Again the police constable agreed. On the way to the brother's house the respondent and the constable met the respondent's brother accompanied by a man who had been a passenger in the respondent's car while it was being driven. The passenger was carrying a bottle of whisky. The respondent took it from him and drank from the bottle.

b On the basis that that evidence was accepted, the deputy recorder inferred, in my judgment quite rightly, that the respondent deliberately drank the whisky with the intention of making it impossible for it to be ascertained from a laboratory test of a specimen which he might subsequently provide under s 3 of the Road Safety Act 1967 whether the quantity of alcohol which he had consumed before he had ceased to drive was such that an offence under s 1 of the Act was committed. The

c deputy recorder nevertheless held that that action did not in law amount to a wilful obstruction of the police constable under s 51 (3) of the Police Act 1964.

To understand the submissions made to this court, it is first necessary to remind oneself briefly of the relevant provisions of the Road Safety Act 1967, and of certain decisions of the House of Lords as to the construction of those provisions. It will

d be remembered that a person commits an offence under s 1 (1) of the Act if he drives a motor vehicle having consumed alcohol in such quantity that the proportion thereof in his blood as ascertained from a laboratory test for which he subsequently gives a specimen under s 3 of the Act exceeds the prescribed limit. The procedure leading to the provision of a specimen which can be tested in the laboratory is laid down, as is now well known, in ss 2 and 3. It begins with a suspicion that the driver has

e alcohol in his body under s 2 (1) (a), or a suspicion that he has committed a traffic offence while his vehicle was in motion under s 2 (1) (b), or on the other hand with the occurrence of an accident under sub-s (2). Given one of those foundations, a constable may require the driver to provide a specimen of breath for a breath test, and if he either fails to do so or provides a specimen which proves positive, he may then be arrested and taken to the police station where the procedure under s 3 begins. It is unnecessary to go in detail through the procedure under s 3. It is an

f elaborate procedure leading in the end to the provision by the suspect driver of a specimen either of his blood or of his urine which can be analysed.

The House of Lords has decided in *Rowlands v Hamilton*¹ that on the true construction of s 1 of the Act the quantity of alcohol consumed by a driver before he ceased driving can only be validly ascertained from a laboratory test within the meaning of s 1 (1) so as to prove an offence under the subsection if the specimen is

g taken at a time when no additional alcohol has entered the driver's body after he ceased to drive and before the specimen was provided.

The question arose in that case because the accused had been involved in an accident, and, being shaken and shocked as a result of the accident, before the police arrived he went into a public house and drank a quantity of whisky. At his trial for an offence under s 1, the prosecution sought to prove that he had consumed alcohol in the necessary quantity to constitute an offence under sub-s (1) by calling expert evidence to establish that a test of his blood would have shown him to be above the prescribed limit even if his blood had been tested before he drank the whisky in the public house. In other words the expert was saying: making all allowances proper to be made for the quantity of alcohol consumed after this driver ceased to

h drive, the laboratory test still shows that before he ceased to drive he was a person who had consumed alcohol in such a quantity that the proportion in his blood exceeded the prescribed limit. The House of Lords, as I have said, held that that was not a

i legitimate way to prove an offence under s 1. The effect of their Lordships' decision

is that as soon as a person who has been driving, after he has ceased to drive, consumes any alcohol, it becomes once and for all impossible to test his blood under s 3 in such a way that the test will be available to prove an offence under s 1. a

Counsel for the appellant has also drawn our attention to an earlier decision of the House of Lords which was concerned with the problem arising when a police officer discovers that a suspect driver whom he has stopped and whom he has required to provide a specimen, has had a drink recently, so that some time must be allowed to elapse in order that the breath test shall be valid. This is *Director of Public Prosecutions v Carey*², where Lord Diplock advertent to this problem said: b

'In any of these cases where a constable believes that the suspect has consumed alcohol within 20 minutes of his being stopped a test conducted by the constable before 20 minutes had elapsed since the suspect's last drink would not be a bona fide use of the device for the purpose of obtaining a reliable indication of the proportion of alcohol in the suspect's blood. But the object of the Act cannot be evaded in this way. The statutory right conferred on a constable by s. 2 (1) of the Act to require a person "to provide a specimen of breath for a breath test" carries with it by necessary implication the right to require that person to remain there or nearby until a "breath test" is completed, even if this means that he must wait there until the effect of recently consumed alcohol has worn off sufficiently to enable him to provide a specimen of breath which when used in the approved device will give a reliable indication of his true blood alcohol level.'

It is in reliance of those two authorities that counsel for the appellant makes his submission that this was a plain case of wilful obstruction of the constable in the execution of his duty. He refers us to the decision of this court approving and adopting an earlier definition of what is necessary to show a wilful obstruction, *Rice v Connolly*³, where Lord Parker CJ said: c

'To carry the matter a little further, it is in my view clear that to "obstruct" under s. 51 (3) [of the Police Act 1964] is to do any act which makes it more difficult for the police to carry out their duty. That description of obstructing I take from . . . *Hinchliffe v. Sheldon*⁴. It is also in my judgment clear that it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they would further include the duty to detect crime and to bring an offender to justice.'

So, counsel for the appellant submits, here was Pc Tully setting in motion the statutory machinery under the Road Safety Act 1967 with the object of detecting whether or not the respondent had committed an offence under s 1, and, if so, of obtaining the evidence to bring him to justice therefor. The respondent's act deliberately done with the object of frustrating that procedure not only, so counsel for the appellant submits, in Lord Parker CJ's language made it more difficult for Pc Tully to carry out his duty, it made it impossible. d

Counsel for the respondent, at the end of the argument, accepts, and in my judgment quite rightly accepts, first that Pc Tully was acting in the execution of his duty; and secondly that he was de facto obstructed by what the respondent did in taking the whisky bottle and drinking whisky from it. Counsel for the respondent nevertheless submits that there was no offence under s 51 (3) of the Police Act 1964 because the obstruction was not wilful. The essence of the submission, as I understand it, e

2 [1969] 3 All ER 1662 at 1680, [1970] AC 1072 at 1097

3 [1966] 2 All ER 649 at 651, [1966] 2 QB 414 at 419

4 [1955] 3 All ER 406, [1955] 1 WLR 1207 f

a is that the act which is relied on by the prosecution as constituting the obstruction must in addition to being an act which makes it more difficult for the police to carry out their duty, be unlawful per se, i.e. unlawful as contravening some law independently of the law which prohibits the obstruction of police officers.

b Counsel for the respondent has referred to two cases of AA scouts warning passing motorists of police speed traps, *Bastable v Little*⁵ and *Betts v Stevens*⁶. For my part I do not find that those authorities throw any light whatever on the question which we have to decide. More to the point is *Rice v Connolly*⁷ to which I have already referred. That was a case on its facts concerned with a defendant who appeared to a police constable to have been acting suspiciously and the police constable asked him to give his name and address which the defendant refused to do. That refusal was the subject-matter of the prosecution; that was the alleged obstruction of the police constable. Counsel for the respondent relies on a passage from the judgment of Lord Parker CJ following the passage I have already quoted where he said⁸:

c 'The only remaining element of the alleged offence, and the one on which in my judgment this case depends, is whether the obstructing of which the appellant was guilty was a wilful obstruction. "Wilful" in this context in my judgment means not only "intentional" but also connotes something which is done without lawful excuse, and that indeed is conceded by counsel who appears for the prosecution in this case.'

d Lord Parker CJ went on to consider whether there was a lawful excuse in the circumstances of that case for the appellant refusing to answer the police officer's question, and refusing to disclose his name and address. Lord Parker CJ decided that there was; accordingly in the circumstances no offence of wilful obstruction e had been committed. He drew a distinction between a person giving false information to a police constable which he thought would clearly amount to an obstruction, and a person declining to give information which he held could not amount to obstruction unless the situation was one in which the law placed him under an obligation to give the information required.

f For my part I would draw a clear distinction between a refusal to act, on the one hand, and the doing of some positive act on the other. In a case, as in *Rice v Connolly*⁷, where the obstruction alleged consists of a refusal by the defendant to do the act which the police constable has asked him to do—to give information, it might be, or to give assistance to the police constable—one can see readily the soundness of the principle, if I may say so with respect, applied in *Rice v Connolly*⁷, that such a refusal to act cannot amount to a wilful obstruction under s 51 unless the law imposes g on the person concerned some obligation in the circumstances to act in the manner requested by the police officer.

h On the other hand, I can see no basis in principle or in any authority which has been cited for saying that where the obstruction consists of a positive act, it must be unlawful independently of its operation as an obstruction of a police constable under s 51 (3) of the Police Act 1964. If the act relied on as an obstruction had to be shown to be an offence independently of its effect as an obstruction, it is difficult to see what use there would be in the provisions of s 51 (3) of the 1964 Act.

i In my judgment the act of the respondent in drinking whisky when he did with the object and effect of frustrating the procedure under ss 2 and 3 of the Road Safety Act 1967 clearly was a wilful obstruction of Pc Tully. The learned deputy recorder in my judgment erred in upholding the submission of no case which was made to him and I would allow the appeal and send the case back to quarter sessions with a direction to continue the hearing.

5 [1907] 1 KB 59

6 [1910] 1 KB 1

7 [1966] 2 All ER 649, [1966] 2 QB 414

8 [1966] 2 All ER at 651, 652, [1966] 2 QB at 419

ASHWORTH J. I agree. a

LORD WIDGERY CJ. I agree with the judgment of Bridge J, particularly I would emphasise the importance of his distinction between obstruction which is alleged to consist of a default, and obstruction which is alleged to consist of a positive act.

Appeal allowed. b

Solicitors: Sharpe, Pritchard & Co, agents for A C Staples, Maidstone (for the appellant); Worthington-Edridge, Hulme & Court, Folkestone (for the respondent).

Gordon H Scott Esq Barrister. c

Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd d

QUEEN'S BENCH DIVISION

DONALDSON J

11th, 12th, 22nd OCTOBER 1971

Industrial training – Training board – Establishment – Consultation – Duty of Minister to consult with specified organisations appearing to him to be representative of those engaged in industry – Failure to consult – Effect – Failure to consult association – Association a specialist branch of parent body – Consultation with parent body – Appropriate invitation for comments on draft order sent by Minister to association – Invitation not received by association – Association having no knowledge of order until after it was made – Whether Minister under duty to consult association – Whether consultation with parent body and sending of invitation for comments constituting consultation – Whether order applicable to members of association – Industrial Training Act 1964, s 1 (4) – Industrial Training (Agricultural, Horticultural and Forestry Board) Order 1966 (SI 1966 No 969). e

In 1965 the Minister of Labour had plans to set up a training board for the agricultural, horticultural and forestry industry under the provisions of the Industrial Training Act 1964. Preliminary consultations were held with the National Farmers Union ('the NFU'). By April 1966 a draft order had been prepared and a copy of the schedule defining the industry to which it related was circulated to a large number of addressees inviting comments. At the same time a press notice was published summarising the activities which it was proposed should be covered by the new board and advising any organisation which considered that it had an interest in the draft schedule and had not received a copy to apply to the Minister. Among the addressees to whom the draft schedule was sent was the Mushroom Growers Association ('the association') which was a specialist branch of the NFU, although largely autonomous. The membership of the NFU was approximately 150,000, of whom about 180 were full members of the association. The association was not represented on the NFU council but a representative was invited to attend when matters relating to mushroom growing were discussed. No comments were received from the association in response to the invitation accompanying the draft schedule and no application was made for a copy of it. The order^a constituting the board was made on 2nd August f

^a The Industrial Training (Agricultural, Horticultural and Forestry Board) Order 1966, SI 1966 No 969 g

a 1966 and came into operation on 15th August. It subsequently emerged that the association had never received a copy of the draft schedule and had no knowledge of the press notice or of the consultations which had taken place between the NFU and the Minister. The association contended that it was not bound by the order on the ground that, before making it, the Minister was under a duty to consult the association since it was an organisation 'appearing to him' to be within one of the categories of organisations which, under s 1 (4)^b of the 1964 Act, he was bound to consult.

Held – (i) The expression 'any organisation' in s 1 (4) meant that the Minister was under a duty to consult 'every' organisation which appeared to him to be an organisation which fell within the provisions of s 1 (4) and not merely one such organisation; in view of the importance which was attached to consultation in the scheme of the Act, and the fact that the Minister had not in terms stated that the association did not appear to him to fall within s 1 (4) it followed that the association was a body which had to be consulted (see p 284 d and p 285 c d and f, post).

c (ii) No consultation had taken place with the association for the mere sending of a letter which was not received was but an attempt to consult; the essence of consultation was the communication of a genuine invitation, extended with a receptive mind, to give advice (see p 284 e and f and p 285 g, post); *Rollo v Minister of Town and Country Planning* [1948] 1 All ER 13 applied.

d (iii) Although, prima facie, consultation with a parent body would constitute consultation with the constituent parts, this general rule did not apply in the present case since the Minister had attempted and intended direct consultation with the association as well as with the NFU (see p 285 e and g, post).

e (iv) Accordingly the 1966 order had no application to persons engaged in the growing of mushrooms solely by reason of their being so engaged (see p 283 h and p 285 h, post).

Notes

For the establishment of industrial training boards, see Supplement to 38 Halsbury's Laws (3rd Edn) para 690A.

f For the Industrial Training Act 1964, s 1, see 12 Halsbury's Statutes (3rd Edn) 219.

Case referred to in judgment

Rollo v Minister of Town and Country Planning [1947] 2 All ER 488; *aff'd* CA [1948] 1 All ER 13, [1948] LJ 817, 112 JP 104, 45 Digest (Repl) 376, 195.

Adjourned summons

g By an originating summons dated 1st January 1970 the Agricultural, Horticultural and Forestry Industry Training Board ('the board') sought the determination of the court whether, on the true construction of s 1 (4) of the Industrial Training Act 1964, the Minister of Labour (subsequently the Secretary of State for Employment and Productivity) was under a duty to consult the Mushroom Growers Association ('the association') before establishing a training board for the agricultural, horticultural and forestry industry, whether on the facts the Minister had consulted the association, and, if not, what was the effect of such failure on the provisions of the Industrial Training (Agricultural, Horticultural and Forestry Board) Order 1966^c. There were joined as defendants Aylesbury Mushrooms Ltd on their own behalf and as representatives of the members of the association. The facts are set out in the judgment.

i M F Gettleston for the board.
J Bradburn for the association.

b Section 1 (4) is set out at p 282 b, post

c SI 1966 No 969

Cur adv vult

22nd October. **DONALDSON J** read the following judgment. The Industrial Training Act 1964 makes provision for the establishment of industrial training boards which, as their name implies, arrange industrial training for those employed in the industries concerned. The expenses of the boards are defrayed out of a levy imposed on employers in the industry, subject to such exceptions as may be specified in the order constituting any particular board.

Section 1 (4) of the Act provides:

'Before making an industrial training order the Minister shall consult any organisation or association of organisations appearing to him to be representative of substantial numbers of employers engaging in the activities concerned and any organisation or association of organisations appearing to him to be representative of substantial numbers of persons employed in those activities; and if those activities are carried on to a substantial extent by a body established for the purpose of carrying on under national ownership any industry or part of an industry or undertaking, shall also consult that body.'

In the present proceedings the Agricultural, Horticultural and Forestry Industry Training Board seek a determination whether the Minister complied with his duty of consultation before making the order which established that board, and, if not, what are the consequences. The real defendants are the Mushroom Growers Association, but that is an unincorporated body and it has been thought more convenient that the nominal defendants should be Aylesbury Mushrooms Ltd, who are representatives of the membership of the association.

In the second half of 1965 the then Minister of Labour was minded to set up the plaintiff board and, as is customary, officials of his Ministry held preliminary consultations with the largest representative body concerned, namely the National Farmers Union. By April 1966 a draft order had been prepared. An advance copy of the schedule to the order, which defined the industry to which the order related, was sent to the National Farmers Union on 15th April 1966. On 26th April 1966 copies of this document were circulated to a large number of addressees, including the Mushroom Growers Association, inviting comments. Simultaneously there was a press notice summarising the activities which it was proposed should be covered by the new board and advising any organisation which considered that it had an interest in the draft schedule and which had not received a copy to apply to the Ministry of Labour. No comments were received from the Mushroom Growers Association and no application was made by them for a copy of the schedule.

The Minister of Labour made the order constituting the board on 2nd August 1966, it was laid before Parliament on 11th August and came into operation on 15th August. Still there was no comment from the Mushroom Growers Association. I was told that the vice-chairman of the association knew of the existence of the order by October 1967, but on the evidence filed in this case the first clear sign of hostility or indeed any activity by the Mushroom Growers Association towards the board occurred on 16th May 1968, when Mr Alderton, the secretary, wrote to the board. The letter is headed 'Mushroom Growers Association. Specialist branch of the National Farmers Union'. The text reads as follows:

'Dear Sir, This Association, on behalf of Mushroom Growers, herewith makes formal application to be completely excluded from the Industrial Training Act, 1964, on the grounds [and then he sets out various grounds for exclusion and adds:] This application has the full support of the parent body of this Association, The National Farmers Union.'

In subsequent correspondence it emerged for the first time that the Mushroom Growers Association had never received a copy of the draft schedule and had no knowledge of the consultations which took place between the Minister and the

a National Farmers Union between September 1965 and April 1966. It is implicit in the evidence filed, although not I think expressed, that the Mushroom Growers Association were also unaware of the contents of the press notice.

b All this is rather surprising because the Mushroom Growers Association is a specialist branch of the National Farmers Union which, although largely autonomous, in 1966 occupied the same premises as the headquarters of the National Farmers Union, albeit as sub-tenants of part for which they paid an economic rent and of which they no doubt had exclusive possession. My surprise was not diminished when I was referred to r 2 (1) (b) of Part IX of the Rules of the National Farmers Union which provides:

c 'A notice to be served on the Council or on any branch may be given by sending it by post to the General Secretary of the Union at the offices for the time being of the Council, or to the Secretary of the branch at the office for the time being of the branch, as the case may be.'

Presumably independence is not carried to the point at which notices of correspondence addressed to the Mushroom Growers Association which end up with the National Farmers Union are not normally passed on to the intended recipient.

d Presumably, too, independence does not in any way inhibit consultation on matters of mutual concern.

The interrelationship of the National Farmers Union and the Mushroom Growers Association has been the subject-matter of an agreed statement of facts, but the only further information to which I need refer is contained in paragraphs 8-10 of that statement which are in these terms:

e 'The membership of N.F.U. is approximately 150,000; of these about 180 are full grower members of M.G.A., 154 carrying on business in England and Wales, 5 in Scotland and 21 in Northern Ireland. M.G.A. is not represented in its own right on the N.F.U. Council, although a representative is invited to attend when matters relating to mushroom growing are discussed; N.F.U. is not represented

f in its own right at meetings of M.G.A. N.F.U. nominates the employers' representatives on the Agricultural Wages Board for the whole of the agricultural and horticultural industry. N.F.U. handles all matters connected with the annual price review, obtaining information where necessary from M.G.A.; mushroom prices are outside the review system, but mushroom growers are affected by, for example, changes in the fertilizer subsidy. M.G.A. deals directly with the

g Ministry of Agriculture on specific points relating to mushroom growing and informs N.F.U. thereof.'

Both parties are agreed that under the terms of s 1 (4) of the Act, some consultation by the Minister is mandatory and that in the absence of any particular consultation which is so required, the persons who should have been but were not consulted are not bound by the order, although the order remains effective in relation to all

h others who were in fact consulted or whom there was no need to consult. Both parties are further agreed that if consultation with the Mushroom Growers Association was mandatory and there was no or no sufficient consultation the order takes effect according to its terms subject to a rider that it does not apply to the growing of mushrooms or to persons engaged in this activity solely by reason of their being

i so engaged. They may, of course, come within the scope of the order in some other capacity.

Both parties are also agreed that the organisations required to be consulted are those which appear to the Minister, or to his alter ego who in this case was a Mr Devey, to be representative of substantial numbers of employers engaging in the activities concerned or persons employed therein and nationalised industries which engage in those activities to a substantial extent. Thus whether any particular organisation

has to be consulted depends on a subjective test, subject always to bona fides and reasonableness which are not in question. a

Against this background counsel for the association submits that the court must see what organisations appeared to the Minister to fall into the specified categories, that the Minister clearly sought to consult the Mushroom Growers Association thereby showing that he regarded it as being within the class of organisation which had to be consulted. It follows, as he submits, that neither the board nor the Minister can now turn round and say that consultation with the National Farmers Union constituted a sufficient discharge of his duties. Counsel goes on to submit that there can be no consultation without at least unilateral communication and that no such communication occurred. b

Counsel for the board submitted that 'any' in the phrase 'the Minister shall consult any organisation' imposed a duty to consult not more than one organisation, that the posting of the letter of 26th April 1966 constituted consultation with the Mushroom Growers Association despite the fact that it was never received, that the Mushroom Growers Association was not an organisation which had to be consulted and that consultation with the National Farmers Union involved consultation with all its branches including the Mushroom Growers Association. c

I have no doubt that the first point of counsel for the board is without foundation. 'Any' must mean 'every' in the context of s 1 (4). There is a little more to be said for his submission that the mere sending of the letter of 26th April 1966 constituted consultation in that the Shorter Oxford English Dictionary gives as one definition of the verb 'to consult', 'to ask advice of, seek counsel from; to have recourse to for instruction or professional advice'. However, in truth the mere sending of a letter constitutes but an attempt to consult and this does not suffice. The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice (see per Bucknill LJ¹ approving a dictum of Morris J in *Rollo v Minister of Town and Country Planning*²). If the invitation is once received, it matters not that it is not accepted and no advice is proffered. Were it otherwise organisations with a right to be consulted could, in effect, veto the making of any order by simply failing to respond to the invitation. But without communication and the consequent opportunity of responding, there can be no consultation. d e f

This leaves only the related questions whether the Mushroom Growers Association did in fact appear to the Minister to be an organisation falling within the categories set out in s 1 (4) with the consequence that he was under an obligation to consult them and whether in any event his consultations with the National Farmers Union constituted consultation with the Mushroom Growers Association as a branch of the NFU. This is the heart of the problem. g

Mr Devey has deposed in para 5 of his affidavit that:

'In accordance with practice the circulation of the draft schedule was not restricted to organisations that appeared to me to be representative of substantial numbers of employers engaging in activities specified in the draft schedule. This will appear sufficiently from a perusal of the document. In particular the Mushroom Growers Association was listed, although it was, and remains, a specialist branch of the National Farmers Union. The listed address of the Association is the same as that of the Union which is Agriculture House, Knightsbridge, London, S.W.1.' h

In each case he sent a covering letter in one of three forms. The addressees on the first list, such as the National Farmers Union, the Trades Union Congress, the Confederation of British Industry, and major government departments received special letters from Mr Devey. Those on the second list received letters which were in j

1 [1948] 1 All ER 13 at 17

2 [1947] 2 All ER 488 at 496

a standard form but were sent personally to named officials of the organisations concerned. These included the Local Government Examinations Board which clearly is an organisation which should have been consulted, but not one which in the terms of the Act had to be consulted. Those on the third list, including the Mushroom Growers Association, received or should have received letters in standard form addressed to the organisation impersonally. I can find no clue in the form of the covering letter to whether any particular addressee appeared to the Minister to be a s 1 (4) organisation and examples can be found in each list of organisations which plainly fall outside this category. I am thus thrown back on Mr Devey's affidavit coupled with a letter dated 20th January 1969, signed by a Mr Thomson of the Department of Employment and Productivity, which states that a copy of the draft schedule was sent to the National Farmers Union of which it is understood that the Mushroom Growers Association is a specialist branch 'and also as a matter of courtesy to the Association'. Bearing in mind the importance which attaches to consultation in the scheme of the Industrial Training Act 1964, which seems to be based on the healthy principle of 'no taxation without consultation', and the fact that Mr Devey has not in terms said that the association did not appear to him to fall within the scope of s 1 (4), I feel obliged to conclude that it was an organisation which had to be consulted, although its small membership in the context of the number of persons employed in agriculture, horticulture and forestry and the specialised nature of their activities could well have led the Minister to take a different view.

This only leaves the question of whether it was consulted vicariously, and it may be accidentally, by means of the consultations with the National Farmers Union. This is a nice point. Prima facie consultation with the parent body undoubtedly constitutes consultation with its constituent parts, but I think that this general rule is subject to an exception where, as here, the Minister has also attempted and intended direct consultation with a branch. The association's complaint has very little merit, because it seems to have been completely blind to all that was going on around it. Nevertheless it is important that statutory powers which involve taxation shall be strictly construed and, so construed, I consider that the association should have been consulted and was not consulted.

I therefore answer the question in the originating summons as follows: Whether before making an order establishing a training board for the agricultural, horticultural and forestry industry, the Minister was under a duty to consult the Mushroom Growers Association—Yes. Whether the consultations held by the Minister with the National Farmers Union constituted a sufficient consultation with an organisation or an association of organisations representative of those engaged in the activity of horticulture—No. If it be held that the Minister was under a duty to consult the Mushroom Growers Association, whether on the facts such consultation took place—No. If it be held that the Minister was under a duty to consult the Mushroom Growers Association and failed to do so, what effect such failure had on the provisions of the Industrial Training (Agricultural, Horticultural and Forestry Board) Order 1966³. The order has no application to mushroom growers as such.

Ruling accordingly.

Solicitors: *Wood & Sons* (for the board); *Theodore Goddard & Co* (for the association).

E H Hunter Esq Barrister.

Practice Note

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND GRIFFITHS JJ

16th DECEMBER 1971

Case stated – Magistrates' courts – Contents of case – Preparation of case – Magistrates' Courts Rules 1968 (SI 1968 No 1920), r 68 – Magistrates' Courts (Forms) Rules 1968 (SI 1968 No 1919), Sch, Form 148.

Notes

For the Magistrates' Courts Rules 1968, see 13 Halsbury's Statutory Instruments (Second Re-issue) 44.

For the Magistrates' Courts (Forms) Rules 1968, see *ibid* 38.

LORD WIDGERY CJ delivered the following direction at the sitting of the court:

1. It is necessary to draw attention to r 68 of the Magistrates' Courts Rules 1968¹, the terms of which are frequently disregarded. Every magistrates' case should contain a full statement of the facts proved or admitted, and should not contain any statement of the evidence unless it is to be contended that there was no evidence to support a particular finding of fact. The case should follow Form 148² of the Schedule to the Magistrates' Courts (Forms) Rules 1968³ as closely as possible.

2. Much of the prevalent delay in stating the magistrates' case is attributable to the belief that the appellant must obtain a copy of the magistrates' clerk's notes of the evidence before drafting the case. In simple cases when the appellant was professionally represented at the hearing this should be unnecessary.

Christine Ivamy Barrister.

Practice Direction

QUEEN'S BENCH DIVISION

Practice – Chambers – Queen's Bench Division – Chambers applications – Hearing before judges in chambers – Sittings in chambers at trial centres outside London.

Sittings of a Queen's Bench judge in chambers out of London

1. To the extent that the business of the courts permits, and subject to the provisions of this direction, judges of the Queen's Bench Division will sit in chambers at trial centres as specified below, as well as in London, to deal with: (a) appeals from district registrars (RSC Ord 58, r 4); (b) such other business as may from time to time be notified.

2. The specified trial centres are: Manchester, Leeds, Birmingham, Cardiff and Bristol.

3. Where a party desires that a matter be heard before a judge in chambers at one of the above centres the notice of appeal or summons shall bear the title of the district registry in which the action is proceeding but shall be issued in the district registry at the trial centre at which it is to be heard.

4. Before a party issues a judge's summons or a notice of appeal in a district registry, he should enquire at the registry whether the state of business will permit

¹ SI 1968 No 1920

² See Stone's Justices' Manual, 1971, vol 2, pp 3856, 3857

³ SI 1968 No 1919

- a the matter to be heard there and it is proper to be so heard, or whether the summons or notice should be issued in the Central Office or elsewhere.
5. A judge's summons or notice of appeal issued in a district registry may be transferred for hearing to a judge in chambers sitting in London or at another trial centre on the application of a party or by the court of its own motion and such a summons or notice issued in the Central Office may similarly be transferred for hearing to a trial centre. Before a transfer to another trial centre is ordered, the court will require to be informed from enquiries made by the parties or the court officials whether the matter can conveniently be taken there.
- b 6. In cases not specifically provided for the practice of the Central Office as to district registry appeals shall be followed as nearly as circumstances permit.

10th December 1971

WIDGERY CJ

Practice Direction

QUEEN'S BENCH DIVISION

- d *Practice – Trial – Trial out of London – Date – Fixture of date – Certificate of readiness for trial.*

Setting down

1. An action ordered to be tried elsewhere than in London shall be set down within the period specified in the order for directions at the district registry for the place of trial (hereinafter called the trial centre).

- e *Certificate of readiness for trial*

2. On or after setting down it shall be the duty of the plaintiff, after giving to the defendant seven days' notice of his intention to do so, to lodge with the district registrar a certificate of readiness for trial containing the following particulars: (i) whether the order made on the summons for directions has been complied with and in particular (where applicable): (a) whether medical or experts' reports have been submitted for agreement; (b) if so, whether they have been agreed or agreement has been refused, and in the latter case, how many medical or expert witnesses will be called; (c) whether plans and photographs have been agreed; (ii) an up-to-date estimate of the length of trial; (iii) a statement that the plaintiff is ready and wishes the action to be brought on for trial; (iv) the name, address and telephone number of the plaintiff's and defendant's solicitors and agents, their reference number or numbers and of the parties' intended counsel, as far as is known; (v) a statement that the defendant has been given seven days' notice of the intention to lodge the certificate.

Entry on list of actions ready for trial

- h 3. (a) On receiving a certificate of readiness and if satisfied thereby, the district registrar will mark or list the action as ready for trial. (b) The parties will be notified when the action has been so marked or listed and as soon as practicable thereafter will be informed of approximately when it may be expected to be heard. (c) Before taking any action under sub-para (a) or (b) the court may exercise its powers under RSC Ord 34, r 5 (3) (as amended), to call for further information as to the readiness of the action for trial.

- j *Fixed dates*

4. Applications for fixed dates, where these can be given, or that an action be not heard before a certain date, must be made when lodging the certificate of readiness, or as soon as possible thereafter. Such application shall be lodged at the district registry by the parties jointly or by one of the parties on seven days' notice to every other party and shall state fully the matters relied on. Where a fixed date is given

or where an action is not to be tried before a certain date, it will be so marked or listed. a

5. It is the duty at all times of the parties' solicitors to comply with RSC Ord 34, r 8 (2), by informing the court immediately of any settlement or of any matter affecting the length of trial or likely to lead to delay or to any application for adjournment.

Adjournments etc b

6. The following directions shall apply to applications for adjournments, postponements and vacation of fixed dates: (i) consent applications may be made to the officer of the court having charge of the list at the time the application is made who may, if he thinks fit, refer the matter to the district registrar or to the judge; (ii) opposed applications must be made to the district registrar, save when the action is likely to come on for trial within ten days, in which case any such application should ordinarily be made to the judge; (iii) the district registrar may refer any application to the judge if he thinks it desirable. c

7. In any case not specifically provided for, in this direction, the practice set out in the *Practice Direction*¹ of 9th December 1958 shall be followed as nearly as circumstances may permit and subject to any special directions of the judge.

8. In this direction 'district registrar' means the district registrar for the district in which the trial centre is situated, and 'judge' means the judge in charge of civil business at the trial centre. d

10th December 1971

WIDGERY CJ e

Practice Direction

QUEEN'S BENCH DIVISION f

Practice – Summons for directions – Assessment of case – Grading as to substance, difficulty or public importance – Duty of parties to furnish court with up-to-date details affecting assessment.

In order to assist in the listing of cases there will, in the order for directions, be added to the estimate of length of trial a provisional assessment of the substance, difficulty or public importance of the case, as follows: g

- 'A' —cases of great substance or great difficulty or of public importance;
- 'B' —cases of substance or difficulty;
- 'C' —other cases.

When at a later stage of the proceedings a party furnishes the court with an up-to-date estimate of the length of trial, he shall inform the court of any circumstances affecting such assessment. h

This practice direction is issued with the approval of Lord Widgery CJ, and has effect from 1st January 1972.

10th December 1971

W RUSSELL LAWRENCE
Senior Master j

¹ [1958] 3 All ER 678, [1958] 1 WLR 1291

Mouncer v Mouncer

FAMILY DIVISION

WRANGHAM J

1st, 2nd NOVEMBER 1971

- a**
- b** *Divorce – Separation – Living apart – Parties ‘living apart’ unless living with each other in same household – Two year separation and consent to divorce by respondent spouse – Parties living in same household within two years prior to presentation of petition but sleeping in separate bedrooms – Whether rejection of normal physical relationship sufficient to constitute ‘living apart’ – Divorce Reform Act 1969, s 2 (1) (d), (5).*
- c** The husband and the wife, who were married in 1966, were on very bad terms by August 1969 and from November 1969 slept in separate bedrooms in the matrimonial home. They continued to take their meals, cooked by the wife, together, often in the company of one or both of their children. They also shared the cleaning of the house making no distinction between one part of the house and the other, but the wife no longer did any washing for the husband. The only reason why the husband
- d** continued to live in the house was his wish to live with and help look after the children. In May 1971 the husband left the matrimonial home and in November presented a petition for divorce under s 2 (1) (d) of the Divorce Reform Act 1969. The question then arose whether the parties had, within the meaning of s 2 (5)^a of the Act, been ‘living apart’ for a continuous period of two years immediately preceding the presentation of the petition. The parties contended that on the true
- e** construction of s 2 (5) husband and wife were to be treated as living apart unless they fulfilled two separate requirements (i) living with each other; (ii) living in the same household; and that as they had not in any real sense been living with each other they had for the purposes of the Act been ‘living apart’.

Held – (i) Section 2 (5) of the 1969 Act was declaratory of the existing law and did not lay down two separate requirements; the words ‘in the same household’ were words of limitation (see p 291 f and h, post).

(ii) Where, as in the present case, a husband and wife were sharing the same household, a rejection of a normal physical relationship coupled with an absence of normal affection was not sufficient to constitute ‘living apart’ (see p 291 e, post).

(iii) Accordingly between November 1969 and May 1971 the husband and wife were not living apart for the purposes of the 1969 Act (see p 291 j, post).

g *Jackson v Jackson* [1924] P 19 applied.

Notes

For living apart, see 12 Halsbury’s Laws (3rd Edn) 241, 242, para 453, and for cases on the subject, see 27 Digest (Repl) 339, 340, 2809-2819.

h For proof of breakdown that the parties to the marriage have been living apart for a continuous period of two (five) years, see Supplement to 12 Halsbury’s Laws (3rd Edn) para 437A, 5.

For the Divorce Reform Act 1969, s 2, see Halsbury’s Statutes (3rd Edn) 1969 Vol, p 1328.

j Cases referred to in judgment

Hopes v Hopes [1948] 2 All ER 920, [1949] P 227, [1949] LJR 104, 113 JP 10, 27 Digest (Repl) 340, 2818.

Jackson v Jackson [1924] P 19, 27 Digest (Repl) 335, 2791.

a Section 2 (5) provides: ‘For the purposes of this Act a husband and wife shall be treated as living apart unless they are living with each other in the same household.’

Smith v Smith [1939] 4 All ER 533, [1940] P 49, 109 LJP 100, 162 LT 333, 27 Digest (Repl) 339, 2184. a
Wilkes v Wilkes [1943] 1 All ER 433, [1943] P 41, 112 LJP 33, 168 LT 111, 27 Digest (Repl) 340, 2816.

Petitions

In August 1969 the wife petitioned for divorce on the ground of cruelty and in his answer dated 22nd March 1971 the husband cross-prayed for divorce on the ground that the marriage had irretrievably broken down, alleging that the wife had behaved in such a way that he could not reasonably be expected to live with her. On 1st November 1971 the husband was given leave to file a petition for divorce under s 2 (1) (d) of the Divorce Reform Act 1969 and his petition was transferred to the court to be consolidated with the existing proceedings. The facts are set out in the judgment. b

N A Medawar and *B S Green* for the husband. c
M I Tennant for the wife.

WRANGHAM J. In this case, by a petition granted by leave of the court and transferred to this court to be consolidated with the existing proceedings, the husband prays for a divorce on the ground that the marriage has broken down irretrievably, and relies on the allegations that the parties have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition, and that the wife agrees to a decree being granted. It was proved that the wife consented to the decree. There is no reason to suppose the marriage has not broken down irretrievably. The sole question was whether it was proved that the parties had lived apart for two years before the petition was presented, i e before 1st November 1971. d

The facts are not in dispute. The parties were married on 17th June 1966 and there are two children of the family, a boy of five and a girl of four. By August 1969 the parties were on very bad terms, although they still shared a bedroom at a house at 49 Belmont Road, Sutton, in Surrey. On 13th August 1969 the wife presented a petition for divorce on the ground of cruelty. Sometime towards the end of that month it was served on the husband. He thereupon left 49 Belmont Road and for five weeks lived with his mother. An attempt at reconciliation was then made. On 25th September 1969 the parties went on holiday to Majorca for three weeks and at the end of the holiday they returned together to 49 Belmont Road. However the reconciliation was not a success, and after three weeks, i e sometime in November 1969, the wife left the matrimonial bedroom. Thereafter she slept with the girl in one bedroom and the husband slept with the boy in the other. From then until 12th May 1971, when the husband left 49 Belmont Road, and went to live with his mother once more, the position remained unchanged. The wife and husband, although in separate rooms, usually took their meals together, cooked by the wife, often but not always in the company of one or both of the children. Two or three days a week the husband attended a meeting at his place of work. The cleaning of the house continued to be done by the wife, except on Fridays and Saturdays when she went out to work all day, and on those occasions it was done by the husband. 49 Belmont Road has a dining room, a living room, two bedrooms, a kitchen and a bathroom. The evidence does not suggest that any of these rooms was particularly allocated to either husband or wife except to the extent that the husband and the boy slept in one room and the wife and the girl in the other; and husband and wife, when they respectively cleaned the house, made no distinction between one part of the house and the other. In his evidence the husband referred to one of the rooms (not his bedroom) as 'the room we lived in'. The wife, however, did no washing e
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- a for the husband. He made his own arrangements for that to be done elsewhere. The only reason why the husband continued to live in this way at 49 Belmont Road was his wish to continue to live with and help to look after the children. On these facts it seems to me to be beyond dispute that husband, wife and children were all living in the same household. There have, of course, been many cases in which it has been held under the former law that husband and wife were living apart even though they lived under the same roof: e.g. *Smith v Smith*¹ and *Wilkes v Wilkes*².
- b It is, however, to my mind plain that if this case were being considered under the old law it would be held that this husband and wife were living together up to 12th May 1971: see *Hopes v Hopes*³. But it is contended on the part of both the husband and the wife that the test under the new legislation is wholly different. Section 2 (5) of the Divorce Reform Act 1969 provides that for the purposes of the Act, a husband and wife shall be treated as living apart unless they are living with each other in the same household. It is argued that the effect of this subsection is that spouses are to be treated as living apart unless they fulfil two separate requirements. First they must be living with each other; second, they must be living in the same household.
- c On the facts of this case it is said the parties may be said to be living in the same household but they were not in any real sense living with each other. The wife had done all she could to reject her husband as a husband and to break the matrimonial relation between them by refusing to share his bedroom. It is hard to see how husband and wife who share a household could ever be said not to be living with each other unless rejection of a normal physical relationship coupled with the absence of normal affection is sufficient for this purpose. But if the effect of s 2 (5) is that spouses are to be treated as living apart whenever one spouse has refused the right of intercourse, and they are (as of course they naturally would be in such circumstances)
- d on bad terms, that would mean that the law laid down in *Jackson v Jackson*⁴ has been altered, and I think that if Parliament had intended to do that, it would have done so specifically.

The truth, in my opinion, is that s 2 (5) does not lay down two separate requirements at all. A clue to the true meaning of the subsection can be discovered from comparison with s 3 (6) which provides:

‘References in this section to the parties . . . living with each other shall be construed as references to their living with each other in the same household.’

- It is plain that in that subsection the words ‘in the same household’ are words of limitation. Not all living with each other is sufficient for the purposes of s 3 (6), only living with each other in the same household. And in my view the same applies to s 2 (5). What it means is that the husband and wife can be treated as living apart, even if they are living with each other, unless that living with each other is in the same household. It follows that in my judgment the draftsman of s 2 (5) was not providing for a case where parties live in the same household but do not live with each other. Indeed I do not think that there is such a case. In my view, the test
- h to be applied to determine whether parties are living apart or not is unaltered by s 2 (5) or s 3 (6), which are really declaratory of the existing law on this question. For these reasons I have come to the conclusion that it is not proved that these spouses were living apart between November 1969 and May 1971. On the contrary I think that during that period they were living with each other in the same household. The fact that they did this from the wholly admirable motive of caring properly
- j for their children cannot change the result of what they did.

Before concluding I should add that I have been greatly assisted by the arguments of both the learned counsel who addressed me and if I have not referred specifically to the arguments based on the cases decided in the Dominion courts, that does not

1 [1939] 4 All ER 533, [1940] P 49

2 [1943] 1 All ER 433, [1943] P 41

3 [1948] 2 All ER 920, [1949] P 227

4 [1924] P 19

mean that I did not carefully consider their arguments. My only complaint about the two learned counsel would be that they were on the same side; indeed had they been against one another, it would perhaps have been possible to have had an even more careful analysis of the problem from them.

Husband's petition and wife's original petition rejected; wife given leave to file new petition under s 2 (1) (b) of the Divorce Reform Act 1969; husband's cross-prayer to wife's original petition to stand as cross-prayer to wife's new petition; decree nisi granted to wife and to husband on his cross-prayer.

Solicitors: Lewis & Dick, agents for John Smythe, Sutton (for the husband); Sharpe, Pritchard & Co, agents for A R Drummond & Co, Epsom (for the wife).

Alice Bloomfield Barrister.

Kaur v Singh

COURT OF APPEAL, CIVIL DIVISION

DAVIES, KARMINSKI AND ROSKILL LJJ

28th OCTOBER 1971

Nullity – Wilful refusal to consummate marriage – Refusal to arrange religious ceremony – Marriage at register office – Mutual intention to hold subsequent religious ceremony – Parties being Sikhs knowing that consummation could only follow religious ceremony – Refusal by husband to arrange ceremony – Refusal constituting wilful refusal to consummate.

The parties who were Sikhs were married at a register office. The marriage had been arranged between the wife's brothers and her father on the one hand and the respondent husband on the other. In order fully to marry according to the Sikh religion and practice it was necessary to have not only a civil ceremony in a register office but also a Sikh ceremony in a Sikh temple. This was understood by all the parties concerned. After the ceremony the wife returned to the home of one of her brothers and the marriage was not consummated. It was the husband's duty to arrange the Sikh ceremony. The wife's brothers on a number of occasions approached the husband and asked him what he proposed to do about the religious ceremony. The husband gave various excuses until eventually he told the wife's brothers that he had no intention of arranging for the religious ceremony at all. The husband had never tried to persuade the wife to have sexual intercourse with him. The wife sought a decree of nullity on the ground of wilful refusal by the husband to consummate the marriage.

Held – The wife was entitled to a decree of nullity because from the time of the ceremony at the register office the husband had entirely refused and failed to implement the marriage and in failing to implement the marriage he had wilfully failed to consummate it (see p 295 c d and h, post).

Jodla v Jodla (otherwise Czarnomska) [1960] 1 All ER 625 applied.

Notes

For wilful refusal to consummate, see 12 Halsbury's Laws (3rd Edn) 232, para 434, and for cases on the subject, see 27 Digest (Repl) 280, 281, 2252-2259.

Case referred to in judgments

Jodla v Jodla (otherwise Czarnomska) [1960] 1 All ER 625, [1960] 1 WLR 236, Digest (Cont Vol A) 702, 2259b.

Appeal

This was an appeal by the wife, Surrindjit Kaur, from a judgment of his Honour Judge Lind-Smith given at Coventry County Court on 10th March 1971 refusing her petition for a decree of nullity of marriage on the ground of alleged wilful refusal

- a by the husband, Gian Singh, to consummate it. The facts are set out in the judgment of Davies LJ.

P J Cox QC and R J Toyn for the wife.

The husband did not appear and was not represented.

- b **DAVIES LJ.** This is an appeal by a petitioning wife from a judgment of his Honour Judge Lind-Smith given at the Coventry County Court on 10th March 1971. He had before him a petition by the wife (as I shall call her), who was a Sikh, for a decree of nullity of marriage on the ground of the alleged wilful refusal by the husband to consummate it. The learned judge heard the evidence on 27th January and then adjourned in, as it were, the middle of the hearing because he had expressed the view that perhaps this case and another similar one (the facts of which we do not know) presented some difficulty and might be thought to be better dealt with by a judge of the Probate, Divorce and Admiralty Division. However, on consideration, he thought that in the circumstances he had no jurisdiction to transfer, because he had heard the evidence, and he therefore proceeded to judgment on 10th March, dismissing the wife's petition.

- d The facts are in very short compass indeed. The husband had been living in this country for some seven to ten years prior to the events in question. He was, of course, a Sikh too. He was a student at, I think, Surrey University, where he met one of the brothers of the wife. The wife up to then had lived all her life in the Punjab, where she had been born. Eventually it was arranged between the brothers and, I think, the father of the wife, on the one hand, and the respondent husband on the other that he should marry the wife. There was apparently an engagement party held some time in the spring of 1968. On 30th November 1968 the wife arrived at London Airport and was met by, among others, the husband, and I dare say the brothers were there too. She had never seen the husband before but apparently they had corresponded to some extent between the time of the engagement party and her arrival at Heathrow. Having arrived, she went with one of her brothers to Leamington, where he was living. The husband continued to live in Shepherd's Bush. On 15th February 1969 they went through a ceremony of marriage at the Hammersmith Register Office, their respective ages then being, the husband 30 and the wife 22. That evening the wife went back with her brother to Leamington. She has not seen the husband from that day to this.

- g It is beyond question that in order fully to marry according to Sikh religion and practice it is necessary to have not only a civil ceremony in a register office but also a Sikh religious ceremony in a Sikh temple. It was the belief of all these parties, the wife and the brothers, and no doubt the husband as well, that they should in due course go through this Sikh ceremony. Indeed one of the brothers did at some time make tentative arrangements with, I think it is called, the committee of the Sikh temple for a religious ceremony to take place. No sign of any step by the husband in that behalf was forthcoming, and so the brother or brothers on a number of occasions approached him and asked him what he was proposing to do about this religious ceremony. He gave various excuses. On one occasion he said that he had got tonsillitis and was ill for a fortnight or so. On another occasion he said that he could not really deal with the matter at that particular time because he was engaged in writing a thesis for a doctor of philosophy degree and that he could not consider the matter while that was in hand. He failed, he apparently told one of the brothers, in his examination to get his degree. To put it quite shortly, on every occasion when one of the brothers spoke to him he gave one excuse or another. Finally he told them that he had no intention of arranging for the religious ceremony at all. As I have said, since the day of the wedding ceremony at the register office the husband and wife have never met at all.

Those are the facts. The judge was in no doubt as to the sincerity of the wife. He said he had doubts about the sincerity of the two brothers. What he meant by that I do not quite know and how it is relevant I do not know, for there is no doubt that they did approach the husband on more than one occasion. Then the judge goes on:

'There is no doubt in this case in respect of the [wife] that she regarded it as entirely wrong that she should live with her husband before the Sikh ceremony and in that I find the [wife] was entirely sincere . . . The marriage being spoken of [i.e. which was asked to be declared null] of course must be that in the Register Office, but according to the evidence, and I accept it, the [wife] did not expect or would not have allowed—a severe problem, no doubt, according to her view—sexual intercourse to take place: it is difficult to see, in my mind, how it could be said to be wilful refusal by the [husband]. I have no doubt at all of the sincerity of the [wife] in her views, but I have the gravest doubts, as I have said, about the sincerity of the [husband] in his views, because he evinced reluctance to arrange a Sikh ceremony immediately after the Register Office ceremony had been completed, and never did he give any sort of ground for failing to arrange a Sikh ceremony. I think I ought to add here a further finding of fact, that it appears to be the duty of the man to arrange for the Sikh ceremony.'

I confess that I find that passage a little difficult to understand. There was no evidence here of any approach by the husband to the wife, no evidence that the wife was refusing, on a sincere religious belief or at all, to have intercourse with him before a religious ceremony was performed. The naked facts were that he never went near her again, as I have said, and never tried to persuade her to live with him and have intercourse with him. It may very well be true that if he had made any such approach she, according to her religious beliefs, might have said that she was unwilling to allow it before the ceremony. But that never happened.

The learned judge had cited to him *Jodla v Jodla (otherwise Czarnomska)*¹, a decision of Hewson J. The learned county court judge managed—I am not quite sure how, I say with respect—to distinguish that case. For my part, I think it is indistinguishable. Indeed, I think that the present case is a stronger case than *Jodla v Jodla (otherwise Czarnomska)*¹. What happened in *Jodla v Jodla (otherwise Czarnomska)*¹ was this. The two parties were Poles and the woman was having to be sent back to Poland because her visa was going to expire; so in order that she should be able legally to remain in this country the parties, who were both Roman Catholics, went through a register office ceremony. The parties intended that thereafter they should be properly married according to the rites of their church. They never were. The husband, according to his evidence, was asked several times by the wife to make arrangements for the Catholic ceremony, but he failed to do so. They kept in contact, and on one occasion she rebuked him for not arranging the ceremony. I quote from the statement of the facts:

'... early in January, 1958, when the husband complained to the wife that she was not looking after him as a wife should, she replied that he had not arranged the church ceremony so that they could live together. Thereafter the parties drifted apart.'

There you have a case where the wife, consequent on the default by her husband, was refusing to live with him until he corrected that default and arranged the ceremony. Hewson J¹ took the view that that did not amount to wilful refusal by the wife, because she had a legitimate and proper excuse in the circumstances, and that it was the husband's conduct in failing to arrange the religious ceremony that resulted in the non-consummation of the marriage.

¹ [1960] 1 All ER 625, [1960] 1 WLR 236

a As I have said, I think that this case is a stronger case than that, and I am unable to accept, and indeed if I may say so without disrespect, I do not entirely understand the distinction which the learned judge here sought to draw between that case and this one. I refer to where he said in his judgment:

b 'Eventually Hewson J² was able to arrive at the conclusion that the refusal of the husband to arrange a further ceremony so put it out of his power to have sexual intercourse with the wife and accordingly he was able to grant the wife a decree. I cannot think that Hewson J would have found the same if there had been no evidence that the parties had tried to live together in the sense of making a home together. I think it is very different where the husband has actually been in a position to complain to the wife that she has not been looking after him as a wife should, and then they have drifted apart.'

c I cannot understand that distinction. The facts of this case, to my way of thinking, are as clear as they could be. This husband from the time of the register office ceremony entirely refused and failed to implement the marriage, and in failing to implement the marriage I think it is clear that he wilfully failed to consummate it. I would allow this appeal and grant the wife a decree.

d **KARMINSKI LJ.** I agree with the judgment of Davies LJ and would venture to emphasise what he has said about the error of the learned judge below in the passage Davies LJ has read from the judgment. It is clear from that passage that the learned judge below misdirected himself both on the facts and on the law. If in this case the learned judge had availed himself of the provisions of s 6 of the Matrimonial Causes Act 1965, I think it is at least possible that he would have avoided that particular error. That section allows the court to ask for help by way of argument before the court from counsel instructed under the direction of the Attorney-General on any question in relation to the matter which the court deems it necessary or expedient to have fully argued. That is a provision which is obviously of great help to the court when, as here, only one side is before the court. I hasten to add that what I am saying
e is not in the slightest degree disrespectful to the argument below of junior counsel for the wife, who put the matter fully, and obviously with great care and skill, before the learned county court judge. But the effect of that section is to let the court be quite certain that all the relevant facts and all the relevant authorities are put before it by a skilled and wholly neutral source. Speaking from my own experience I would say at once that in the past I have had very great help in difficult cases from the arguments of counsel instructed by the Queen's Proctor at the request of the court. I have called attention to s 6 because I have sometimes wondered whether that section
f is quite as well known as it perhaps ought to be.

g I agree with Davies LJ that this appeal succeeds and that the wife is entitled to a decree.

h **ROSKILL LJ.** I agree that this appeal must be allowed for the reasons which have been given by Davies and Karminski LJJ. It seems to me that *Jodla v Jodla* (otherwise *Czarnomska*)² is indistinguishable. But, if there be any distinction to be made between this case and *Jodla's* case², it is a distinction which on the facts leads inexorably to the result that the present is a stronger case.

j *Appeal allowed. Decree nisi granted.*

Solicitors: White & Leonard & Corbin Greener, agents for Coopers, Coventry (for the wife).

Mary Rose Plummer Barrister.

Langen & Wind Ltd v Bell

CHANCERY DIVISION

BRIGHTMAN J

19th, 22nd NOVEMBER 1971

Lien – Vendor's lien – Specific performance – Preservation of lien – Purchase of shares – Transfer of shares conditional on payment of purchase price – Calculation of purchase price in accordance with prescribed formula – Calculation not possible until future date – Vendor agreeing to execute transfer of shares in company to plaintiffs forthwith on termination of his employment with company – Price payable to be determined by valuation from company's accounts for two years following date of transfer – Whether plaintiffs entitled to order to execute transfer in advance of payment of purchase price.

The two plaintiff companies entered into an agreement in 1966 to employ the defendant as managing director, he being granted an option to purchase a certain proportion of the companies' shares. The defendant exercised this option and purchased shares in one of the companies. The agreement was subject to determination by either side at six months' notice; under the agreement the defendant undertook that, in the event of the termination of his employment for any reason, he would execute instruments of transfer in respect of shares held by him in the companies and deliver them to the third and fourth plaintiffs. The agreement further provided that 'the consideration payable to [the defendant] shall be for each share so transferred the prescribed price' which was to be calculated from sums appearing in the company's books of account and including inter alia a sum equal to the average of the annual net profit or loss contained 'in the Accounts of the Company approved and signed by two of its directors certified by its auditors and adopted by such Company at the two Annual General Meetings which immediately succeed the date of the transfer'. On 30th September 1970 the defendant's contract of service ended in consequence of a notice served by him. By a letter of 11th November the defendant was required to transfer the shares to the third and fourth plaintiffs in accordance with the agreement and it was intimated that the purchase money would be paid when the price had been calculated after the two accounting years ending 30th June 1972 had expired. The defendant refused to transfer the shares until he had been paid. The plaintiffs sought an order for specific performance in effect requiring the defendant to execute a transfer of the shares and deliver it with the relevant certificates to the third and fourth plaintiffs.

Held – Although under the contract the purchase money was not payable until a future date, the transfer of the shares was conditional on the payment of the purchase price, there being no separate covenant or security for it; accordingly, should the defendant transfer his shares in accordance with the agreement in advance of the calculation and payment of the purchase price he would be entitled in equity to an unpaid vendor's lien on the shares so transferred; in the circumstances the court ought not to grant the equitable relief of specific performance unless the order sought effectively safeguarded the defendant's equitable lien; since it failed to do this the order in the terms sought would be refused (see p 300 d e and h to p 301 a and c, post).

Notes

For a vendor's equitable lien for unpaid purchase money, see 24 Halsbury's Laws (3rd Edn) 156-158, paras 289-291, and for cases on the subject, see 32 Digest (Repl) 330-332, 591-608.

Cases referred to in judgment

Albert Life Assurance Co, Re, ex parte Western Life Assurance Society (1870) LR 11 Eq 164, 40 LJCh 166, 23 LT 726, 32 Digest (Repl) 327, 580.

Clarke v Royle (1830) 3 Sim 499, 57 ER 1085, 32 Digest (Repl) 332, 606.

- a* *Dixon v Gayfere, Fluker v Gordon* (1857) 1 De G & J 655, 27 LJCh 148, 30 LTOS 162, 44 ER 878, 32 Digest (Repl) 332, 605.
Nives v Nives (1880) 15 Ch D 649, 49 LJCh 674, 42 LT 832, 32 Digest (Repl) 332, 607.
Parrott v Sweetland (1835) 3 My & K 655, 40 ER 250, 32 Digest (Repl) 352, 753.
Stucley, Re, Stucley v Kekewich [1906] 1 Ch 67, [1904-07] All ER Rep 281, 75 LJCh 58, 93 LT 718, 32 Digest (Repl) 332, 609.

b **Cases and authorities also cited**

- Australian Hardwoods Pty Ltd v Comr for Railways* [1961] 1 All ER 737, [1961] 1 WLR 425.
Davies v Thomas [1900] 2 Ch 462.
Musselwhite v C H Musselwhite & Sons Ltd [1962] 1 All ER 201, [1962] Ch 964.
Odessa Tramways Co v Mendel (1878) 8 Ch D 235.
Parkes, Re, ex parte Parkes (1822) 1 Gl & J 228.
c *Wilkinson v Clements* (1872) 8 Ch App 96.
 Ashburner, *Principles of Equity* (2nd Edn).
 Chitty on *Contracts* (23rd Edn).
 Keeton and Sheridan, *Equity*.
 Snell's *Equity* (26th Edn).

d **Procedure summons**

- By a writ issued on 16th February 1971 the plaintiffs, Langen & Wind Ltd, Bell Partners Ltd, Nicholas Langen and Gerald Wind, sought specific performance of two contracts in writing between the plaintiffs and the defendant, Simon Bell, dated 24th June 1965 and 6th January 1966. By summons dated 15th April 1971 the plaintiffs applied, inter alia, for an order pursuant to RSC Ord 86 for specific performance of the two contracts. The facts are set out in the judgment.

- e* *M H Potter* for the plaintiffs.
H M Boyd for the defendant.

- f* **BRIGHTMAN J.** The summons before me raises a short but not altogether easy point and one that in the experience of counsel before me seems to be without any direct guidance from the authorities. The action is a purchaser's action for specific performance of an agreement for the sale of shares. Under the terms of the contract it is not possible to calculate the exact purchase price until at earliest the second half of 1972. The plaintiffs seek an order for specific performance under which the defendant will be required to transfer the shares into the unincumbered ownership of the purchasers forthwith. The defendant objects to parting with the shares until he has been paid.

- g* There are four plaintiffs: the first is an English company, Langen & Wind Ltd, called in the contract 'the sales company'; the second is Bell Partners Ltd, also an English company and called 'the production company'; the third and fourth plaintiffs are Mr Nicholas Langen and Mr Gerald Wind, both of whom are resident in the United States of America. The defendant is Mr Simon Bell, who lives in this country.

- h* The agreement containing the contract of sale was dated 24th June 1965. It was expressed to be made between the sales company of the first part, the production company of the second part, Mr Langen and Mr Wind of the third and fourth parts and Mr Bell, the defendant, of the fifth part. Under cl 1 and 2 the production company agreed to employ Mr Bell as managing director until mid-1970, and thereafter until determination by either side on six months' notice. Clause 8 gave Mr Bell an option to acquire by subscription or purchase a certain proportion of the shares of the production company and of the sales company. He exercised that option to the extent of 1,000 shares in the production company. I am not certain whether or not he also exercised it in respect of the shares in the sales company, but those shares are not the subject of the summons before me, and I need not consider them. Clause 17 provided as follows:

'(a) In the event of the termination of [the defendant's] employment hereunder for any reason whatsoever [the defendant] shall forthwith and upon demand execute Instruments of Transfer in respect of all the shares then held by [the defendant] in the Production Company and the Sales Company to Mr. Langen and Mr. Wind in equal shares or as they may direct and deliver the same together with all share certificates in respect thereof to Mr. Langen and Mr. Wind or as they may direct (b) In respect of shares so transferred as above the consideration payable to [the defendant] shall be for each share so transferred the prescribed price calculated as mentioned in sub-clause (c) of this clause (c) THE "prescribed price" shall mean the sum per share produced by adding together in the case of the Production Company or the Sales Company (as the case may be):—(i) the nominal amount of the equity share capital (as defined in Section 154 of the Companies Act 1948) of such Company (ii) the aggregate amount of all the capital and reserves of such Company (other than any reserve for future taxation) and including therein such amount as stands to the credit or debit of Profit and Loss Account and (iii) a sum equal to the average of the annual net profit or loss (before taxation but after making all other necessary provisions) as contained in the Accounts of the Company approved and signed by two of its directors certified by its auditors and adopted by such Company at the two Annual General Meetings which immediately succeed the date of the transfer and by dividing the resulting sum by the aggregate number of issued shares in the capital of the Production Company or the Sales Company (as the case may be) (d) ANY price calculated in accordance with the foregoing provisions of this Clause shall be certified by the Auditors for the time being of the Production Company or the Sales Company (as the case may be) who in so certifying shall be deemed to be acting as experts and not as arbitrators.'

By a supplemental agreement dated 6th January 1966, the agreement was formally adopted by the production company, which was in fact incorporated after the date of this principal agreement, and therefore had not executed the same.

On 30th September 1970 the defendant's contract of service ended in consequence of a notice served by him. By a letter of 11th November 1970 the defendant was required to transfer the shares to Mr Langen and Mr Wood in accordance with cl 17 of the agreement. It was intimated that payment would be made after the purchase consideration had been calculated; and that such calculation could not be made until the two accounting years ending 30th June 1972 had expired, and the accounts for those two years had been made up, audited and adopted at annual general meetings. The defendant declined to transfer the shares until he had been paid.

A writ for specific performance was issued on 16th February 1971 and in April a summons under RSC Ord 86 was taken out for specific performance of the contract. The minutes of the order to which the plaintiffs claimed to be entitled are in this form; first of all a declaration that the contract ought to be specifically performed and carried into execution, then an enquiry as to any damage sustained by reason of any delay, and then this paragraph:

'It appearing that the defendant is a party to the said contracts and was appointed managing director of the [production company] thereunder and his said appointment having determined upon September 30, 1970 and the defendant being the registered owner of 1,000 ordinary shares in the [production company] issued on May 10, 1966 and the plaintiffs having demanded of the defendant that he execute an instrument of transfer in respect of the said shares, let the defendant execute the said instrument of transfer and deliver the same together with the share certificate in respect of the said shares to the [production company] within 14 days.'

- a So that the order for specific performance which is sought is really nothing more than a mandatory order on the defendant to execute a transfer and hand it over together with the share certificates.

The plaintiffs' argument is that cl 17 of the principal agreement is perfectly clear; that it requires on the part of the vendor an immediate execution of a transfer and an immediate delivery of the share certificates; and on the plaintiffs' part a deferred

- b payment of the whole of the purchase price. Therefore, it is said, the plaintiffs can come to court for specific performance of the only part of the agreement which is at present ripe for performance.

Counsel for the plaintiffs accepted the general principle which appears in *Fry on Specific Performance*¹:

- c 'It is, as we have already seen, a principle of the court, that it will not compel specific performance of executory contracts unless it can at the time execute the whole contract on both sides.'

But this, counsel said, is subject to an exception²:

- d 'It is hardly needful to repeat that the principle will not apply to contracts which, though they may be entire and single in themselves, contemplate a separate and piecemeal performance of separate parts. There, in the absence of other objection, the court will carry into effect the intention of the parties.'

This contract, it was said, falls within that exception.

- e Specific performance is an equitable remedy, granted on equitable principles. In considering whether to grant that remedy in a case such as the present, a court administering equity ought in my judgment to have regard to another equitable principle, namely that in equity an unpaid vendor is entitled to a lien on the subject-matter of the sale, although he has parted with possession of the subject-matter, and although under the contract the purchase money is not payable until a future date, unless the parties have expressly or by implication excluded such a lien.

- f So far as future instalments of the purchase money are concerned it seems to me quite clear on authority that the equitable lien of the unpaid vendor applies in respect of such instalments. I refer to *Nives v Nives*³, where Fry J made the following order in a vendor's specific performance action:

'Declare the Plaintiff entitled to specific performance of the agreement, and to a lien on the leasehold interest of the Plaintiff for the entirety of the unpaid purchase-money and future instalments . . .'

- g It is not necessary for me to cite any authority—because it is not disputed, and rightly so, by counsel—that the equitable lien for unpaid purchase money is not lost by parting with possession.

It will be convenient to read a brief passage from the judgment of Sir James Bacon V-C in *Re Albert Life Assurance Co, ex parte Western Life Assurance Society*⁴:

- h 'Now, although the rule of law upon which the doctrine of an unpaid vendor's lien depends must be very frequently influenced by the particular circumstances of each case in which it is said to arise, there is one plain principle which guides and governs its application in all cases. If it be expressed, or can be safely and properly inferred from documentary or other evidence, or from the nature of the contract, that it was the intention of the parties that the sale or transfer, however absolute in its terms, was subject to the condition that the purchase-money should be paid, or that the thing contracted to be done by the vendee should
- j

¹ 6th Edn, p 386, para 830

² 6th Edn, p 390, para 840 (i)

³ (1880) 15 Ch D 649 at 650

⁴ (1870) LR 11 Eq 164 at 178, 179

be performed, the lien will prevail. If, on the other hand, no such inference can be properly drawn—if the performance of the thing contracted to be done by the vendee was not the condition upon which the transfer was made, but the engagement to do the thing was the consideration for the transfer, the vendor, having accepted that engagement, has the very thing he bargained for, and cannot say that the consideration has not passed to him. In such cases the lien cannot prevail. The rule I have mentioned and its application cannot be more pointedly illustrated nor more clearly expressed than in the judgment of Lord Cranworth in *Dixon v. Gayfrere*⁵.

The same principle is established by *Parrott v Sweetland*⁶ and *Clarke v Royle*⁷ and Lord St Leonards⁸ in commenting on the latter case states:

'There is a marked distinction between a conveyance as for money paid, with a separate security for the price, whether by covenant, bond, or note, and a conveyance expressed to be in consideration of a covenant which the purchaser enters into by the deed itself.'

In the case before me there is no separate covenant or security for the purchase price. There was not in express terms any covenant at all for the payment of the purchase price, nor even any express identification of those who were to pay it. All that the agreement says is that 'the consideration payable to [the defendant] . . . for each share so transferred' shall be so much. Therefore it seems to me that the parties have not by their contract purported to exclude the lien which *prima facie*, as it seems to me, arises in the case of a vendor who has not (either under the terms of the contract or in the events which have happened) been paid the full purchase price.

I think it right that I should add—although this again is common ground between the parties—that an unpaid vendor's lien extends not only to land but to all property over which a court of equity will assume jurisdiction in the case of a contract of sale; see for example *Re Stucley*, *Stucley v Kekewich*⁹. I therefore reach the conclusion that if and when the defendant transfers his shares to Mr Langen and Mr Wind in accordance with the terms of cl 17 of the principal agreement in advance of the calculation and payment of the purchase price he will be entitled in equity to a lien on the shares so transferred.

Now here, I think, a difficulty is encountered. If the lien arose in the case of a sale of land there would be no problem. If the land were registered, no doubt a caution could be put on the register to protect the lien; if unregistered, no doubt there is a comparable notice which could be entered in the land charges register. But in the case of an unincorporated company such as the production company, it will not be possible to require the company to accept notice of the lien. So clearly, although in my judgment the lien exists, it can quite easily be lost, because someone may purchase the shares from Mr Langen or Mr Wind without notice of the existence of the lien, or otherwise in circumstances which override the lien.

The question I have to determine is whether a court of equity ought to require some effective steps to be taken to preserve the lien as a term on which the court is prepared to grant specific performance. Having regard to the fact that specific performance is an equitable remedy and to some extent discretionary—although of course that discretion can only be exercised along well-established lines—it seems to me equitable that the court should impose a term which will protect this other equity. In my judgment in circumstances such as arise in the case before me a court of equity ought not to grant the equitable relief of specific performance unless

5 (1857) 1 De G & J 655

6 (1835) 3 My & K 655

7 (1830) 3 Sim 499

8 See Lord St Leonards on Vendors and Purchasers, 14th Edn, 1862, p 673

9 [1906] 1 Ch 67 at 79, [1904-07] All ER Rep 281 at 285

- a the order sought will effectively safeguard the unpaid vendor's equitable lien for his purchase money.

Now the order which I am asked to make on the summons and the minutes of order is one which neither seeks to preserve such lien nor even acknowledges its existence. At the start of the case I asked counsel for the plaintiffs whether he was able, on behalf of the plaintiffs, to offer any charge on the shares or security of any type for the unpaid purchase money. He told me that Mr Langen and Mr Wind were not in this country, that there was a difficulty in communicating with them, and that his instructions did not extend to offering any such security. I am not sure whether, on this second day of the hearing, the plaintiffs' counsel may not now have wider authority than on the first day, but he tells me that he primarily seeks an order in the terms of the minutes which have been placed before the court; and that he desires a decision whether he is entitled to that order, before, as a second best, any question of security arises. For the reasons I have given I conclude that on the facts of the present case, and applying principles of equity, the plaintiffs are not entitled to the relief which is sought by the summons in its present form, but I will give the plaintiffs' counsel an opportunity to apply to me for leave to amend the summons if he so wishes, and in case any such application is made to offer proper security, should that arise.

d *Consent order made whereby the defendant was to execute an instrument of transfer and deliver it with the share certificates to the second plaintiffs but the second plaintiffs' solicitors were to hold the shares as stakeholders until payment of the purchase price.*

Solicitors: Meredith & Co (for the plaintiffs); Adam Shale & Garle (for the defendant).

e Richard J Soper Esq Barrister.

Riggall v Hereford County Council

QUEEN'S BENCH DIVISION

f LORD WIDGERY CJ, BROWNE AND BRIDGE JJ
8th NOVEMBER 1971

g *Quarter sessions – Costs – Civil proceedings – General rule – Costs following event – Proceedings by member of public as complainant against highway authority – Complainant having proprietary right directly affected by outcome of proceedings – Justices finding in complainant's favour – Absence of special circumstances – Complainant entitled to award of costs.*

h The appellant served a notice on the respondent highway authority under s 59 (2)^a of the Highways Act 1959, requiring them to state whether or not they admitted that a certain piece of road was highway maintainable at the public expense. The respondents did not make the appropriate admission and accordingly the appellant brought proceedings in quarter sessions for an order that the highway be maintained by the respondents. The road in question was some two miles long and for some 600 yards formed the only means of vehicular access to the appellant's premises. At the hearing the justices found in the appellant's favour that the road was a highway repairable at the public expense. They decided, however, to make no order as to costs on the grounds that the work of making up the road would involve great expense, most if not all of little value to the public, and that the success of the application meant

a Section 59 (2), so far as material, provides: 'A person . . . who alleges that a way . . . (a) is a highway maintainable at the public expense . . . and (b) is out of repair, may serve a notice on the highway authority or other person alleged to be liable to maintain the way . . . (in this . . . section referred to as "the respondent") requiring the respondent to state whether he admits that the way . . . is a highway and that he is liable to maintain it.'

that a substantial and uncovenanted advantage accrued to the appellant; they concluded by observing that it was possible that the public highway might nevertheless be stoppeed up under other provisions of the 1959 Act. a

Held – Although in cases where a successful complainant in civil proceedings before quarter sessions was merely acting as a member of the public, it was possible that the court might have some discretion to deprive him of his costs on the footing that the public themselves had not benefited adequately out of the bringing of the proceedings in the present case the appellant was not just a member of the public but had in fact a proprietary right which was directly affected by the outcome of the proceedings; accordingly the ordinary rule in civil proceedings, that costs followed the event, prima facie applied and, in the absence of any adequate reason for depriving him of his costs, an award should be made in his favour (see p 305 c and f to j, post). b

Dictum of Sir George Jessel MR in *Cooper v Wittingham* (1880) 15 Ch D at 504 applied. c

Notes

For costs of a successful applicant, see 30 Halsbury's Laws (3rd Edn) 421, 422, para 796, and for cases on the subject, see 51 Digest (Repl) 885-895, 4376-4466.

Case referred to in judgment

Cooper v Whittingham (1880) 15 Ch D 501, 49 LJCh 752, 43 LT 16, 51 Digest (Repl) 885, 4380. d

Cases also cited

Donald Campbell & Co Ltd v Pollak [1927] AC 732, [1927] All ER Rep 1.
Instrumatic Ltd v Supabrase Ltd [1969] 2 All ER 131, [1969] 1 WLR 519.

Case stated

This was an appeal by way of case stated by justices for the county of Hereford in respect of their adjudication sitting as quarter sessions on 23rd and 24th November 1970. The appellant, Patrick Hugh Riggall, appeared before the justices as an applicant for an order under s 59 (3) of the Highways Act 1959 that the respondents, Hereford County Council, as the relevant highway authority should put into proper repair within such period as might be specified a certain way known as Croft Lane lying in part in the parish of Yarpole in the county of Hereford for its length between places known as 'The Broad' and 'Barr's Croft'. The appellant contended this way was a highway for all purposes maintainable by the respondents and that it was out of repair. e

On 8th December 1970 the justices delivered their determination in writing in which they found that the relevant part of Croft Lane was a highway for all purposes maintainable by the respondents and that it was out of repair and they ordered the respondents to put the relevant part of Croft Lane into proper repair within a period of 12 months from 1st December 1970. The justices allowed the application and made no order as to the costs of the appellant in making the application. The appellant being dissatisfied with that part of the determination by which no order was made for his costs as being in error in point of law he requested the justices to state a case for the opinion of the High Court and the justices agreed to do so. f

On the hearing of the application the following facts were proved or admitted. The relevant part of Croft Lane had never been maintained by any highway authority in the past. The respondents had consistently denied any obligation to maintain the relevant part of Croft Lane until by a letter dated 2nd October 1970 addressed and sent to the appellant's solicitors they admitted that the relevant part of Croft Lane was a public bridleway. The relevant part of Croft Lane was manifestly out of repair but such disrepair with regard to the first 1,300 yards of the lane from the Broad, for 600 yards of its length from the appellant's farm to the Riddle and for 800 yards north of the Riddle was the result of many years of disuse. The appellant purchased his farm known as Lypiatts Farm (formerly Cabbage Hall) in 1969. g

It was contended for the appellant on the question of costs at the hearing that in the h

i

a event of the appellant succeeding in showing that the relevant part of Croft Lane was a highway for all purposes maintainable by the respondents, the respondents should be ordered to pay the appellant's costs. It was further contended that if the appellant should fail to do so he should nevertheless be entitled to costs up to 2nd October 1970, the date on which the respondents made the admission by letter that the relevant part of Croft Lane was a public bridleway.

b It was contended for the respondents on the question of costs at the hearing that in the event of the respondents succeeding the appellant should be ordered to pay the respondents' costs and on the matter of the admission and generally the court had an unfettered discretion about costs. Reference was made to s 60 (1) (d) of the Highways Act 1959.

c On reserving their determination the deputy chairman of the justices indicated that he was disposed, subject to anything his fellow justices might hold, to award costs of the day of the hearing to the side which substantially succeeded subject to a possibility (which was doubted) that some allowance might be made for those costs incurred as a result of a failure to admit that which had been subsequently admitted.

d On the facts stated above the justices came to the following conclusions with regard to the question of costs. The work of making up the relevant part of Croft Lane would involve great expense most if not all of which would be of no value to the public. The success of the application meant that there would accrue to the appellant and possibly others a substantial and uncovenanted advantage and that s 38 (2) (a) of the Highways Act 1959 created this anomalous result. It was not suggested by the appellant that the price he paid for his farm failed to reflect the financial burden of maintaining the length of Croft Lane fronting his farm. It was not suggested by the appellant that he purchased the farm in the belief that the length of Croft Lane leading to it was maintainable at public expense. The application seemed to the justices to lack merit in as much as they would have made no order if they had been empowered to apply s 50 or 108 of the 1959 Act to the way in question. The justices, accordingly, made no order as to the appellant's costs.

F A Allen for the appellant.

f *D W Keene for the respondents.*

LORD WIDGERY CJ. This is an appeal by case stated by justices for the quarter sessions of Hereford, who on the application of the appellant made an order against the respondents, the Hereford County Council, that a certain piece of road known as Croft Lane in that county was a highway maintainable at public expense under s 59 (2) of the Highways Act 1959. No question arises as to the propriety of the quarter sessions' decision that this road was a highway of the kind described. The only question put before us as a question of law is whether or not quarter sessions erred in refusing to make an order for costs in favour of the appellant.

h From that somewhat unpromising material an extremely interesting and quite important debate has resulted, and we would like to thank counsel on both sides for their assistance. The matter can be put quite shortly: under s 59 there is a procedure whereby any person, and I stress the words 'any person', who alleges that a way or bridge is a highway maintainable at public expense may serve notice on the highway authority requiring that authority to state whether or not it admits that the way or bridge in question is a highway, and that it is liable to maintain it.

i The section goes on with further machinery depending in its application on whether the original recipient of the notice does or does not admit the facts alleged. In particular, if the authority on whom the notice is served does not within a specified time agree that the way or bridge in question is a highway and repairable at public expense, then the complainant, who is the man who originally served the notice, may bring proceedings in quarter sessions for an order that the highway be maintained by the highway authority.

All that was done in the present case. The appellant served what is admittedly a proper notice under the section; the highway authority, the respondents, were not prepared to accede to what he had alleged in the notice. Initially the respondents maintained that there was no public highway over the road in question at all, but at a later stage, some month or so before the hearing, the respondents did concede that there was a public bridleway over the road in question, but disputed to the end the claim of the appellant that there was a public right of way for all purposes. In the end, the justices found in favour of the appellant, and in a judgment which is incorporated in the case they review the evidence, and it is really fair to say that the evidence was all one way, and that the ultimate conclusion that this was a highway repairable by the public was not one to be escaped.

Then came the question of costs. The parties had left the matter, when quarter sessions reserved their judgment, with mutual submissions that he who succeeded in the issue should have his costs. But somewhat to the surprise of the appellant, when the justices made a conclusion in his favour, they directed that there should be no order as to costs. Their reasons for making no order have been explored and are set out in detail in the case before us. It is worth observing, in order to understand the reasons, that the road in question was some two miles long and for some 600 yards of it, it formed the only means of vehicular access to the appellant's premises. It was therefore right to say that he had a special interest in the outcome of these proceedings, special and superior to the interests of the ordinary public at large. In deciding not to make an order for costs in his favour, the quarter sessions relied on the following reasons. They stated that:

'The work of making up the relevant part of Croft Lane would involve great expense most if not all of which would be of no value to the public.'

This is clearly reflecting the special interests of the appellant to which I have referred. They go on to say: 'The success of the application meant that there would accrue to the [appellant] and possibly others a substantial and uncovenanted advantage...' and that this anomalous result was created by the provisions of the Highways Act 1959, to which I have referred. They went on:

'It was not suggested by the [appellant] that the price he paid for his farm failed to reflect the financial burden of maintaining the length of Croft Lane fronting his farm. It was not suggested by the [appellant] that he purchased the farm in the belief that the length of Croft Lane leading to it was maintainable at public expense.'

Finally they observed, and I paraphrase their wording here somewhat, that the matter is not finalised by their decision because under other provisions of the Highways Act 1959 it is possible that this public highway, now established as such, may nevertheless be stopped up under machinery contained in the Act, to the details of which I do not refer.

Before us, the argument of counsel for the appellant has been that the reasons given by the justices are reasons on which their conclusions could not properly be based. He says that they are irrelevant considerations not proper to be used in determining this issue, and he says that since this argument, in his submission, applies to all the reasons the justices have given, one must conclude that there are no good reasons to sustain their decision to refuse costs. He asks us to give effect to that argument by making an order for costs in his favour now.

Counsel for the respondents opened an entirely new window on the scene by pointing out that this kind of litigation is not in all respects similar to ordinary party and party litigation. In ordinary civil litigation between parties, counsel would accept the ordinary rule that costs follow the event, but here he says it is not litigation between the appellant as one party and the respondents as another party. The application initiated by the appellant, so the argument goes, is an application on behalf

a of the public and not on behalf of himself and counsel for the respondents argues that in those circumstances it is perfectly open to the quarter sessions to say that in their view the public will gain very little as a result of all that has been done, and inferentially that the costs involved in the proceedings were not really merited by the advantage to the public which would follow. Accordingly, he said, it is open to the justices to say that the public should not be fairly expected to pay the costs of the proceedings when the benefit to them is so minimal and there was here a sufficient reason for the
b justices to exercise their discretion in the way in which they did.

I would approach this problem on these lines. In criminal cases any conception that costs follow the event is a very dangerous conception, and one which I would not attempt to encourage. But in the case of purely civil proceedings in quarter sessions, I would have thought the general principle that costs follow the event should
c apply in the same way as it applies in litigation in ordinary civil proceedings in the civil courts.

We were referred to a dictum of Sir George Jessel MR in *Cooper v Whittingham*¹, where he said:

‘As I understand the law as to costs it is this, that where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion, and cannot take away the plaintiff’s right to costs. There may be misconduct of many sorts: for instance, there may be misconduct in commencing the proceedings, or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the Court to refuse costs; but where there is nothing of the kind the
d rule is plain and well settled, and is as I have stated it.’

For my part I think that that ought to be a general guiding line in regard to costs in the civil jurisdiction of quarter sessions. But I still recognise the argument put forward by counsel for the respondents that there will be cases where the circumstances are such that the litigation is not on a par with ordinary civil litigation *inter partes*. I
f for my part reserve for further consideration on another day the submission made by counsel for the respondents that if the complainant in proceedings such as the present is acting merely as a member of the public, there may well have to be some discretion left in quarter sessions to deprive him of his costs after success, on the footing that he is no more than a member of the public, and the public themselves have not benefited adequately out of the bringing of the proceedings. I would leave that as I say for further and more detailed consideration on another day. But where as here
g the complainant is not just a member of the public but has in fact a proprietary right which is directly affected by the outcome of the proceedings, in those circumstances in my judgment the ordinary rule in regard to costs in civil proceedings should *prima facie* apply, and in the absence of any adequate reason for depriving such an appellant of his costs, I think it would follow that an award of costs should be made in his
h favour. I accordingly for my part would allow this appeal and order that the costs of the appellant in the court below should be paid by the respondents.

BROWNE J. I agree.

BRIDGE J. I agree.

j Appeal allowed.

Solicitors: Owen, White & Catlin, agents for Durrad, Davies & Co, Nantwich (for the appellant); Gibson & Weldon, agents for Clerk to Hereford County Council (for the respondents).

N P Metcalfe Esq Barrister.

R v Rowlands

COURT OF APPEAL, CRIMINAL DIVISION

EDMUND DAVIES AND STEPHENSON LJJ AND WALLER J

2nd, 16th NOVEMBER 1971

Criminal law – Indictment – Joinder – Joint charge of assault occasioning actual bodily harm – One accused acquitted for want of sufficient evidence – Jury told acquittal of one accused no bar to conviction of other accused – Other accused convicted – No evidence of joint action between two accused – Whether evidence of joint action necessary before second accused could be convicted.

The appellant and W were jointly charged with assault occasioning actual bodily harm. At the close of the prosecution case the jury were directed to acquit W for want of sufficient evidence. In his summing-up the trial judge directed the jury that the acquittal of W was no bar to a verdict of guilty against the appellant but he made no reference to any need for evidence of joint action between the appellant and W. The appellant was convicted. On appeal the question arose whether, since W had been acquitted, the appellant could be found guilty without some evidence that he had been acting jointly with W.

Held – Where one of two persons jointly charged with an offence was found guilty, a jury could not convict the other without evidence that he had acted jointly with the first, since there would be two offences found where only one was charged. Where, however, the first accused was acquitted of the joint offence, there was no question of the other being found guilty of a second offence and no need for evidence that he had acted jointly; the joint offence disappeared with the acquittal of the first accused and the second accused could be convicted of the offence charged as if he had been charged in a separate court with an independent offence (see p 309 c and d, post).

R v Scaramanga [1963] 2 All ER 852, *R v Parker* [1969] 2 All ER 15 and *R v Merriman* [1971] 2 All ER 1424 distinguished.

Notes

For joinder of offences or defendants, see 10 Halsbury's Laws (3rd Edn) 391, 392, paras 708, 710, and for cases on the subject, see 14 Digest (Repl) 253, 254, 2189-2212.

For permissible verdicts, see 10 Halsbury's Laws (3rd Edn) 428, para 790, and for cases on the subject, see 14 Digest (Repl) 355, 356, 3447, 3448.

Cases referred to in judgment

R v Merriman [1971] 2 All ER 1424, [1971] 2 WLR 1453.

R v Parker [1969] 2 All ER 15, [1969] 2 QB 248, [1969] 2 WLR 1063, 133 JP 343, 53 Cr App Rep 269, Digest (Cont Vol C) 202, 3463a.

R v Scaramanga [1963] 2 All ER 852, [1963] 2 QB 807, [1963] 3 WLR 320, 127 JP 476, 47 Cr App Rep 213, Digest (Cont Vol A) 399, 6653a.

Cases and authority also cited

R v Butterworth (1823) Russ & Ry 520.

R v Hempstead and Hudson (1818) Russ & Ry 344.

Archbold's Criminal Pleading, Evidence and Practice, 37th Edn, 1969, para 577.

Appeal

This was an appeal by Andrew Malcolm Rowlands against his conviction on 7th October 1971 at Oxford City Quarter Sessions before the deputy recorder (I J Black

a Esq QC) and a jury of assault occasioning actual bodily harm. He was sentenced to serve three months at a detention centre. He applied for leave to appeal against sentence. The facts appear in the judgment of the court.

A R F Redgrave for the appellant.

J R A Rampton for the Crown.

b

Cur adv vult

16th November. **STEPHENSON LJ** read the judgment of the court at the invitation of Edmund Davies LJ. The appellant was tried at Oxford City Quarter Sessions on an indictment containing three counts. On count 1 his brother Roger (Dick) Rowlands was charged with assaulting Lajos Nagy thereby occasioning him actual bodily harm on 23rd July 1971 in the city of Oxford. On that count he was convicted and sentenced by the deputy recorder to 18 months' imprisonment. On count 2 the appellant and a man named Woodward were charged with assaulting Nagy thereby occasioning him actual bodily harm on the same date and at the same place. On the direction of the deputy recorder, the jury acquitted Woodward, but they convicted the appellant and he was sentenced to three months' detention in a detention centre. A third count charged Mr Nagy's wife with maliciously wounding the appellant on the same date and at the same place. She was acquitted.

d

The appellant appeals against his conviction under s 1 (2) of the Criminal Appeal Act 1968 on a certificate granted by the deputy recorder on this ground:

e

'[The appellant] and Barry Ronald Edward Woodward were jointly charged in one count of the indictment with an assault occasioning actual bodily harm to Lajos Nagy. I directed the jury to acquit Woodward at the close of the prosecution case for want of sufficient evidence against him. In summing up I directed the jury in the case of [the appellant] that if they came to the conclusion that the charge against him of occasioning Nagy actual bodily harm is proved then it was their duty to convict him of it, and the fact that upon my direction they acquitted Woodward who was charged in the same count is no bar to that verdict. In the course of my summing up I made no reference to any need for there to be evidence that [the appellant] was acting jointly with Woodward.'

f

Counsel for the appellant makes a second point, that the evidence did not establish that any injury suffered by Mr Nagy was inflicted by the appellant and therefore if the appellant was guilty of anything it was of common assault. Counsel for the Crown concedes that this is so and asks us to substitute a verdict of common assault if we decide the point certified against the appellant.

g

All three counts arose out of incidents on the night of 23rd July 1971. Mr and Mrs Nagy were selling 'hot dogs' from a motor van in the street. Dick Rowlands and the appellant arrived in a car driven by Mr Woodward (who was their brother-in-law); there was a fourth man with them. There was some cause of friction between Dick and Mr Nagy and they got into a fight. The case against the appellant was that he joined in to assist Dick; he claimed that he was never more than a spectator. At some stage the appellant suffered a wound as a result of a blow by Mrs Nagy and this, it was said, so infuriated Dick and the others that they attacked Mr Nagy with considerable ferocity. Mr Nagy said that Dick abused him and then struck him. He grappled with Dick who then butted him in the face. Then others from the car, including the appellant, joined Dick in attacking him. He was, however, not sure that Mr Woodward took part. He went to the ground and suffered a one inch cut over his nose and bruising on his head and body. Mrs Nagy said that she saw the appellant and others attacking her husband. She went to his assistance and punched the appellant. She forgot that she had a kitchen utensil in her hand, and this caused a serious cut on the appellant's throat.

h

j

The affair was witnessed by two men called Morris and Bellinger. Mr Morris said he saw Mr Nagy chasing Dick, then there was a cry from the appellant that his throat had been cut and thereafter 'all hell was let loose'. Mr Bellinger said there was a scuffle between Dick and Mr Nagy. Others including the appellant but not Mr Woodward joined in, and Mr Nagy went to the ground. After some fighting he saw that the appellant had a throat wound and after this Dick and others attacked Mr Nagy violently and he was kicked and punched. Dick Rowlands said that Mr Nagy was the aggressor at the outset. He agreed that later someone kicked Mr Nagy; he would not, or could not, say who it was. He said that after the appellant was hurt his only concern was to take him to hospital. He made a statement to the police in which he appeared to take sole responsibility for Mr Nagy's injuries. The appellant said that he only watched whilst Dick and Mr Nagy struggled. A man called Sparks joined in and kicked Mr Nagy. Then Mrs Nagy attacked him. At the hospital he at first told the doctor that he had got his injury by walking into a lamp-post. In a statement to the police he denied attacking Mr Nagy.

Counsel for the appellant does not now contend that the acquittal of Mr Woodward on count 2 is a bar to the conviction of the appellant on the same count. But he submits that once Mr Woodward was acquitted, the jury could not find the appellant guilty without some evidence that he was acting jointly with Mr Woodward in assaulting Mr Nagy, and as there was no such evidence of joint action the jury should have been directed to acquit him too. Counsel for the Crown concedes that there was no evidence of joint action with Mr Woodward, but says that there need not be.

If the submission made on behalf of the appellant is right, the results are startling. Take the case of two men indicted for burglary in one count, one as the person actively entering the premises as a trespasser, the other as the look-out man, together concerned in a joint enterprise. If the jury acquit the look-out man because they think that his explanation that he was waiting outside the premises for some innocent purpose may be true, the burglar caught red-handed inside must usually be acquitted. For the verdict that the look-out man is not guilty must negative any evidence of a common plan of concerted action between the two of them except where there is some evidence against the actual burglar which is not evidence against the look-out, such as an admission to the police by the burglar that there was such a plan of action. To avoid that injustice in many cases the two of them must be indicted in separate counts. Is there any principle or authority which forces such a surprising conclusion on criminal courts?

It is suggested that authority is to be found in the cases of *R v Scaramanga*¹, *R v Parker*² and *R v Merriman*³. An examination of those authorities has convinced us that they do not support, let alone compel, any such conclusion. What those cases establish is that where two persons are jointly charged in one count with one offence (and the use of the word 'jointly' or 'together' is not necessary to make the offence charged in the count a joint offence), and one of them is convicted whether by verdict (*R v Scaramanga*¹) or on his own confession (*R v Parker*²), the other cannot be convicted of a second and independent offence, whether a separate act of malicious damage (*R v Scaramanga*¹) or an independent theft (*R v Parker*²) or an independent wounding (*R v Merriman*³)—but only of taking part in the joint offence charged against both and proved against one.

We have considered with care the language of Donaldson J in giving the judgment of this court in *R v Parker*⁴ where he said:

'It is clear law that if a person is accused of stealing two articles, he can be

1 [1963] 2 All ER 852, [1963] 2 QB 807

2 [1969] 2 All ER 15, [1969] 2 QB 248

3 [1971] 2 All ER 1424, [1971] 2 WLR 1453

4 [1969] 2 All ER at 17, [1969] 2 QB at 252

a convicted if it be proved that he stole one only. It is also clear that if two persons are accused of stealing jointly one or other or both may be convicted of that joint stealing. Alternatively either, but not both could be convicted of stealing independently . . . In each of these cases the essential feature is that one offence is charged and one offence is proved. *R. v. Scaramanga*⁵ and the other decisions therein cited all proceed on the basis that in the absence of statutory provisions, such as s. 44 (5) of the Larceny Act 1916, if only one offence is charged it is not open to the court or jury to find two offences proved. In the present case the verdict of the jury is at least capable of the interpretation that a different offence was committed by the appellant from that to which Miss Overy pleaded guilty. Only one offence was charged and it was not open to the jury to find that a second offence was committed.'

c We accept counsel for the Crown's submission that where one of two persons jointly charged with one offence is guilty, it is not open to a jury to convict the other without evidence that he acted jointly with the first because otherwise there would be two offences found when only one was charged; but that where the first accused is found *not* guilty of the joint offence charged there is no question of the other being found guilty of a second offence and no need for evidence that he acted jointly. In our view the joint offence has gone with the passing of the first accused from the case and the second can be convicted of the offence charged as if he had been charged in a separate count with an independent offence.

d If Mr Woodward had been found guilty on this indictment, we should have felt bound to follow the earlier decisions to which we have referred. But we endorse the view of this court in *R v Merriman*⁶ that the position which they establish calls for further consideration either by legislature or by another court and we have no wish to extend them to cases like the present case which they do not govern. As stated in the passage of the judgment in *R v Parker*⁷ already cited, 'either but not both could be convicted of stealing independently', and the first of those two results is what has happened here: the appellant has been convicted of an independent assault after the acquittal of Mr Woodward accused with him of a joint assault.

e It is conceded that the appellant's assault was a common assault only. We therefore, instead of allowing or dismissing this appeal, substitute for the verdict found by the jury a verdict of guilty of common assault in the exercise of the court's powers under s 3 of the Criminal Appeal Act 1968. We then have to consider whether on the application for leave to appeal against sentence we should pass such sentence in substitution for the sentence passed at the trial as may be authorised by law for the offence of common assault.

g In considering this application we take into account, as did the deputy recorder, that the appellant was only 17 at the time, five years younger than his brother, that his part in the attack on Mr Nagy was not as great as his brother's and that he had suffered substantially by having his throat seriously cut. There was also before the deputy recorder, as there is before us, the probation officer's opinion expressing doubts about probation or a financial penalty, and the appellant's record of two offences, both apparently committed shortly before this offence. On 1st June 1971 he had been bound over in the sum of £25 for 12 months for threatening behaviour, and on 2nd August for assaulting a police officer he was fined £10. The deputy recorder made no order forfeiting the £25, but ordered him to go to a detention centre for three months. This court does not see how any other or lesser punishment could meet this offence of common assault in all the circumstances, and this application for leave to appeal against sentence is refused.

5 [1963] 2 All ER 852, [1963] 2 QB 807

6 [1971] 2 All ER at 1426, [1971] 2 WLR at 1456

7 [1969] 2 All ER at 17, [1969] 2 QB at 252

Verdict of common assault substituted. Application for leave to appeal against sentence refused. a

Solicitors: Registrar of Criminal Appeals; Henry F Galpin & Co, Oxford (for the Crown).

N P Metcalfe Esq Barrister. b

R v Metropolitan Police Commissioner, ex parte Ruxton

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, BROWNE AND BRIDGE JJ c

12th NOVEMBER 1971

Licensing – Permitted hours – Exemption – Special order of exemption – Special occasion – Club premises – Premises licensed for persons attending social functions held by outside bodies – Application for special order of exemption in respect of function held by outside body – Refusal on ground that function not a special occasion for club members – Character of body holding function not in itself determining whether function special occasion or not – Licensing Act 1964, s 74 (4). d

The applicant, the secretary of a club, held a justices' on-licence for the ground floor and basement of the club premises which restricted the sale of intoxicating liquor to members of the club, bona fide guests of such members and to persons attending a dinner-dance reception or other similar social function. This latter restriction was intended to reflect the facility whereby the large hall on the ground floor of the premises could be hired to outside organisations for a function which they proposed to hold. The club wished to hire the hall for a plumbers' dinner and the applicant made an application under s 74 (4)^a of the Licensing Act 1964 to the Commissioner of Police for the Metropolis for a special order of exemption. The commissioner refused to grant the order on the ground that the holding of the plumbers' dinner was not a special occasion for the members of the club in respect of which the licence had been granted. e

Held – The reason given by the commissioner for refusing the order was an irrelevant reason because the character of the body holding the function did not in itself determine whether the function was a special occasion or not. Whether an occasion was special or not did not depend on whether the body organising the function was the club itself or an outside body. As the reason given for refusing the order was the only reason put forward by the commissioner for his decision, his discretion had not been validly exercised and, therefore, the matter should be sent back to him to consider the application on relevant and admissible grounds (see p 313 b to d and h, post). g

Per Curiam. The fact that a wide variety of different organisations use club premises week after week would not itself make each occasion a special occasion if similar activity on the part of the club itself would lose the quality of being special (see p 313 f and h, post). h

Notes

For special orders of exemption, see 22 Halsbury's Laws (3rd Edn) 663, para 1392, and for cases on the subject, see 30 Digest (Repl) 79-81, 612-623. i

For the Licensing Act 1964, s 74, see 17 Halsbury's Statutes (3rd Edn) 1134.

Case referred to in judgment

R v Llanidloes (Lower) Justices, ex parte Thorogood [1971] 3 All ER 932, [1972] 1 WLR 68.

^a Section 74 (4) is set out at p 311 e, post

Motion for mandamus

a This was an application by Anthony Joseph Ruxton for an order of mandamus directed to the Commissioner of Police for the Metropolis requiring him to hear and determine according to law an application for a special order of exemption made under s 74 (4) (a) of the Licensing Act 1964 in respect of premises known as Catholic Association of Social Activities Club situated at Oxlow Lane, Dagenham, in the London borough of Barking. The facts are set out in the judgment of Lord Widgery CJ.

b *D W T Price* for the applicant.

D H Spencer for the commissioner.

LORD WIDGERY CJ. In these proceedings counsel moves on behalf of the applicant, who is the holder of a justices' on-licence for the ground floor and basement of premises known as Catholic Association of Social Activities Club which is situated in Oxlow Lane, Dagenham. He applies for an order of mandamus directed to the Commissioner of Police for the Metropolis requiring him to hear and determine according to law an application for a special order of exemption made under s 74 (4) (a) of the Licensing Act 1964. The special order of exemption is sought in respect of tomorrow, 13th November 1971, and is in respect of a function organised by a local organisation of plumbers. Section 74 (4) provides:

'Justices of the peace may—(a) on an application by the holder of a justices' on-licence for any premises, or (b) on an application by the secretary of a club registered in respect of any premises, make an order (in this Act referred to as a special order of exemption) adding such hours as may be specified in the order to the permitted hours in those premises on such special occasion or occasions as may be so specified.'

In the metropolis that function is exercised not by the justices of the peace but by the Commissioner of Police.

There is a little history which cannot be avoided in leading up to the point which arises before the court today. These premises in Oxlow Lane, Dagenham, which are in their entirety in the ownership of the trustees of the diocese of Brentwood, are in fact on three floors, basement, ground and first floor. There are two justices' licences in force in respect of the premises. The first, which by common consent of the parties is confined to the first floor, is a licence for supply of intoxicating liquor with a condition restricting such supply to, and I only quote the relevant one:

'(a) a member of the said club [in the context that means the Dagenham Catholic Social Club] who has been a member for at least 2 days or whose nomination or application for membership was made at least 2 days before his admission (b) a guest of such a member bona fide entertained by him at his own expense'.

That is no doubt a licence granted under s 55 of the Act, although we take counsel for the applicant's point that it seems now to have got itself on to an inappropriate form. The other licence in the name of the applicant is concerned with the ground floor and basement and is in identical terms except that it refers to a club of a different name, the Catholic Association of Social Activities Club, and the condition restricting the supply of intoxicating liquor extends not only to the conditions of (a) and (b) which I have read from the other licence, but includes at (c) 'a person attending a dinner, dance reception or other similar social function'.

These two licences were originally granted in 1964, and we have an affidavit from Mr Mullis, who was the solicitor concerned with the applications at that time, which shows that it was a matter of deliberate policy to secure two licences for these premises, and to provide further that the licence in respect of the first floor should be restricted by normal club conditions, whereas the licence in respect of the ground floor and basement should be more extensive in that it permitted the supply of intoxicating

liquor to a person attending a dinner/dance reception or other similar social functions. It is not for us to enquire what was passing through the minds of the justices in 1964 when these licences were granted, but I for my part am quite ready to accept what Mr Mullis says, that this was deliberately done with the full co-operation of the justices, and, indeed, with the underlying intention that the large hall on the ground floor might conveniently be let out to various local organisations requiring to hold functions, and that if such functions were held by such outside organisations, an extension of the authority to supply liquor would be necessary to cover such functions. It follows, I think, that condition (c), which I have read, in the licence relating to the ground floor and basement was intended to reflect this facility whereby the premises could be hired out to outside organisations for a function which they proposed to hold.

Having got those licences, everything seems to have gone smoothly for a number of years, and it is clear on the evidence that from time to time, indeed perhaps very frequently, when the hall has been hired to an outside organisation, an application for a special order of exemption under s 74 has been made. The police have thought it right to look into the matter more closely in recent months, and the situation has come to a head by reason of the commissioner's decision to refuse a number of applications of this kind, and in particular to refuse the application for the plumbers' dinner tomorrow evening.

The decision letter, it is agreed, in which the commissioner announced his conclusion in regard to tomorrow's function is one dated 16th July 1971; it is signed on behalf of the assistant commissioner; it is written to solicitors acting for the applicant, and it states:

'I am directed by the Commissioner to refer to your letter of 15 June in which you made application on behalf of [the applicant] for a Special Order of Exemption for the above Club on 21 August, and to say that as it is not considered that the occasion you specified would be a special occasion for the members of the Catholic Association of Social Activities Club, in respect of which Association the Justices licence was granted, he feels unable to grant such an Order.'

I draw attention to the fact that the application there referred to was one in respect of 21st August 1971, but it is, I understand, common ground that this letter in effect gives the commissioner's reason for refusing the later application relative to the function tomorrow.

The matter is taken a little further by the affidavit of Mr Stonely, who is a principal working in the department of the metropolitan police which advises the commissioner. I find it unnecessary to go into the detail; he explains how the police have been somewhat concerned at the unusual situation provided in this building where there are two separate justices' licences. He goes on to set out the history in rather more detail than I have given it, and he sets out what I understand to be the commissioner's reasons for refusing the special order for exemption which is in issue before us. It reads as follows:

'The Commissioner of the Metropolitan Police was advised by me that whilst each application had to be considered separately on its merits those that arose from the ordinary regular outside bookings for the use of the premises and were unconnected in any way with the Social Club would with difficulty rate as special occasions meriting Special Orders of Exemption. I have no doubt that for this reason all such applications were refused.'

Counsel for the applicant says that when one looks at all the material which is before us, it becomes clear that the commissioner has refused this special order of exemption because the organisation which is to hold the function, which function is the special occasion in question, is an organisation other than the club itself. It is argued before us that it is not a proper ground for refusing the special order of exemption that the organisation to enjoy the facility, if the order is granted, is an organisation other than

a the club itself. Counsel for the applicant argues that this is an extraneous and irrelevant reason, and he draws his argument from the fact that the very form of the justices' licence held in respect of the ground floor and basement contemplates that there shall be functions of this kind, and thus gives the lie, as it were, to the commissioner's argument that special occasions do not extend to occasions from foreign organisations and bodies hiring the hall for a particular day.

b For my part I think that if one confines the argument of counsel for the applicant to the precise circumstances of the present case, he is right. I cannot for my part see that the character of the body holding the function in itself determines whether the function is a special occasion or not. I cannot on the face of it see why an occasion should be more or less special if one can put it that way, according to whether the organisation organising the function was the club itself or an outside body. If it be c the fact, and I feel bound to conclude on the material before us that it was the fact, that this was the only reason put forward by the commissioner for his decision, then in my view that was an irrelevant reason and one on which reliance cannot be placed. It follows from that that in my judgment the commissioner's discretion was never validly exercised, and it is right to send the matter back to him, as it were, with instructions in the form of an order of mandamus that he is to exercise his discretion, d in other words that he is to consider this application on relevant and admissible grounds.

I hasten to say that that by no means secures the function planned for tomorrow evening, because I would not wish anything I have said to obscure the fact that the commissioner has a very wide, and often very difficult, discretion to exercise in these matters. It may well be that the commissioner now or hereafter will take the view e that these functions occur with such frequency that they lose their special character. I am not attempting to say that that is so, but it is a matter which may well appeal to the commissioner. If all these functions were held by the club virtually every Friday and every Saturday night, an argument that they had lost their special quality might well be raised. We had a case¹ only a few weeks ago in this court in which those considerations were debated, and just as I do not see any reason for saying that the f identity of the organisers prevents this from being a special occasion, so it seems to me that the fact that there is a wide variety of different organisers using this club week after week does not in itself make each occasion a special occasion when similar activity on the part of the club itself would lose the quality of being special.

g It is unwise that I should say more, but I am anxious to emphasise that all we ought to do in my judgment is to declare that the single reason apparently relied on is an invalid reason, but to stress the great width of the commissioner's discretion in regard to a variety of other reasons, which I would not seek to canvass. In my judgment the order of mandamus should go on the terms prayed.

BROWNE J. I agree.

h **BRIDGE J.** I also agree.

Order for mandamus.

Solicitors: *Monier-Williams & Keeling*, agents for *Mullis & Peake*, Romford (for the applicant); *Solicitor, Metropolitan Police.*

Mary Rose Plummer Barrister.

i ¹ See *R v Llanidloes (Lower) Justices, ex parte Thorogood* [1971] 3 All ER 932, [1972] 1 WLR 68

Rose v Humbles (Inspector of Taxes) Aldersgate Textiles Ltd v Inland Revenue Commissioners

COURT OF APPEAL, CIVIL DIVISION

RUSSELL, SACHS AND STAMP LJJ

2nd, 5th, 6th, 7th, 8th JULY, 13th OCTOBER 1971

Income tax – Appeal – Appeal against additional assessment – Hearing – Adjournment – Unjustified refusal of adjournment – Effect – Whether ground for rehearing or for discharge of assessment – Assessment under Sch E made in respect of unexplained increase in taxpayer's wealth – Increase alleged by Crown to represent payments from undisclosed profits of private company controlled by taxpayer – Claim by taxpayer that increase arose from betting winnings – Taxpayer too ill to attend hearing and give evidence – Subsequent recovery in health would have enabled him to give evidence at adjourned hearing – Hearing in absence – Assessments affirmed by commissioners – Appeal to High Court – Order for rehearing – Decline in health of taxpayer following High Court decision – Taxpayer's ill-health precluding him from ever giving evidence – Effect of refusal of adjournment to deprive taxpayer of opportunity of ever giving evidence – Whether refusal justifying discharge of assessment.

Income tax – Appeal – Appeal against additional assessment – Hearing – Hearing of separate but connected appeals by different taxpayers simultaneously – Admission by one taxpayer accepted as evidence against other – Appeal by company against additional assessment to profits tax and excess profits tax in relation to alleged undisclosed profits – Appeal by taxpayer controlling company against additional assessments in relation to alleged remuneration from undisclosed profits of company – Application for separate hearings – Imperfectly stated refusal – Counsel for taxpayer and company reasonably understanding that application accepted – Counsel forbearing to submit that figures, calculations etc accepted by taxpayer and evidence by Crown not accepted by or evidence against company – No evidence against company – Discharge of assessment against company.

Income tax – Appeal – Case stated – Order for rehearing by High Court – Order in respect of assessments not in case stated – Assessments dealt with by commissioners but not appealed – Competence – Income Tax Act 1952, s 64 (6).

The taxpayer was the owner of 80 per cent of the shares of the taxpayer company ('the company'), a private company dealing in the purchase and sale of textiles which he personally carried on and of which he, his wife and his son, who each owned 10 per cent of the shares, were the directors. He was assessed to income tax under Sch E to the Income Tax Act 1952 for the years 1942-43 to 1950-51 in respect of remuneration said to have been received by him from the company amounting in total to £65,000 by which his asset position was found to have been improved. The company was simultaneously assessed to profits tax and excess profits tax on the basis that the £65,000 was profits of its trade which did not appear in its accounts and, having been paid out in remuneration, was assessable under the enactments relating to excess directors' remuneration. Both the taxpayer and the company were alternatively assessed to income tax under Sch D on the footing that the taxpayer had acquired the £65,000 from the company so as to remain accountable to it for that sum and therefore the £65,000 was not remuneration but earnings by way of a trade of the taxpayer or profits of the company. The taxpayer and the company appealed to the General Commissioners of Income Tax. At the hearing their counsel applied for an adjournment on the ground that, on medical evidence, the taxpayer was too ill to give evidence in person although his health (as in fact happened) would improve and enable him to do so later. The application was

a refused. Counsel also applied for the taxpayer's appeals and the company's appeals to be heard separately. The commissioners again refused but their refusal was stated in such a way that counsel reasonably understood that the application had been granted. Accordingly, on the assumption that only the taxpayer's appeal was being heard he forbore to submit that the evidence of figures and calculations and correspondence accepted by the taxpayer and evidence given by the Crown in his appeal had not been accepted by and were not evidence against the company. The taxpayer's case was that the £65,000 arose from betting gains and a great number of vouchers were produced indicating that he had betted on a large scale. The figures relating to credit account betting extracted from his bank account showed net gains of £10,571 in one year and some £25,000 in six years. The company's accounts appeared to have been properly kept and contained no record of the £65,000.

b The taxpayer's son, who had worked in the same office, albeit primarily engaged in running another jointly owned company, knew nothing of it. An inspector of taxes gave evidence that, from his experience, during the relevant period profits in the form of charges made by textile merchants in excess of the controlled prices, and necessarily kept out of the company accounts, might have been available for such diversion. The commissioners held as follows: '(1) We do not accept that the [taxpayer] during the period under review made any net gain from his betting transactions. (2) We are satisfied that during the period under review the [taxpayer] received sums totalling £65,171 representing taxable income received by him which was not accounted for or disclosed to the Revenue and that wilful default was committed by the [taxpayer]. (3) The sums totalling £65,171 represent concealed profits of [the company] which were diverted to the [taxpayer] and they are assessable to Income Tax Under Schedule E upon the [taxpayer] as constituting remuneration received by him from the Company...' The commissioners confirmed the assessments on the taxpayer under Sch E and the assessments to profits tax and excess profits tax on the company. They discharged the first two assessments on the taxpayer under Sch D and adjourned the others sine die, and they determined the assessment on the company at nil. On appeal by case stated to the High Court it was conceded that the commissioners ought to have granted the application for an adjournment, and the judge^a made an order for the appeals to be reheard by different commissioners, including the appeals against the Sch D assessments, which had not been included in the stated case. The taxpayer and the company appealed, contending that the proper order was to discharge all the assessments. On behalf of the taxpayer it was submitted (i) that, even in the absence of the taxpayer's evidence, the commissioners' conclusion that the company was the source of the taxpayer's increase in wealth was based on a view of the facts that could not be reasonably entertained; (ii) that on the facts as found by the commissioners the taxpayer had diverted profits of the company behind the backs of his fellow shareholders and so the proper conclusion was that the taxpayer was accountable to the company for the £65,000, and accordingly it did not constitute remuneration for which he was assessable under Sch E; (iii) alternatively, that his health had deteriorated so much since the High Court hearing that he would never be able to give evidence with the result that the commissioners' wrongful refusal of an adjournment had in effect deprived him of the opportunity of ever giving evidence.

j **Held** – (i) (Sachs LJ dissenting) The assessments made on the taxpayer by the commissioners could not be discharged, and accordingly the order for a rehearing would be affirmed, for the following reasons—

(a) (Sachs LJ concurring) on all the evidence the commissioners were well entitled to conclude as they had done that no betting gains were established and, as no other possible source of gains existed than the company, which was controlled by the

taxpayer, the sum of £65,000 not accounted for by the taxpayer represented concealed profits of the company diverted to the taxpayer and assessable to income tax on him under Sch E as remuneration from the company (see p 319 d, p 339 h, and p 327 d and e, post);

(b) (Sachs LJ concurring) it could not be said that the finding of the commissioners that the company was the source of the taxpayer's increase in assets was based on a conclusion that the taxpayer had diverted profits of the company in such a manner that it did not constitute remuneration for which he could be assessed under Sch E; on the contrary their finding was that it was to be regarded as remuneration (see p 319 h, p 322 e and p 327 j, post);

(c) the fact that the taxpayer had been wrongfully deprived of the opportunity of giving oral evidence before the commissioners on an appeal against the assessments under Sch E which had been made against him, did not justify the making of an order discharging the assessments; such an order could only have resulted if the taxpayer had been allowed (by an adjournment) to give evidence and the commissioners had been satisfied by that evidence that the increase in assets was attributable to betting gains (see p 320 c and d and p 328 a and b, post).

(ii) The commissioners were wrong in law in upholding the assessments to profits tax and excess profits tax made on the company because, as a result of the confusion over the question whether the taxpayer's and the company's appeals were being heard by the commissioners together, the figures and calculations and correspondence accepted by the taxpayer had been treated as admissions by and evidence against the company although they had not in fact been accepted by or proved against the company; the only evidence admissible against the company was that, while it could have earned profits in excess of those appearing in the accounts, the accounts appeared to have been properly kept; accordingly the assessments against the company should be discharged (see p 321 a to e, p 326 g and p 328 f and g, post).

(iii) The original appeals against the alternative assessments to income tax under Sch D on the first taxpayer and the taxpayer company ought not to have been ordered by the judge to be reheard because they did not form part of the cases stated and were not matters 'the determination in respect of which the case had been stated' within s 64 (6)^b of the Income Tax Act 1952; furthermore they could not be dealt with under the wider power of making 'such other order in relation to the matter as to the Court may seem fit', since the 'matter' in respect of which such an order might be made could not be anything other than the subject-matter of the determination in respect of which the case had been stated; accordingly the commissioners' order would be restored (see p 321 g and p 329 g to j, post).

Per Sachs LJ. If (which was doubtful) the General Commissioners had jurisdiction to hear the appeal of the taxpayer and the company simultaneously without their consent, their discretion in deciding to do so in the circumstances was wrongly exercised (see p 325 h and p 326 j, post).

Decision of Buckley J [1970] 2 All ER 519, affirmed in part, reversed in part.

Notes

For the hearing of appeals against assessments to income tax, see 20 Halsbury's Laws (3rd Edn) 675, 676, para 1330, for the effect of failure to give evidence before the commissioners, see *ibid* 695, 696, para 1374, and for the jurisdiction of the High Court on a case stated, see *ibid* 693, para 1368.

For the Income Tax Act 1952, s 64, see 31 Halsbury's Statutes (2nd Edn) 66.

With effect from 6th April 1970, s 64 of the Income Tax Act 1952 is replaced by s 56 of the Taxes Management Act 1970.

Cases referred to in judgments

Dick v Piller [1943] 1 All ER 627, [1943] KB 497, 112 LJKB 410, 169 LT 26, 13 Digest (Repl) 437, 620.

^b Section 64 (6) is set out at p 329 f, post.

- a *Edwards (Inspector of Taxes) v Bairstow* [1955] 3 All ER 48, [1956] AC 14, [1955] 3 WLR 410, 36 Tax Cas 207, 28 (1) Digest (Reissue) 566, 2089.

Appeals

- b The first taxpayer, David Rose, and the taxpayer company, Aldersgate Textiles Ltd, appealed against an order of Buckley J made on 6th March 1970 and reported at [1970] 2 All ER 519, remitting appeals by the two taxpayers by way of case stated by the General Commissioners of Income Tax for Central Manchester for rehearing by a fresh panel of commissioners. The facts are set out in the judgments.

R A Watson QC and D G H Braham for the taxpayers.
J R Phillips QC and P W Medd for the Crown.

Cur adv vult

- c 13th October. The following judgments were read.

- RUSSELL LJ.** We are concerned in this matter with three appeals from three decisions of Buckley J¹ on three appeals by way of case stated from General Commissioners. The first case stated related to an appeal by the first taxpayer, Mr David Rose, against assessments under Sch E in respect of remuneration said to have been received by him in the years 1942-43 to 1950-51 from the taxpayer company, Aldersgate Textiles Ltd, a company dealing in the purchase and sale of textiles in Manchester in which he, his son Harry, and his wife were the directors and in which the same three were holders of the 100 issued shares in the proportions of 80 : 10 : 10. Put briefly it was found that over the years the asset position of the taxpayer had improved by some £65,000; there was no attempt by the taxpayer to explain this other than by asserting betting gains; the General Commissioners rejected that explanation and inferred that the source of this added wealth was the diversion of profits of the taxpayer company's trade not appearing in the latter's accounts.

- f The second case stated related to an appeal by the taxpayer company against assessments to profits tax; those assessments proceeded on the same basis that some £65,000 profits of the trade of the company did not appear in the accounts of the company, had been paid to the first taxpayer as remuneration, and under the relevant sections of the Acts relating to excess directors' remuneration were assessable to profits tax. The third case stated related to assessments to excess profits tax but was otherwise no different from the second. There were also for consideration by the General Commissioners assessments on the taxpayer company to income tax under Sch D in the same amount of £65,000 on the footing that the sum diverted by the first taxpayer was not remuneration but was a sum for which he remained accountable to the taxpayer company. In the event, the General Commissioners, having come to the conclusion that the first taxpayer had received the sum as remuneration, determined these assessments at nil. On this determination no case was stated.

- h I take first the case of the first taxpayer. His appeal to the General Commissioners had been adjourned owing to his ill-health. In June 1967 it was again due for hearing. Medical evidence was called that he could not then attend to give evidence, but that (as in the event happened) his health would improve and that he would at some time later be fit enough for that purpose. The inspector of taxes resisted an application, supported by this evidence, for an adjournment and the General Commissioners decided to proceed with the case without his evidence and refused an adjournment.
- j Now it is manifest that since his contention was that any otherwise unexplained increase in his assets was attributable to net betting gains—and indeed he had produced a great number of vouchers of various kinds which indicated that he betted on a large scale—it was quite wrong on the part of the General Commissioners to refuse an adjournment in the circumstances. It was ultimately accepted by the

¹ [1970] 2 All ER 519, [1970] 1 WLR 1061

Crown, before the hearing by Buckley J², that this was so, and that it constituted an error of law, and that the proper course was to set aside the determination against him, and order a rehearing by the General Commissioners. Such an order was in fact made by Buckley J², the hearing to be by a differently constituted panel of General Commissioners, after argument in which the Crown contended that the rehearing would have to be by the same panel; the Crown does not pursue that contention. a

The first taxpayer appeals against that decision of Buckley J², contending that he should have made an order in effect discharging the assessments under Sch E. Further it is contended that circumstances connected with the health of the first taxpayer that have occurred or have been revealed since the hearing before Buckley J² now require, if the injustice involved in the refusal of an adjournment is to be remedied, such an order. The contentions of the first taxpayer are briefly the following: b

(1) Even in the absence of the evidence of the first taxpayer the conclusion of the General Commissioners that the taxpayer company was the source of the increase in the assets of the first taxpayer was based on a view of the facts as stated in the case stated which could not be reasonably entertained; that the only true and reasonable view is that wherever the money may have come from it did not come from the taxpayer company either by diversion of its profits or otherwise (*Edwards (Inspector of Taxes) v Bairstow*³). c

(2) Alternatively the finding of the General Commissioners that the taxpayer company was the source was based on (as Buckley J² thought) a conclusion that the first taxpayer had diverted to himself profits of the taxpayer company behind the backs and without the assent of his fellow directors and shareholders. In that case the first taxpayer would be accountable to the taxpayer company for such moneys, they could not be remuneration, and assessment under Sch E could not stand; or (it was contended) on the facts set out in the case stated that conclusion was inevitable. d

(3) Alternatively, since the hearing by Buckley J² it had transpired that the health of the first taxpayer had so much deteriorated that he will never be able to give evidence. Had adjournment been ordered he would have been able to give evidence. The injustice done by the refusal to adjourn can therefore never be directly remedied. To remedy the injustice this court could and should take the only course available in that behalf and discharge the assessments. e

As to (1), it was urged for the first taxpayer that it was clear that neither Mr Blower (the inspector of taxes) nor Mr Lever (the accountant to the taxpayer company and to the first taxpayer) considered that there was anything unusual or suspicious about the accounts of the taxpayer company; they were clearly kept, with nothing on their face to suggest that they did not fully and correctly represent its trading and financial position. Moreover, the first taxpayer's son and fellow director and shareholder shared a small office with the first taxpayer—at least from his discharge from the Merchant Navy in 1945—and he stated in evidence (and he was accepted by the General Commissioners as a credible witness) that he had no knowledge of any profits being diverted from the taxpayer company or of any other irregularities. It was, it was argued, incredible that if profits of the order now under consideration were being diverted from the taxpayer company and its books the son would have been unaware of it. On the other hand there are these considerations. The son on his return from service had asked the first taxpayer whether he could have another company, London Mantle Co, in which the first taxpayer had a 50½ per cent share interest and the son the balance. With the first taxpayer's agreement the son ran the Mantle company completely on his own, the first taxpayer taking no part. The son was therefore primarily concerned with the Mantle company and there is nothing in the case stated to suggest that in evidence the son showed that he concerned himself in any way with the finances or fortunes of the taxpayer company. f

² [1970] 2 All ER 519, [1970] 1 WLR 1061

³ [1955] 3 All ER 48, [1956] AC 14

a (in which his father had an 80 per cent shareholding and he but 10 per cent) or would be on the look-out for any diversion of profits or any irregularities.

Mr Blower pointed out from his experience and knowledge of the textile industry in Manchester between 1941 and 1951 one way in which profits might in the relevant period be diverted from a textile company; textile prices were controlled and it was not uncommon for textile merchants to charge more than the controlled prices; b since such 'overs' were illegal it naturally followed that they would be kept out of the accounts of a textile company, if charged. He said that it would not have been a complicated commercial transaction to have diverted £65,000 from 'a' textile company; it does not appear from the case stated whether Mr Blower was specifically referring to this company or to a company with the taxpayer company's textile turnover; nor however does it appear that he was cross-examined to suggest that c the taxpayer company turnover was such that £65,000 diversion in this manner was out of the question. (We do not know what was the turnover; the accounts were not produced to the General Commissioners.) Moreover against a history of piecemeal increases of alleged betting gains as further unexplained asset gains from time to time emerged the General Commissioners were well entitled to conclude as they did that no betting gains were established, let alone £65,000; this being so, no other d possible source of gains existed than the company that the first taxpayer controlled, the taxpayer company. Bearing all these considerations in mind I am satisfied that the first point made for the first taxpayer cannot be sustained.

As to (2)—the contention that any moneys diverted by the first taxpayer from the profits of the taxpayer company could not be remuneration and therefore the Sch E assessments must be discharged. This was referred to in the course of debate as the 'technical knock-out' point. The case stated (para 11) recited that the inspector e had asked the General Commissioners to determine in principle whether the concealed income (i.e. the £65,000) was to be treated as (a) profits assessable on the taxpayer company or (b) profits of the taxpayer company which having been diverted to the first taxpayer were chargeable on the first taxpayer under Sch E as additional remuneration received by him from the company. The answer of the General f Commissioners was in accordance with (b). They stated that they made the following decisions. I read from para 13:

'(1) We do not accept that the [first taxpayer] during the period under review made any net gain from his betting transactions. (2) We are satisfied that during the period under review the [first taxpayer] received sums totalling £65,171 representing taxable income received by him which was not accounted for or disclosed to the Revenue and that wilful default was committed by the [first taxpayer]. (3) The sums totalling £65,171 represent concealed profits of [the taxpayer company] which were diverted to the [first taxpayer] and they are assessable to Income Tax Under Schedule E upon the [first taxpayer] as constituting remuneration received by him from the Company . . .'

h In my view it is not rightly said that the General Commissioners concluded on the evidence before them that the moneys which they found came to the first taxpayer from profits of the taxpayer company were abstracted by the first taxpayer in a manner which left him accountable to the taxpayer company. On the contrary their finding was that it was to be regarded as remuneration. In those circumstances it does not appear to me that there was a finding which requires this court to discharge the Sch E assessments. It is to be noted that counsel for the first taxpayer j before the General Commissioners deliberately did not put forward a suggestion that, if the conclusion should be that the 'missing' money came from the taxpayer company, it could not in any sense be regarded as remuneration. This was because he was anxious not to involve the son in attack on his credit by introducing controversial matter if it could be avoided, since the son's own appeal based on similar contentions relating to the Mantle company was due before the same General

Commissioners—an appeal which in the event succeeded. This lends strength to the suggestion made by the Crown that if the point had been taken the son might well have been cross-examined on the lines that the son and his mother recognised that the first taxpayer had, so far as his fellow directors and shareholders were concerned, *carte blanche* in the affairs of the taxpayer company. The wife of the taxpayer did not give evidence.

Finally as to contention (3)—that the only way in which the injustice caused by the refusal to adjourn can now be remedied (the first taxpayer being now unable through ill-health to give evidence in support of his betting gains explanation of his increase in assets) is to discharge the Sch E assessments, without the rehearing that has at the instance of the first taxpayer been ordered by Buckley J. I cannot accept that proposition. Assessments under Sch E were made on the first taxpayer. Against those assessments he had a right to appeal to the General Commissioners. The General Commissioners wrongly deprived the first taxpayer of the opportunity of giving oral evidence in support of his betting gains explanation, and his present inability to give evidence will or may weaken his case at a rehearing. But this does not it seems to me justify this court in making an order which could only have resulted if the first taxpayer had been allowed (by an adjournment) to give evidence and the General Commissioners had been satisfied by that evidence that the increase in assets was attributable to betting gains.

In the appeal of the first taxpayer I would accordingly (subject to a point to be later mentioned on income tax) leave the first taxpayer with the order which he sought and obtained below, and which for what it may be worth he seeks in the alternative to retain, that is for a rehearing.

I turn now to the appeals of the taxpayer company in respect of profits tax and excess profits tax assessments. In these cases also the basic question was whether the increase in assets of the first taxpayer was attributable to profits of the taxpayer company diverted to the former, and hereunder of course the betting gains explanation was an important feature. It was for this reason that Buckley J set aside the decision of the General Commissioners on the assessments to profits tax and excess profits tax and ordered a rehearing of the appeals of the taxpayer company against such assessments.

For the taxpayer company it was argued in the same manner as was argued for the first taxpayer that the refusal of an adjournment (if an injustice was to be remedied) required the discharge of the assessments made on the footing that the source of his enrichment was profits made by the taxpayer company. For the same reasons I reject that contention. So also on what may be labelled the *Edwards (Inspector of Taxes) v Bairstow*⁴ point. It was however additionally contended that the evidence of the increase in the first taxpayer's assets was not evidence against the taxpayer company, and that accordingly there was no evidence admissible against the company which justified the General Commissioners in concluding that the company had earned profits in excess of those shown by its accounts. It is quite clear that at the hearing before the General Commissioners there was a misunderstanding. Counsel for the first taxpayer thought from an answer given by the clerk to the commissioners that the hearing was to be initially confined to the appeal by the first taxpayer against his personal assessments. The General Commissioners on the other hand intended to deal with the first taxpayer's appeal and the taxpayer company's appeals together. I think the confusion probably arose because the clerk and the General Commissioners in saying that they would deal first with the David Rose appeal had in mind the first taxpayer and his company's appeals, as distinct from Harry Rose and his company's appeal. As a result of this confusion it was only six months later that on the taxpayer company's appeals the question of admissibility of evidence was raised.

It was contended by the inspector of taxes before the General Commissioners and accepted by them that their findings in the first taxpayer's appeal necessarily led to

⁴ [1955] 3 All ER 48, [1956] AC 14

a their findings in the taxpayer company's appeal. In one sense that is true. But it
was contended for the taxpayer company that the figures and calculations (which
were generally accepted as correct on behalf of the first taxpayer) were not compiled
with the assistance of the first taxpayer given on behalf of the taxpayer company, or by
the accountant otherwise than as the first taxpayer's accountant; and that the cor-
b correspondence nowhere appeared to have been conducted on behalf of the taxpayer
company. They could not therefore have been properly treated as containing
admissions by or on behalf of the company; nor were they proved in evidence; nor
admitted on behalf of the company as in any way correct. I think that this contention
was sound. I think too that but for the confusion about whether the appeals were
being heard together it may well be that these figures might have been proved
against the taxpayer company. But they were not.

c What was then the situation as to admissible evidence in the taxpayer company's
appeals? There was Mr Blower's evidence of the possibility that a textile company
(because of the opportunity of 'overs') could earn profits in excess of those appearing
in its accounts; and there was evidence that the taxpayer company's accounts appeared
to be in 'apple pie' order. But this was all. There was lacking any admissible evidence
that the company had earned more profits than appeared in its accounts, and any
assessments on the company were entirely based on the assumption that it had.

d In those circumstances in my judgment the General Commissioners erred in law in
upholding without any evidence (other than that the taxpayer company's accounts
appeared to be properly kept) any assessments against the company and should have
discharged the assessments on the company; and the learned judge should not have
directed a rehearing of the taxpayer company's appeals.

e If that be the correct view the further question whether in any event the judge
should have ordered additionally a rehearing of the appeals by the taxpayer company
against assessments to income tax on it under Sch D, Case I, does not arise. These
assessments were based on the alternative possibility that enrichment of the first
taxpayer over the relevant years had been out of profits of the taxpayer company
not appearing in its accounts but by the wrongful acts of the first taxpayer, so that they
would be profits of the taxpayer company not received by the first taxpayer as
f remuneration but for which the first taxpayer remained accountable to the company.
(I observe that if this were the situation presumably liability to assessment to profits
tax and excess profits tax would co-exist but on an enhanced basis.) The assessments
to income tax, which assumed no remuneration, were determined by the General
Commissioners not unnaturally at nil. But these decisions formed no part of the
cases stated by the General Commissioners; no dissatisfaction even in the alternative
g was expressed by the Crown with their determination at nil; the machinery was not
set in motion to bring before the High Court this decision of the General Commis-
sioners. In those circumstances in my view the learned judge should in any event not
have made the order which he did make that there should be a rehearing of the
appeals against these assessments to income tax. The discussion of this matter is
elaborated in the judgment of Stamp LJ, who reaches the same conclusion.

h A similar point arises in the appeal of the first taxpayer. Assessments were made
on him to income tax under Sch D, Case I, in respect of the years 1950-51 to 1955-56
inclusive. The assessments in respect of the first two of these years were discharged
by the General Commissioners (the remainder being adjourned sine die). The
assessments were raised in respect of profits alleged to have arisen to the first
taxpayer as a merchant. (It will be recalled that the General Commissioners stated
j that there was no evidence that the first taxpayer carried on a trade in addition to
carrying on the business of the taxpayer company.) As I understand the situation the
assessments to income tax in respect of these two years were regarded as alternative
to the Sch E assessments for the last two years of those assessments (1949-50 and
1950-51), and were for that reason discharged. There seems no difference between
that case and the case of the income tax assessments on the taxpayer company,

except that in the former case they were in fact mentioned in the case stated; accordingly I would hold that the appeals against those discharged assessments should not be included in the rehearing. a

Accordingly the appeal of the first taxpayer should in my judgment be dismissed, leaving the judge's order discharging the Sch E determination of the General Commissioners and ordering a retrial of the first taxpayer's appeal against those assessments; but not including in such rehearing the discharged income tax assessments for 1950-51 and 1951-52. The appeals of the taxpayer company against the determination by the General Commissioners of the assessments to profits tax and excess profits tax should in my judgment be allowed, and those assessments must be discharged. b

I wish to add that this case, as regards the assessments on the taxpayer company, demonstrates the dangers inherent in hearing appeals by two different taxpayers simultaneously. c

SACHS LJ. Taking first the appeal of the first taxpayer, it is only too obvious that the conduct of the commissioners in refusing an adjournment in the face of unchallenged medical evidence was indefensible. Indeed no suggestion has been or could be made in this court that Buckley J⁵ was in error in so holding; on the contrary even before the case was called on before him the Crown had intimated that they could not resist an order based on such a conclusion. That refusal was a grave breach of the rules of natural justice; it was also an error in law within the meaning of s 64 (6) of the Income Tax Act 1952 (cf *Dick v Piller*⁶). In the end the crucial question in the appeal is whether in the highly unusual set of circumstances this court should order that the relevant assessments should be discharged or whether the Crown, who instigated the breach, should be allowed to try to uphold them at a fresh hearing. d

Before considering that question it is convenient to deal with certain other issues canvassed before us. The first is that referred to as the 'technical knock-out' point. Being in agreement with Russell and Stamp LJ⁷ on this matter it suffices to say that in my judgment, too, the first taxpayer's submission fails for the reasons which they give. e

Next comes his contention that on the material before the commissioners their determination was so wrong that it should in any event be reversed. The test to be applied when considering such a submission is of course that enunciated in *Edwards (Inspector of Taxes) v Bairstow*⁷. It is for an appellant to show (per Lord Radcliffe⁸) that no person acting judicially could have come to the conclusion reached by the commissioners and that the true and only reasonable conclusion was one which contradicts their determination: in essence their decision must be shown to be perverse. f

It was conceded by counsel for the taxpayers that in practice it would be for the first taxpayer in this case to show that the true and only reasonable conclusion was that at any rate some part of the £65,000 did come from betting transactions and thus did not derive from the taxpayer company. There was however material before the commissioners on which, approaching the question in the same way as would jurors, they were entitled to refuse to accept that during the period under review the first taxpayer made any net gain from his betting transactions; their conclusions on this issue cannot be said to be perverse. That, however, is quite different from saying that such a conclusion was inevitable—in the sense that that word is used when a court has to consider whether a breach of the rules of natural justice can in practice be disregarded because it has been clearly shown that it could not have produced a miscarriage of justice. On the contrary there was considerable evidence on which it would have been reasonable to hold that the first taxpayer had made considerable betting gains over that period; there are, for instance, the figures extracted from his bank accounts relating to credit account betting which show net gains of as much as £10,571 on one year and some £27,000 over six years. Indeed g

5 [1970] 2 All ER 519, [1970] 1 WLR 1061

7 [1955] 3 All ER 48, [1956] AC 14

6 [1943] 1 All ER 627, [1943] KB 497

8 [1955] 3 All ER at 57, [1956] AC at 36

a on the documentary material before us it is by no means obvious that this is a case where the first taxpayer made no substantial betting gains as opposed to one where he exaggerated them. Looking at the matter 'on paper'—as did the commissioners—it would not have been unreasonable to hold that substantial gains had been made.

It is thus particularly a case where great importance would attach to any views the commissioners might take of the first taxpayer when observed under cross-examination in the witness-box. As Buckley J pointed out⁹ 'the whole outcome of the case depended on whether he was to be believed'. Moreover one cannot eliminate the possibility that the minds of the commissioners may wrongly have been adversely affected by their erroneous conclusion that the application for an adjournment was unwarranted and that this indicated such an evasion on the part of the first taxpayer as should be taken into account against him. Accordingly, whilst the first taxpayer's submission that the commissioners' conclusions were in essence perverse fails, the circumstances to which I have referred are highly relevant to the question of how a court should exercise any discretion it may have in making an order under s 64 (6) of the 1952 Act.

Finally, as regards preliminary points, comes the Crown's suggestion in this court that, despite the refusal of an adjournment being admittedly an error in law, the first taxpayer ought to have sought a prerogative remedy, and should be treated in this court in the same way as, and no better than, if he had adopted that speedier course. He was, however, perfectly within his rights to seek his remedy under s 64, especially as he had alternative errors of law which he wished to put forward: indeed I very much doubt whether he would have been permitted to pursue a prerogative remedy when he was in a position to avail himself of his rights under the above section. So this Crown submission fails.

e I now return to the issue whether the order for a rehearing should stand or whether this court should not only quash the determination of the commissioners but also discharge the assessments, the subject of the first taxpayer's appeal to them. This has been discussed before us on the footing that all points relevant to our decision shall be deemed to have been raised in the notice of appeal and any cross-notice by the Crown respectively—though formal documents in satisfactory form were not filed (for instance, there was nothing in the case stated to show that the refusal of an adjournment was relied on as an error in law).

f To determine this vital issue it is necessary to examine as compactly as practicable the sequence of events to which so much of the arguments were devoted during the five-day hearing in this court. It was suggested by the Crown that in some way there should be taken against the first taxpayer the lapse of time between June 1967 and the date when the prospect of the first taxpayer appearing in person ceased to exist. It is as well to start by recording some relevant dates:

h	1967—15th June	—Adjournment application refused.
	16th June	—Hearing of evidence and submissions completed.
	25th October	—Letter from commissioners stating decision on principle.
j	1968—30th January	—Sitting to announce decision on figures: formal request for case to be stated.
	1969—2nd December	—Case stated.
	1970—11th February	—Revenue communication that remission to <i>same</i> panel will not be opposed.
	6th March	—Hearing before Buckley J ¹⁰ .

In relation to the above dates it is to be observed that in correspondence at the end of

9 [1970] 2 All ER at 523, [1970] 1 WLR at 1071

10 [1970] 2 All ER 519, [1970] 1 WLR 1061

1967 the first taxpayer referred to an already previously expressed desire to have a case stated. a

The unchallenged medical evidence put before this court early in the hearing showed that the first taxpayer was fit to attend a hearing before the commissioners by the end of September 1967 and continued thus fit over the whole of 1968 and 1969 until the spring of 1970. It is thus clear that, but for the opposition of the Crown on 15th June 1967 to the application for an adjournment then made and the commissioners acceding to that opposition, there would have been ample opportunity for a further hearing on a date when the first taxpayer could attend. It is to be observed that even when the matter was before Buckley J¹¹ it rightly proceeded on the basis that there was a reasonable chance of the first taxpayer being able to give evidence and that the order for remission to a new panel of commissioners was then quite plainly correct. Today when there is no longer any such prospect the substratum of that order has gone. (Incidentally, although this is of more importance in the taxpayer company's appeals, Mr Blower, the sole witness for the Crown, has now died.) b

None of the difficulties which have arisen in this case can be laid at the door of the first taxpayer; substantially they all stem from the course taken by the Crown, for it was conceded in this court that it would be almost inconceivable for the commissioners to have refused an adjournment had the Crown consented, as they should have done. At one stage blame was sought to be put on the first taxpayer for the appalling delay of some two years between the date a case was formally requested and the date it was stated but this suggestion was rapidly abandoned by the Crown. We were, indeed, told that delays of this order were not unusual; if so, this is scandalous—but something which must have been known by the Crown when they opposed the adjournment. Nothing in this sequence of events assists it. c

There remains the strongly pressed point that this court should have regard to the interests of the Crown as well as those of the first taxpayer in exercising its discretion—and that it would be unjust in the instant case for it to be put at risk of losing revenue which on a rehearing might be held due. Naturally when exercising its discretion in such a case as the present the interests of both parties must be considered. How then lies the balance? d

For the first taxpayer it has been rightly pointed out that the breach of the rules of natural justice was about as serious as could be, for nowadays it is a paramount right of any man charged with wilful default or fraud under the provisions of a statute normally regarded as penal to have an opportunity personally to give evidence to dispel whatever *prima facie* case may have been set up against him; that if there is a rehearing the matter must go forward on the basis that he must for ever be deprived of the natural justice to which he was entitled; that for an individual the sums involved are large; that he has done nothing to bring about the difficulties that now exist; that those difficulties were caused by or substantially contributed to by the Crown; and that not even on 11th February 1970 did the Crown—despite the length of time they had been aware of the taxpayer's case—concede to him the only just remedy, a rehearing before a *fresh* panel. e

For the Crown were put forward the general interests of the public in the gathering of taxes; the injustice of their being deprived of a chance of success when the onus of obtaining a discharge of the assessments lay on the taxpayer; and the other points to which reference has already been made. Finally it was suggested that as the disablement or death of a taxpayer would not in normal circumstances be any obstacle to pursuing Revenue claims, there was no reason in the present case why the rehearing should not take place as ordered. f

Naturally one has no sympathy for a taxpayer who seems at any rate to have escalated the aggregate of his betting gains to match the claims of the Crown. Nonetheless it is manifest that had an elementary feature of natural justice not been disregarded he might well have shown the assessments appealed were at least in some g

a degree erroneous—as incidentally did his son on his appeal. When that state of affairs is one for which the Crown cannot escape substantial blame the balance of the justice of the case is, in my judgment, deeply tipped against the Crown. No case has been cited in which a party who was thus to blame has yet succeeded in, so to speak, shrugging off irremediable consequences; nor is it likely that such a case will occur, least of all when that party is seeking to enforce penal provisions of a statute. There is simply no analogy between this case and one where a taxpayer becomes disabled from appearing by some natural misfortune for which no one can be blamed.

Accordingly in my judgment the assessments appealed from should be discharged if this court has jurisdiction to do so. For my part I have no doubt that the concluding words of s 64 (6) 'may make such other order in relation to the matter as to the Court may seem fit' give this court jurisdiction to make such order as may be just in the circumstances. Any contrary contention involves assuming an intention on the part of the legislature to force the court to do injustice in certain cases. The point that technically an assessment stands unless the taxpayer displaces it is one which makes it all the more manifest that justice demands a discharge—and the taxpayer should not be left to bear such round figure assessment as may have been selected. I would on those grounds allow the appeal of the first taxpayer by quashing the determination of the commissioners and discharging all the relevant assessments.

d Turning now to the taxpayer company's appeals it is clear that the commissioners based their decisions on inadmissible evidence; accordingly on that ground alone it is necessary to quash their determinations—quite apart from the other matters on which the taxpayer company is entitled to rely. It is, however, also to be observed that the inspector of taxes, after accepting that the onus of establishing that there had been fraud or wilful default in relation to all the years of assessment, failed, as stated by e Russell LJ, to adduce any admissible evidence against the taxpayer company. Moreover he also failed to put any questions whatsoever in cross-examination either to the first taxpayer or to Mr Lever (the accountant) on the 'overs' allegation to which the commissioners seemed to have attached so much importance. Accordingly they should have allowed the taxpayer company's appeals.

f The Crown, however, has been bold enough to contend that, as the hearing was for other reasons a mistrial, they should, despite having mismanaged their case there, be granted a fresh hearing in these matters. It is thus of some importance to examine the reasons why the hearing must be adjudged a mistrial so as to consider whether the discretion of this court should be exercised in favour of the Crown.

g There are two separate grounds on which the hearing must be held to be either a nullity or so irregular that no effect can be given to it. The first is that the taxpayer company was wrongly refused an adjournment without which it was unable to adduce the evidence of its principal witness, the first taxpayer. This is a matter with which I have already dealt when considering the appeal of the first taxpayer and thus needs no further discussion. The second ground is similarly produced by yet another unhappy set of facts relating to the procedure of these commissioners. The taxpayer h company made an application that there should be a separate hearing of its appeals so that the evidence relating to its appeal should not be heard simultaneously with that adduced in the appeal of the first taxpayer. Assuming that the commissioners had jurisdiction to hear the appeals simultaneously (a point to which I will return later in this judgment) and thus had a discretion in the matter, it seems to me that their discretion was wrongly exercised. It is not normally practicable for a lay tribunal in a complex case such as the present to hear at one and the same time the evidence in j two separate appeals and keep distinct what is evidence in one but not evidence in the other. It is quite likely that such a tribunal will fail in such a task—as indeed happened in the instant case. It would have been wiser to accede to the application.

The commissioners, however, not only decided to reject this reasonable application but failed properly to announce their decision. For some reason their chairman, whose function it was to announce what had been decided, left it to their clerk. The

latter proceeded to make a statement of such lack of clarity as to lead counsel for the taxpayer company reasonably to understand that its application had been granted. The result of the misunderstanding was disastrous. Counsel for the taxpayer company naturally adduced no arguments on its behalf at the June hearings. Nonetheless the commissioners by their 25th October letter announced that they had decided against it. The upshot was that at the sitting of 30th January 1968 junior counsel for the taxpayers was put into the position of attempting on behalf of the taxpayer company to persuade the commissioners to reverse the conclusion they had previously reached—not exactly a happy or attractive situation or one likely to lead to the appearance of justice being done. In fact the submissions for the taxpayer company failed—the commissioners yet again accepting ill-founded arguments of the Crown. a

Thus as regards these appeals this court has to consider how to exercise its discretion to make such order as may seem fit—remembering that the assessments under review go back as far as 1942-43 (almost 30 years) and that the Revenue have been pursuing the matters in issue for the best part of two decades. It is in this behalf relevant to observe that the Revenue have as regards matters arising under the relevant sections of the Finance Acts (e.g. the proviso of s 47 (1) of the 1952 Act and s 51 of the 1960 Act) gradually secured from the legislature a position which it is meiosis to describe as formidable. Once the taxpayer is found to have been guilty of a neglect (so defined by s 63 of the 1960 Act as to include a minor inadvertent error) the Revenue may allege wilful default and fraud going back by stages until at any rate 1936; and often can in practice lay the onus on the taxpayer to obtain a discharge of an assessment—and bear all the consequent expenses (unless and until the matter comes before the courts) and anxieties even if he proves to be right. b

When powers exist to open up matters going back an inordinate number of years the borderline between what is reasonable for the protection of the Revenue and what is oppressive vis-à-vis the taxpayer can become blurred. In general the discretion exercised by the Revenue can be relied on to ensure that the line is not crossed. But cases can arise when it is appropriate for the court to consider whether in the interests of justice some limit should be put to the pursuit of the taxpayer when the Crown have previously had every opportunity to examine the matter and to assist to bring proceedings to a conclusion. In the instant case the Crown have had such opportunities but by their own mismanagement and by taking false points have by now reached that limit. c

Incidentally there is one further point to be mentioned—since the hearings under appeal the rules as to hearsay evidence have been altered by the Civil Evidence Act 1968, and the Crown contend that they should now have the advantage of that change—which they could not have had if they had not put forward ill-founded arguments. That contention lacks attraction. Accordingly in these, I hope, unusual circumstances the Crown should not be granted a rehearing; the taxpayer company's appeals should in my judgment be allowed, and the relevant assessments discharged. d

There remain two matters that require mention. The first is the primary ground of objection taken by counsel for the taxpayers on 15th June 1967 to the appeals of the first taxpayer and the taxpayer company being heard together by the commissioners—that they had no jurisdiction to take such a course. This is in the circumstances a point that does not fall to be determined on this occasion. It suffices to note that there is no set of regulations dealing with the procedure before the commissioners and accordingly their jurisdiction on appeals depends on the contents of the statute that provides for it, taking into account the nature of the legislation as a whole. Whether the statute which gives a right of appeal to a taxpayer and the right to have it heard by commissioners can be so construed that the appeal can, without the consent of all parties concerned, be actually heard together with those of one or more other parties—however convenient that course may be—is manifestly an arguable question. Moreover counsel for the Crown when dealing with the point referred with his usual frankness to the fact that any hearing of an appeal by commissioners was supposed to e

a be something not to be communicated outside the parties without their consent. The point has apparently never been decided by the High Court, although we understand it has been canvassed before commissioners; it is a pity that there exists no regulation dealing with it.

b The other matter of concern is that unfortunately this is not the only Revenue case to come before me relatively recently in which it has become apparent that commissioners have, at the instance of a representative of the Revenue, acted in a way that showed notable lack of attention to the requirements of natural justice—or fair play in action as it is often now called. One has every sympathy with men called on to adjudicate on numbers of cases under the pressure that ensues from those numbers being large and the time available short; indeed one of the main factors resulting in the confusion which occurs in such cases is a desire to save as much time as practicable. But the existence of such a desire should of itself engender caution.

c These two matters indeed provide an indication that the time may have come for a review or reinforcement of the system of appeals—coupled with an issue of regulations to minimise the chances of the taxpayer becoming the subject of injustices that can only be expensively remedied by appeals to the High Court.

d **STAMP LJ.** I also take first the case of the first taxpayer. I find it quite impossible to hold on the facts found by the General Commissioners that they erred in law in their conclusion that the unexplained accretion of capital wealth did not arise from betting transactions; and in my judgment on the facts found the commissioners could properly conclude that the accretion arose from moneys received by the first taxpayer in respect of dealings with cloth belonging to the taxpayer company which did not go through the books of that company. Much play was made by the first taxpayer of the fact that the accounts of the taxpayer company were according to the evidence apparently in order and of the fact found by the General Commissioners that Mr Harry Rose (the first taxpayer's son) had no knowledge of any profit being diverted from the taxpayer company to the first taxpayer or of any other irregularities. But there is no finding that Mr Harry Rose concerned himself at all with the management of that company's day-to-day business. Illicit transactions must be carried out secretly and the fact that a man's co-director who shares an office with him is unaware of the existence of any illicit transaction, although no doubt one of the facts which must be taken into account in determining whether there have been illicit transactions, is only one of those facts. There is no reason to suppose that the General Commissioners did not give that fact due weight. The General Commissioners' finding that the £65,000 represented concealed profits of the taxpayer company diverted to the first taxpayer is not in my judgment one to which no person acting judicially and properly instructed as to the relevant law could have come.

g As Russell LJ has said, the taxpayers' advisers, for a reason unconnected with the first taxpayer's appeal, purposely did not take the point that the first taxpayer having illicitly received moneys belonging to the taxpayer company became accountable to the taxpayer company for those moneys which accordingly were not remuneration assessable under Sch E. The inspector of taxes is entitled to say that had the point been taken the hearing before the commissioners would have taken a different course. One does not know what a different cross-examination of Mr Harry Rose, which was viewed by his advisers with apprehension, might not have disclosed, and one is in ignorance of any general authority which the first taxpayer may have had from the other two shareholders in the taxpayer company to fix his own remuneration. The articles of association of the taxpayer company were not in evidence. For these reasons the point, involving a finding of fact or an inference drawn from the facts, that the first taxpayer had no general authority, express or implied, to fix or retain his own remuneration is not in my judgment one which ought to be allowed to be taken on appeal.

Nor in my judgment is the submission well-founded that, because the commissioners wrongly refused an adjournment, thereby subjecting the first taxpayer to an injustice which, because of his present state of health, cannot now be remedied, the Sch E assessment ought to be discharged. In the absence of a finding that the Sch E assessments were wrongly made they cannot in my judgment be discharged. I, like Russell LJ, would leave the first taxpayer with the order which he sought and obtained below: a rehearing.

I turn to consider the appeals by the taxpayer company. At the first hearing before the General Commissioners counsel for the taxpayer company, having submitted that the appeals of that company should be heard separately, was led to believe that that submission had been acceded to. At that stage he accordingly did not make the submission that evidence in the first taxpayer's appeal, and more particularly admissions made by the first taxpayer in the correspondence and interviews which he had with the inspector of taxes, was not evidence against the taxpayer company, and when that submission was made at the later hearing in January 1968 the commissioners did not accept it. It is perhaps understandable that the commissioners should have been reluctant to come to a conclusion, which to a layman must have all the elements of absurdity, that as between the Crown and the first taxpayer the £65,000 represented money derived from dealings with the taxpayer company's cloth and so money belonging to the company which was to be taken as applied in paying remuneration to the first taxpayer, whereas as between the taxpayer company and the Crown it has not been shown that the money was derived from such dealings. They robustly concluded that the money was income of the taxpayer company which the company had paid to the first taxpayer by way of remuneration and that for the purposes of excess profits tax and profits tax it was to be so regarded. It is clear from the cases stated by the commissioners that they came to this conclusion on the basis that the issue was concluded by their decision on the appeal of the first taxpayer and without consideration of what evidence given on that appeal—even if it had been heard together with the appeals of the taxpayer company—was admissible against the company and without making any findings of fact on that admissible evidence.

This being so I find the conclusion that the commissioners were wrong in law in upholding the assessments against the taxpayer company inescapable. I confess to having entertained a doubt whether in the circumstances it is right to discharge those assessments or to affirm the learned judge's¹² decision to direct a rehearing of the taxpayer company's appeals. But having had the advantage of reading the judgment of Russell LJ I conclude, for the reasons which he gives, that the assessments ought to be discharged; more particularly because there was lacking any admissible evidence that the taxpayer company had earned more profits than appeared in its accounts and there was evidence that those accounts had been kept properly.

After the learned judge had delivered his judgment¹², holding that there had been mistrials, it was submitted on behalf of the inspector of taxes that there should be a rehearing of certain other determinations of the commissioners: determinations in respect of which neither side had expressed dissatisfaction and in respect of which there was no appeal to the court by way of case stated. In particular there were assessments on the first taxpayer under Case I of Sch 2 on the footing that the undisclosed accretion, or part of it, represented profits made by him in respect of some unspecified trading activity not derived from the taxpayer company and assessments on the taxpayer company under Case I of Sch D on the footing that the moneys were not moneys received by the first taxpayer as remuneration assessable on him under Sch E but moneys received by and belonging to the taxpayer company. These assessments were alternative to the Sch E assessments on the first taxpayer, and if there was to be a rehearing of the appeal against the Sch E assessments at which the point might be taken that the money received by the first taxpayer was money for

- a which he was accountable to the taxpayer company the justice of the case required that the determinations of the General Commissioners in effect discharging these alternative assessments should also be the subject of the rehearing. The learned judge¹³ acceded to the submission of the Crown and his decision in that respect is challenged by the taxpayers on these appeals, it being contended that there is no jurisdiction in the court on an appeal by way of case stated to direct a rehearing of an appeal to the commissioners against an assessment when the commissioners have made a determination thereon in respect of which no dissatisfaction has been expressed and regarding which there is of necessity no question raised in the case stated for the decision of the court.
- b

The jurisdiction of the High Court is a statutory jurisdiction conferred by s 64 of the Income Tax Act 1952, to be found in Chapter 3 of Part II of that Act: a section of the Act which is concerned with appeals against assessments. Section 51 conferred a right on a person aggrieved by any assessment to appeal to the General Commissioners and s 62 conferred an option, where assessments under Sch D are made, to appeal to the Special Commissioners instead of the General Commissioners. Section 64, conferring jurisdiction on the High Court, provided:

c

(1) Immediately after the determination of an appeal by the General Commissioners, or by the Special Commissioners, the appellant or the surveyor [the reference to the surveyor is for present purposes a reference to the inspector of taxes], if dissatisfied with the determination as being erroneous in point of law, may declare his dissatisfaction to the Commissioners who heard the appeal. [I pause to observe that the appeal spoken of in that subsection is an appeal against an assessment.]

d

(2) The appellant or surveyor, as the case may be, having declared his dissatisfaction, may, within twenty-one days after the determination, by notice in writing addressed to the clerk to the Commissioners, require the Commissioners to state and sign a case for the opinion of the High Court thereon. [There are then provisions relating to the payment of the fee for the case stated, its form and other provisions which are not material for present purposes.]

e

(6) The High Court shall hear and determine any question or questions of law arising on the case, and shall reverse, affirm or amend the determination in respect of which the case has been stated, or shall remit the matter to the Commissioners with the opinion of the Court thereon, or may make such other order in relation to the matter as to the Court may seem fit.

f

I emphasise the words 'the determination in respect of which the case has been stated', which can only refer to the determination of the commissioners of the appeal against an assessment in respect of which dissatisfaction has been expressed; and it is in my judgment clear that the section confers no power on the High Court 'to reverse, affirm or amend' a determination in respect of which no case has been stated. The Crown nevertheless fastening on the phrase 'or may make such other order in relation to the matter as to the Court may seem fit' submit that that phrase, with its use of the words 'the matter', is wide enough to confer jurisdiction in relation to assessments which are not before the court but are associated or connected with the assessments which are before the court. In my judgment this submission is not well founded. Reading the subsection as a whole I cannot doubt that the phrase relied on does no more than confer on the court a power in a proper case, instead of reversing affirming or amending the determination of the Special Commissioners in respect of which the case has been stated, or remitting the matter to the commissioners, to make such other order in relation thereto as the court thinks fit. The 'matter' cannot in my judgment be anything other than the subject-matter of the determination in respect of which the case has been stated.

g

h

j

For these reasons and those given by him in his judgment I agree with the order proposed by Russell LJ.

First taxpayer's appeal dismissed.

Taxpayer company's appeals allowed.

Leave to appeal to the House of Lords granted.

Solicitors: *Beer, Timothy Jones & Webb* (for the taxpayers); *Solicitor of Inland Revenue.*

F A Amies Esq Barrister.

Huxford v Huxford

FAMILY DIVISION

HOLLINGS J

26th OCTOBER 1971

Divorce – Practice – Pleading – Time – Leave to file answer out of time – Leave to file answer containing cross-prayer alleging adultery – Reasonable cause for delay shown – No prejudice to respondent in maintenance proceedings by refusal of leave – Respondent free to raise allegation of adultery in ancillary proceedings – Respondent's right to have allegation, if established, made the subject of a public decree.

On 24th August 1971 the husband filed a petition for divorce alleging that the wife had committed adultery and that he found it intolerable to live with her. Acknowledgment of service of the petition was delivered on 3rd September by the wife who indicated her intention not to defend. The time for filing an answer without leave expired on 25th September. On 18th October evidence of the husband's adultery committed in August or September came into the hands of the wife's solicitors. Thereupon the wife obtained an emergency legal aid certificate and at the hearing on 26th October applied for leave to file an answer containing a cross-prayer founded on the allegation of the husband's adultery. It was contended by the husband that the application should not be granted on the ground that it would cause delay and extra costs to the husband and, by allowing the petition to proceed undefended, the wife's right to maintenance would in no way be prejudiced in that she could bring up all matters of the husband's conduct, including adultery, in the subsequent ancillary proceedings.

Held – On the facts the wife had shown reasonable cause for the delay in filing an answer; although the wife had nothing to lose by allowing the husband's petition to remain undefended insofar as her rights to maintenance would be completely preserved, nevertheless it was important for a respondent, if she so desired, and was advised that she had good grounds for a decree, to seek to obtain a cross-decree; furthermore the wife's interest in having her allegations against the husband considered by the court and, if established, made the subject of a public decree, outweighed the slight inconvenience of the delay and extra costs incurred by the husband; accordingly the application would be allowed (see p 332 f and p 333 g and h, post).

Note

For the time for filing and delivery of an answer, see 12 Halsbury's Laws (3rd Edn) 338, 339, para 703.

Cases referred to in judgment

Blunt v Blunt [1943] 2 All ER 76, [1943] AC 517, 112 LJP 58, 169 LT 33, 27 Digest (Repl) 429, 3589.

Sydenham v Sydenham and Illingworth [1949] 2 All ER 196, [1949] LJR 1424, 27 Digest (Repl) 612, 5737.

Trestain v Trestain [1950] 1 All ER 618, [1850] P 198, 27 Digest (Repl) 614, 5748.

Case also cited

- a *Tumath v Tumath* [1970] 1 All ER 111, [1970] P 78.

Application

The respondent wife to a petition for a decree of divorce applied for leave to file out of time an answer containing a cross-prayer for a decree founded on an allegation that the husband had committed adultery. The facts are set out in the judgment.

- b *F H L Petre* for the wife.
T H K Berry for the husband.

- HOLLINGS J.** In this application the cause has been referred to me sitting in the county court by his Honour Judge Beresford, before whom it came today as an undefended cause, in which Paul Anthony Huxford, the husband, sought a divorce from his wife, Joan Lilian Huxford, on the ground of the irretrievable breakdown of the marriage based on the facts, under s 2 (1) (a) of the Divorce Reform Act 1969, that the marriage had broken down irretrievably, the wife had committed adultery with John Alexander McMillan, the co-respondent, and the husband found it intolerable to live with his wife. At that hearing, counsel appeared for the husband and due notice having been given of the intention to do so by a letter of 22nd October 1971 counsel appeared on behalf of the wife and made application to the county court judge for leave to file an answer containing a cross-prayer on the very same ground, i e s 2 (1) (a), alleging that the husband had himself been guilty of adultery with another woman. Now as counsel for the wife said in opening this application to me, under the old law, no doubt, such an application would have gone through without more, but now that the Divorce Reform Act 1969 is in force I can see, as his Honour apparently said, that different considerations might well apply whether the court should grant leave to file such an answer. Of course the effect of filing such an answer would be to translate the undefended cause into a defended cause and that would make it necessary for the suit to be transferred, would have the effect indeed of automatically transferring the suit into the High Court. In view of the new law and in view no doubt of the undoubted fact that whatever the decree may be, the conduct of the parties on either side can still be raised for all ancillary purposes, the county court judge decided that it had better be referred to a High Court judge to decide whether leave should be granted.

- Now there are two factors which I must consider. One is whether a matter of general principle is involved and, if so, which way to decide that matter of general principle and, secondly, what are the merits of this particular application. In opening the application, and these are the facts which I assume for the purpose of this decision, counsel for the wife said the following in relation to the various dates. The petition was filed as recently as 24th August 1971; it was served on 27th August. Acknowledgment of service was delivered on 3rd September by the wife indicating her intention not to defend. The case was set down for hearing on 16th September and notice of hearing on this date was given on 12th October. The time for filing an answer without leave expired on 25th September. The facts briefly relating to the marriage are that the parties for one reason or another separated in August 1971. There was adultery by the wife, which I understand will be admitted, from February 1971 onwards. When the husband found this out, the wife admitted it to him. It was suggested and agreed that she should stay until July to see how it worked out and during that time it appears the husband met the other woman. In July the husband suggested that the wife should leave the matrimonial home and she left. It is stated by counsel for the wife that she sought reconciliation and that the husband refused and later, the second occasion I think it was, when she sought reconciliation, by direct approach, he told her that another woman was involved. Counsel for the husband has told me that there was an occasion when he did admit his adultery to the wife. It may be that that is the same occasion. Then counsel for

the wife told me that the wife instructed an enquiry agent, but no evidence could be obtained until on 11th October some hearsay evidence was obtained to the effect that the other woman was in the house or living with the husband. On 18th October he told me that what is best described as admissible evidence was available; in other words documentary evidence, I suppose, from the enquiry agent had come into the hands of counsel for the wife's instructing solicitors which indicated that there was satisfactory evidence of the husband's adultery. That adultery, as I understand it, was commencing—and here I am not absolutely clear—by about August or more probably September. In those circumstances the wife applied for and was granted an emergency legal aid certificate on 21st October and under that this application has been made. I say at the outset that counsel for the husband has admitted that there has been this adultery, although no specific admission as to dates or names has been made and it has been indicated by counsel that if a cross-prayer were allowed, then providing there is nothing surprising in the allegation of adultery, adultery would be admitted. Now, says counsel for the wife, that evidence which came into the hands of the wife's solicitors on 18th October was of course nearly a month after the relevant date for putting in an answer without the leave of the court. Up until 25th September the wife could, without applying for the leave of the court, have put in an answer with a cross-prayer in it alleging this adultery. In those circumstances the judge before whom it would eventually appear would have had before him evidence on which he could grant a decree if he was so minded to both parties. There is no doubt I think that on those facts the probabilities are that a decree would have been granted to both parties. So, counsel for the wife says that really she had a right until 25th September. She now has to apply for leave because she has delayed and, provided she can show reasonable cause for that delay, the court should in its discretion give her leave, provided of course no great hardship is caused to the husband. So far as the husband is concerned, the only harm that I can see is (a) the delay itself, and I have been told nothing makes that more than just delay; and (b) the fact, which I assume, that he will have to bear his own costs of today which have been thrown away because the wife was not in a position, or would not be in a position even if an order for the costs of today were made against her, to pay those costs. I have no doubt an order would not be made in those circumstances bearing in mind that she is a legally aided person with a small contribution. On the facts placed before me by counsel for the wife, I would say that a valid reason has been placed before the court to show why no answer was filed before 25th September.

Now in regard to those facts, counsel for the husband points out, adultery has at no time been denied by the husband. Indeed he tells me that the husband did tell his wife that he had committed adultery. I have referred to that already in the earlier part of my decision. He suggests that the wife's solicitors ought to have written to the husband's solicitors asking if they would produce evidence of his own adultery.

As appears from the letters, the first one dated 18th October, the wife's solicitors had very much in mind the question of her maintenance and the fact that adultery on the part of the husband might have some good effect on the amount of her maintenance. But I do not think it would be right for me to criticise, particularly with hindsight, the wife or her solicitors for not writing and asking for evidence of the husband's adultery at an early stage. So I am left simply with this burden of costs to be borne by the husband, plus the delay I have referred to, to weigh against the wife's desire to be enabled to file an answer. Now, says counsel for the husband, under the Divorce Reform Act 1969 first there is no longer a matrimonial offence. The essential ground on which a decree is founded is irretrievable breakdown, and secondly, it is pointed out, that decree or no decree the wife's rights to maintenance are completely preserved. Her rights to bring up all matters of the husband's conduct including adultery are completely preserved and so the amount of her maintenance, whether she should get it and other matters of that kind would, it is

a true, not be affected one way or the other by a decree being given also to her. Yet, says counsel for the wife, the reality is, and here I agree, that the decree goes out before the public as one not only where the marriage has irretrievably broken down, but where the evidence of that breakdown is the fact of the wife's adultery. He says, a mere matter of lapse in time for which there is a good excuse should not deprive the wife of the right which she had before that lapse of time to file an answer and give herself an opportunity of obtaining for herself a decree against her husband. I have been referred by counsel for the husband amongst other cases to *Trestain v Trestain*¹. There, to read the headnote, Singleton LJ said²:

'Where a husband obtains a decree for the dissolution of his marriage, but the evidence shows that he is the spouse responsible for the break-up of the marriage, there is no bar to the wife's obtaining an award of maintenance.'

c Denning LJ said in his judgment³:

'I desire to say emphatically that the fact that the husband has obtained this decree does not give a true picture of the conduct of the parties. I agree that the marriage has irretrievably broken down and that it is better dissolved. So let it be dissolved. But when it comes to maintenance, or any of the other ancillary questions which follow on divorce, then let the truth be seen. If this wife had herself sought a divorce, she would in all probability have been granted one. She could, for instance, have got it by going on with her original petition; or, if she had put in a cross-prayer for divorce in these proceedings, she would probably have been granted it, at any rate in this court, even if the husband had also been granted a divorce on his petition. She ought not to be in any worse position simply because she does not wish herself to ask for a divorce.'

d But Denning LJ then referred⁴ to the then recent case of *Sydenham v Sydenham and Illingworth*⁵ and said that in that case the court was able to see that justice was done by granting a decree to both parties and in so doing it followed the suggestion of Viscount Simon LC in *Blunt v Blunt*⁶. There have, he said, been other unreported cases on the same lines. In the present case, he went on, they could not take that course because the wife did not herself ask for a decree in her own favour. Though not in the same context, I consider that passage affords some support for the wife's application in the present case. Notwithstanding the enactment of the 1969 Act I am of the opinion that it is important still for a respondent if she so desires and, if she is advised that she has good grounds for obtaining a decree, to seek to obtain a cross-decree even though she is vulnerable to a decree being granted to the other party and even though it does not of itself assist her right to maintenance. On that ground of principle I do not think that counsel for the wife is debarred from making this application.

g I come back now to the merits; I have outlined them. It all comes down, as I said before, to the delay and costs. I think that the wife's interest in having her allegations against the husband considered by the court and, if established, made the subject of a public decree outweighs the slight inconvenience of the delay and the extra costs incurred by the husband. For that reason I allow the application.

h *Application granted.*

Solicitors: *James & Charles Dodd*, agents for *Glanvilles, Wells & Way*, Fareham (for the wife); *R V Stokes, Neville-Smith & Grubb*, Portsmouth (for the husband).

j Alice Bloomfield Barrister.

1 [1950] 1 All ER 618, [1950] P 198

2 [1950] P at 198

3 [1950] P at 202

4 [1950] P at 203

5 [1949] 2 All ER 196

6 [1943] 2 All ER 76 at 81, [1943] AC 517 at 531

Collister v Collister

FAMILY DIVISION

SIR GEORGE BAKER P AND REES J

21ST, 22ND JULY, 13TH OCTOBER 1971

Magistrates – Husband and wife – Maintenance order – Jurisdiction – Application for order against person resident in dominions outside the United Kingdom – Application by wife ordinarily resident in Manchester to justices in Manchester for order against husband resident in Isle of Man – Husband absent from hearing – Wife's cause of complaint wholly arising outside United Kingdom – Jurisdiction to entertain application where wife or husband ordinarily resident within petty sessional area of the court to which the application is made even though cause of complaint arising outside United Kingdom – Maintenance Orders (Facilities for Enforcement) Act 1920, s 3 – Matrimonial Proceedings (Magistrates' Courts) Act 1960, s 1 (2).

By s 3 (1)^a of the Maintenance Orders (Facilities for Enforcement) Act 1920, where an application was made to a court of summary jurisdiction in England for a maintenance order against a person who was resident in a part of Her Majesty's dominions outside the United Kingdom to which the Act extended, the court, if after hearing the evidence it was satisfied of the justice of the application, was empowered in the absence of the defendant to make any such order as it might have made if a summons had been duly served on the defendant and he had failed to appear; but such an order was to be provisional only and was to be of no effect until it was confirmed by a competent court in the dominion concerned. The Summary Jurisdiction Acts were applied to proceedings under s 3 of the 1920 Act by s 7 of that Act; accordingly, a complainant seeking a provisional maintenance order under s 3 had to establish that the court to which the application was made had jurisdiction to make the order. The jurisdiction of magistrates' courts to hear a complaint in matrimonial proceedings was governed by s 1 (2) of the Matrimonial Proceedings (Magistrates' Courts) Act 1960 which gave jurisdiction '(a) if at the date of the making of the complaint either the complainant or the defendant ordinarily resides within the petty sessions area for which [the] court acts; or (b) . . . if the cause of complaint arose wholly or partly within the said petty sessions area . . .'

The husband and wife were married in the Isle of Man in 1965. They lived together there until June 1970 when the wife left the husband. She stayed two or three weeks in the Isle of Man and then went with her child to Manchester. On 18th December 1970 the wife applied to Manchester City justices, under s 3 of the 1920 Act, for a provisional maintenance order against the husband on the grounds of cruelty and constructive desertion. At the date of the application the wife was ordinarily resident within the area of the court, but the husband was then resident, and always had been resident, in the Isle of Man, i.e. outside the United Kingdom, and he was absent from the hearing of the wife's application. Further, the cause of complaint, the cruelty and constructive desertion alleged by the wife, arose (if at all) outside the United Kingdom, i.e. in the Isle of Man. The 1920 Act extended to the Isle of Man. On the question whether the justices had jurisdiction to entertain the wife's application for maintenance,

Held – The court had jurisdiction notwithstanding that the cause of complaint arose wholly outside the area of the court, and even outside the United Kingdom, provided that the complainant wife satisfied s 1 (2) (a) of the 1960 Act by proving that she or the husband ordinarily resided within the petty sessional area for which the court acted; for s 1 (2) of the 1960 Act specified alternative grounds on which jurisdiction might be based and neither authority nor public policy required that there

^a Section 3 (1) is set out at p 336 e, post

a should be implied as a condition of the exercise of the power to make an order under s 3 of the 1920 Act, that the cause of complaint arose wholly or partly within the area of the court to which the application was made, or at least within the United Kingdom; and the defendant's interests were protected by the machinery of the 1920 Act (see p 342 h and j and p 343 c, post).

Re Wheat [1932] All ER Rep 48 considered.

b Per Curiam. There is no power on an application under the 1920 Act for the court to make an order for custody of a child. If however the court of summary jurisdiction has power apart from the 1920 Act to make a custody order in respect of a child so as to render that child a 'dependant' whom the husband is liable to maintain, then the machinery of the 1920 Act may be set in motion to enforce a maintenance order in respect of such child (see p 337 a and b, post).

c Notes

For the reciprocal enforcement of maintenance orders by the making of provisional orders by magistrates' courts, see 12 Halsbury's Laws (3rd Edn) 505-507, paras 1110-1112. For the making of an application for an order to a magistrates' court, see *ibid* 493-495, para 1092.

d For the Maintenance Orders (Facilities for Enforcement) Act 1920, ss 3, 7, see 17 Halsbury's Statutes (3rd Edn) 274, 277. For the Matrimonial Proceedings (Magistrates' Courts) Act 1960, s 1, see *ibid*, p 241.

Cases referred to in judgment

Berkley v Thomson (1884) 10 App Cas 45, 54 LJMC 57, 52 LT 1, 49 JP 276, 50 Digest (Repl) 334, 632.

e *Forsyth v Forsyth* [1947] 2 All ER 623, [1948] P 125, [1948] LJR 487, 177 LT 617, 112 JP 60, 27 Digest (Repl) 693, 6628.

Harris v Harris [1949] 2 All ER 318, 113 JP 495, 27 Digest (Repl) 721, 6897.

Lowry v Lowry [1952] 2 All ER 61, [1952] P 252, 116 JP 243, Digest (Cont Vol A) 814, 6630a.

f *Macrae v Macrae* [1949] 2 All ER 34, [1949] P 397, [1949] LJR 1671, 113 JP 342, 27 Digest (Repl) 693, 6629.

Matalon v Matalon [1952] 1 All ER 1025, [1952] P 233, 11 Digest (Repl) 476, 1058.

Wheat, Re [1932] 2 KB 716, [1932] All ER Rep 48, 101 LJKB 720, 147 LT 437, 96 JP 399, 27 Digest (Repl) 720, 6895.

Cases also cited

g *Peagram v Peagram* [1926] 2 KB 165, [1926] All ER Rep 261.

Pilcher v Pilcher [1955] 2 All ER 644, [1955] P 318.

Sowa v Sowa [1961] 1 All ER 687, [1961] P 70.

Appeal

h This was an appeal by the wife against the dismissal by Manchester City justices on 18th December 1970 of her application for a provisional maintenance order, under the Maintenance Orders (Facilities for Enforcement) Act 1920, against the husband who was resident in the Isle of Man. The facts are set out in the judgment of the court.

i I T R Davidson for the wife.

j M L Brent for the husband:

Cur adv vult

13th October. **SIR GEORGE BAKER P** read the judgment of the court. This is an appeal against the dismissal by the Manchester City justices on 18th December 1970, of what is described in the heading of the notes of evidence, as an—

'Application for a provisional maintenance order under the provisions of the Maintenance Orders (Facilities for Enforcement) Act 1920, on the grounds of cruelty and constructive desertion.'

The memorandum of dismissal entered in the register of the court describes the matter of complaint as 'Application for a provisional maintenance order on the grounds of cruelty and desertion'. It is important to see exactly what the justices were dealing with, because the notice of appeal first refers to the dismissal of—

'the applicant's application for a provisional maintenance order on the ground of cruelty and for custody and maintenance of the child Diane'.

Then it asks this court—

'to make a provisional order on the ground of cruelty, or alternatively on that of desertion, and for custody and maintenance of Diane, or in the alternative to remit the matter to the said justices for re-hearing and determination by them.'

Having heard this appeal on 21st and 22nd July 1971, we intimated that the appeal would be dismissed and that we would give our reasons at a later date.

The Maintenance Orders (Facilities for Enforcement) Act 1920, which we will refer to hereafter as 'the 1920 Act', provides by s 3 (1):

'Where an application is made to a court of summary jurisdiction in England or Ireland for a maintenance order against any person, and it is proved that that person is resident in a part of His Majesty's dominions outside the United Kingdom to which this Act extends, the court may, in the absence of that person, if after hearing the evidence it is satisfied of the justice of the application, make any such order as it might have made if a summons had been duly served on that person and he had failed to appear at the hearing, but in such case the order shall be provisional only, and shall have no effect unless and until confirmed by a competent court in such part of His Majesty's dominions as aforesaid.'

A right of appeal against a refusal to make such a provisional order is given by s 3 (6) of the 1920 Act.

The expression 'maintenance order' is defined in s 10 as—

'an order other than an order of affiliation for the periodical payment of sums of money towards the maintenance of the wife or other dependants of the person against whom the order is made'.

'Dependants' are there also defined as—

'such persons as that person is, according to the law in force in the part of His Majesty's dominions in which the maintenance order was made, liable to maintain'.

We are not satisfied that the justices understood that they had before them, or adjudicated on, the issue as to the custody of and maintenance for the child, Diane, born on 30th December 1962, who was living with the wife in Manchester. The absence of any reference to the custody or maintenance of the child in the description of the nature of the application in the heading of the notes of evidence and in the memorandum of dismissal in the court register, taken together with the fact that the justices' reasons are likewise silent on the point, in our opinion fully justify the conclusion which we have expressed above. In our judgment this conclusion is well founded notwithstanding that the wife in the course of her evidence is recorded as having said, 'The child is with me and I apply for custody', and produced the birth certificate.

In the last of the additional grounds of appeal, it is said that the justices were wrong

a in not committing custody of the child of the family to the wife, even though they dismissed her application in her own behalf; but there is no power on an application under the 1920 Act for the court to make an order for custody of a child. As counsel well put it, there can be no export of a custody order. In any event, no court could have made a custody order on the information available in this case. If, however, the court of summary jurisdiction has power apart from the 1920 Act to make a custody order in respect of a child so as to render that child a 'dependant' whom the husband is liable to maintain, then the machinery of the 1920 Act may be set in motion to enforce a maintenance order in respect of such child. (See by analogy *Harris v Harris*¹ in which a Divisional Court of the Probate, Divorce and Admiralty Division upheld such an order made under reciprocal Australian legislation and enforced in England.) That concludes the matter of the child.

c The brief undisputed facts of the case are that the parties were married on 15th April 1965 in the registrar's office in Douglas, Isle of Man, in the terms of the Acts of Tynwald. They lived together in Douglas until 15th June 1970, when the wife left the husband, stayed two or three weeks in the Isle of Man, and then took herself, with the child to Manchester. The wife's complaints, as given in her evidence, are that the marriage had never been happy, that in 1968 there had been a quarrel about her going out with girls, and that in March 1969, when she again went out, she was locked out. There was a fight and she was told that if she went out like that again she would have to get out of the house. Later that year she again went out with a girl called Pamela Crellin, aged 19, got home about midnight and found that she had been once more locked out of the house. She stayed away for some three weeks, and then returned and got into the house by using her own key. In June 1970 she again went out with Pamela Crellin, and was once more locked out. e On the following day she broke down the door; but when she entered her husband, so she said, hit her and bruised her. She left, staying for a week with Mr and Mrs Crellin, Pamela's parents, stayed three weeks with friends, and finally went to live in a flat in Manchester, in the same house that Mr Crellin—who appears to have left Mrs Crellin—is living. The wife is about 33 or 34 years of age. Mr Crellin, who f was a verger at a church in the Isle of Man, gave evidence that there had been no improper behaviour between them; but, perhaps not surprisingly, the husband, clearly suspected adultery. He wrote a number of very strongly worded letters at the end of 1970, containing numerous threats and allegations.

The justices did not accept the wife's evidence. They say in their reasons:

g 'In this particular case we are at great disadvantage in only being able to hear the evidence of the [wife] and her witness, but at the outset must say that we feel unable to accept the truth of the evidence either of them gave before us. The [wife] in particular was most hesitant and, it almost seemed, reluctant to give full details of the allegations she was making against the husband, and we feel unable to attribute this solely to nervousness.'

h They then dealt with the various allegations made by the wife, found her statement that she went out with Pamela Crellin, a girl of 19, incapable of belief, and came to the conclusion that the husband was bound to draw the inference that there was an association with Mr Crellin. They concluded:

j 'Taking all the above factors into account, we feel that the [wife] is the author of her own misfortunes and accordingly dismiss her application.'

Counsel for the wife has argued the appeal on the facts of the case with great clarity and skill, but we cannot see any reason for upsetting the clear conclusion to which the justices came. They saw the two witnesses and read the letters, and they

alone were in a position to judge whether they could accept the truth of the evidence given to them. They did not accept that evidence. The decision whether to accept or reject is the primary function of justices. It is quite impossible for us to say that they must or, indeed, ought to have come to any other conclusion in this case. Finally, note the words of s 3 (1) of the 1920 Act: '... the court may ... if after hearing the evidence it is satisfied of the justice of the application, make any such order ...' The court was not satisfied of the justice of this application, and that was the end of the matter. a

This case, however, raises an interesting and important question, which has been fully argued before us and on which we consider we ought to state our opinion. It is whether the court has in any event jurisdiction on such an application as this to make an order against a man who not only is not, but never has been, resident in England or Wales or within the ordinary jurisdiction of the court. b

It is at first sight a somewhat surprising proposition that a lady can come to Manchester (or elsewhere in England or Wales) from any of the many territories to which the 1920 Act extends (see Rayden on Divorce²), and obtain from the justices a provisional order against her husband, with whom she has always hitherto lived in that territory, and who has always been and still remains there. She may have arrived from Christmas Island, or the Falkland Islands, or the Niger Delta, not from the Isle of Man. If, as is possible, legislation is passed with a view to ratification by the United Kingdom of the United Nations Convention of 1956 on the recovery abroad of maintenance, the catchment area could become almost universal. The question does not appear ever to have been directly decided, and we understand that such orders have from time to time been made. c

The only textbook reference that we have been able to discover is in Bromley's Family Law³: 'A magistrates' court has no jurisdiction if the defendant resides outside the United Kingdom ...' *Macrae v Macrae*⁴ is cited as authority, but the text does not mention the 1920 Act, and it is true that except where the 1920 Act applies a maintenance order cannot be made where the defendant is resident outside the United Kingdom, since the summons cannot effectively be served on him. d

Section 3 of the 1920 Act is silent about jurisdiction, but it is plain that the 'application' for a 'maintenance order' therein referred to is an application made pursuant to the jurisdiction and powers of the court of summary jurisdiction to which the application is made. e

The 1920 Act enables such an order to be made against the defendant who is resident at one of the places outside the United Kingdom to which the 1920 Act has been extended, and who is absent when the order is made and the Summary Jurisdiction Acts are applied to those proceedings⁵. Accordingly, a complainant seeking a provisional order under s 3 of the 1920 Act must establish that the court to which the application is made has jurisdiction and power to make the order sought, and also that, being absent when the hearing takes place, the defendant is resident in one of the places to which the Act extends. The object of the 1920 Act is to provide reciprocal arrangements to enforce maintenance orders against persons resident in the places to which the Act has been extended, but living outside the territory of the court making the order. No provisions for the service of process on the defendant are included and, indeed, the court may only make the order 'in the absence' of the person against whom it is sought. f

The interests of the defendant are protected by the elaborate provisions of s 3 (2) (5) inclusive. It is unnecessary to set out these provisions in detail, and it is sufficient to emphasise that the order made in the first instance is provisional only, and of no effect unless and until confirmed by an order of the court in the place where the defendant resides. g

² 11th Edn, 1971, pp 2044, 2045, footnote

³ 3rd Edn, 1966, p 236; cf 4th Edn, 1971, p 148

⁴ [1949] 2 All ER 34, [1949] P 397

⁵ See s 7 of the 1920 Act h

a When the 1920 Act was passed, the jurisdiction of the court to which the application was to be made was governed by s 4 of the Summary Jurisdiction (Married Women) Act 1895 ('the 1895 Act'). This section restricted the jurisdiction to the petty sessional area (1) in which the husband had been convicted of a specified assault on the wife, or (2) in which the wife's cause of complaint against him (i.e. the matrimonial offence) wholly or partially arose. This remained the position until 16th December 1949
b when the Married Women (Maintenance) Act 1949 was passed ('the 1949 Act'). It was during this period and while the jurisdiction was thus restricted by the, as yet, unamended provisions of the 1895 Act, that the two cases of *Forsyth v Forsyth*⁶ and *Macrae v Macrae*⁷ were decided by the Court of Appeal. In each of these cases, however, the husband resided in Scotland, and therefore the 1920 Act did not apply, since he did not reside 'outside the United Kingdom' (see s 3 of the 1920 Act). Accord-
c ingly, the Court of Appeal did not consider—nor is there any reference to—the provisions of the 1920 Act in the report of either case. In the *Forsyth* case⁶ there is only a possibility that the husband's desertion arose partly in England. In the *Macrae* case⁷ the husband certainly deserted the wife within the jurisdiction of the court which issued the summons. Somervell LJ said⁸:

d 'The fact that the desertion took place in England and that he was ordinarily resident in England up to a short time before does not seem to me to affect the matter. Ordinary residence... can be changed in a day.'

Therefore, at least in the *Macrae* case⁷, the requirements of s 4 of the 1895 Act as to jurisdiction were satisfied, because the cause of complaint initially arose within the jurisdiction of the English court. But the complainant failed in the *Macrae* case⁷
e on the basis of the principle stated in the *Forsyth* case⁶, namely, that unless the defendant was ordinarily resident or 'resident'—or possibly merely 'present'—in England when the summons was issued, there was no jurisdiction. In *Forsyth v Forsyth*⁹ Bucknill LJ cites with approval the following passage from Dicey's *Conflict of Laws*¹⁰:

f '... presence is enough, or in other words... residence means for the present purpose nothing more than such presence of the defendant as makes it possible to serve him with a writ or other process by which the action is commenced.'

Bucknill LJ in the *Forsyth* case¹¹, without deciding the point, was 'disposed to think' that the mere presence of the defendant within the jurisdiction when the summons is issued is sufficient. Of course, if there were no jurisdiction the use of mere procedural
g provisions as to the issue and service of process cannot confer it. The result, therefore, of the *Forsyth*⁶ and *Macrae*⁷ cases, taken together, may properly be said to be that even though the cause of complaint may have arisen within the jurisdiction of the court, it has no power to adjudicate when the defendant is not resident—or possibly not even 'present'—within the jurisdiction when the summons was issued and served, and a fortiori when he is ordinarily resident outside it and has never resided
h within it. In his statement of the principle in *Berkley v Thompson*¹² Lord Selborne LC recognised that a person resident abroad may be brought within the jurisdiction by 'special statute or legislation'. He said:

'... not only must there be a cause of action of which the tribunal can take cognizance, but there must be a defendant subject to the jurisdiction of that

j 6 [1947] 2 All ER 623, [1948] P 125
7 [1949] 2 All ER 34, [1949] P 397
8 [1949] P at 403, cf [1949] 2 All ER at 36
9 [1947] 2 All ER at 626, [1948] P at 134
10 5th Edn, p 403
11 [1947] 2 All ER at 627, [1948] P at 130
12 (1884) 10 App Cas 45 at 49

tribunal; and a person resident abroad, still more, ordinarily resident and domiciled abroad, and not brought by any special statute or legislation within the jurisdiction, is *prima facie* not subject to the process of a foreign Court—he must be found within the jurisdiction to be bound by it.’ a

Section 6 of the 1949 Act amended the 1895 Act by giving jurisdiction to the court of summary jurisdiction for the area in which the married woman or the husband ‘ordinarily resides’, as well as to the court within whose area the cause of complaint wholly or partially arose. This amendment would not, by itself, have affected the decisions in the *Forsyth*¹³ or *Macrae*¹⁴ cases, because the principle excluding jurisdiction in those cases was effective even where—as in the *Macrae* case¹⁴—the cause of complaint arose wholly within the jurisdiction. But s 1 of the Maintenance Orders Act 1950 expressly gave an English court jurisdiction to make a maintenance order against a man residing in Scotland or Northern Ireland provided the applicant wife resided in England and the parties last ordinarily resided together as man and wife in England. This statute certainly would have given jurisdiction in the *Macrae*¹⁴ case, but not in the *Forsyth* case¹³. b

In the light of the foregoing, we must now consider whether the magistrates’ court at Manchester had jurisdiction to entertain this application for maintenance, apart from the facts proved that the husband was resident in the Isle of Man and was absent at the date of the hearing. The jurisdiction is now to be found consolidated in s 1 (2) of the Matrimonial Proceedings (Magistrates’ Courts) Act 1960 (‘the 1960 Act’) which (in addition to the place where the husband was convicted of an assault on his wife) gives jurisdiction to the court for the petty sessional area where either the complainant or the defendant ‘ordinarily resides’, or in which the cause of complaint wholly or partly arose. The wife’s case undoubtedly was that at the material time she ‘ordinarily resided’ within the petty sessional area of the city of Manchester. It was assumed throughout the hearing of the appeal before us that there was evidence on which the magistrates could find that they had jurisdiction on the basis that the wife ‘ordinarily resided’ within their petty sessional area. It is not, therefore, necessary to consider the quality of her residence or the decisions dealing with that point, such as *Matalon v Matalon*¹⁵ or *Lowry v Lowry*¹⁶. The requirements of s 3 of the 1920 Act were also satisfied, because it was proved that the husband was resident outside the United Kingdom and in a part of Her Majesty’s dominions to which the Act extends—namely the Isle of Man—and was absent at the date of the hearing. *Prima facie*, therefore, all the conditions necessary to give the court jurisdiction were satisfied. No difficulties as to the service of process on an absent defendant, such as arose in the *Forsyth*¹³ or *Macrae*¹⁴ cases, existed because of the provisions of the 1920 Act. The crucial question is whether the terms of the 1920 Act, taken together with those of the 1960 Act, constitute (in Lord Selborne LC’s phrase¹⁷) a ‘special statute or legislation’ which bring the defendant within the jurisdiction of the court concerned, or whether some other essential requirements not expressed in the statute must also be satisfied. c

Clearly, unless the express terms of the 1920 Act are to be ignored, the conditions stated in the *Forsyth* case¹³ that the husband must be ordinarily resident or, at least, present in the jurisdiction where the summons was issued cannot apply—because the whole basis of the statute is that he is not only resident abroad but actually not present when the application is heard. Is a condition to be implied that the cause of complaint, e.g. the alleged cruelty or desertion, shall have wholly or partly d

13 [1947] 2 All ER 623, [1948] P 125

14 [1949] 2 All ER 34, [1949] P 397

15 [1952] 1 All ER 1025, [1952] P 233

16 [1952] 2 All ER 61, [1952] P 252

17 (1884) 10 App Cas at 49 e

a arisen within the jurisdiction; that is in England or Wales? If so, then the 1949 Act must have been intended only to enable a wife, who had moved from one petty sessional area (e.g. Bristol) in which her cause of complaint arose to another (e.g. Manchester) to take out a summons in and have her case heard in Manchester. Before the 1920 Act was passed there was the essential condition arising from s 4 of the 1895 Act that the wife might—

b ‘apply to any court of summary jurisdiction acting within the city, borough, or petty sessional or other division or district, in which any such conviction has taken place, or in which the cause of complaint shall have wholly or partially arisen . . .’

c That was her sole remedy and means of enforcement. That was the only jurisdiction the magistrates possessed; and, of course, it follows that the cause of complaint must have arisen in England or Wales. However, from December 1949 up to the present time the jurisdiction has remained extended so as to include the petty sessional area in which the married woman or the husband ordinarily resides, irrespective of where the cause of complaint arose. Section 1 (2) of the 1960 Act is clearly disjunctive.

d No case was cited to us nor have we been able to discover any authority which decides the point whether it is an essential condition of the exercise of the power to make an order under s 3 of the 1920 Act that the cause of complaint shall have arisen wholly or partly within the petty sessional area of the court to which the application is made. But the point did arise and was considered by a Divisional Court of the King’s Bench, consisting of Lord Hewart CJ, Avory and Humphreys JJ in relation to the reciprocal South African legislation in *Re Wheat*¹⁸. In that case a wife resident in East London in South Africa in July 1931 obtained a provisional order for maintenance for herself against her husband, a doctor, then resident and domiciled in England, pursuant to a statute of the Legislature of the Union of South Africa, Act No 15 of 1923. This statute enacted reciprocal provisions to the English Act of 1920. The order was made on the ground of desertion. A metropolitan magistrate in November 1931 confirmed the provisional order (subject only to a reduction in the amount) pursuant to the powers given by s 4 of the 1920 Act. The husband appealed to the Divisional Court, inter alia, on the ground that it was an essential requirement of South African law to found jurisdiction that the husband’s desertion should be proved to have taken place in South Africa, and that there was no evidence of such desertion. The considered judgment of the court was delivered by Humphreys J, who said this¹⁹:

g ‘In the year 1923 the Legislature of the Union of South Africa enacted such reciprocal provisions by Act No. 15 of 1923 of the Statutes of South Africa, and s. 4 of that Act enables a magistrate’s court in the Union to which application is made for a maintenance order against a person resident in England to make, in the absence of that person, “any such order as it might have made if a summons had been duly served on that person and he had failed to appear at the hearing,” but provides that such order shall be provisional only and shall have no effect until confirmed by a competent court in England. This Act affords no guide as to the jurisdiction of a magistrate’s court to make a maintenance order in any particular case, and we are thrown back upon the language of Act No. 7 of 1895 to ascertain whether the order in this case is one which the court “might have made” under that Act.’

j The provisions of s 4 of the reciprocal South Africa Act 15 of 1923 appear to be similar in all relevant respects to s 3 of the 1920 Act, and likewise silent as to the

18 [1932] 2 KB 716, [1932] All ER Rep 48

19 [1932] 3 KB at 722, [1932] All ER Rep at 52

jurisdiction to make the order for which application was made. Accordingly, the Divisional Court turned to the South Africa Statute No 7 of 1895, which gave power to a South African magistrate to make a maintenance order in the favour of a deserted wife. The relevant parts of this Act are set out in the report²⁰ and need not be repeated. By s 2 jurisdiction was given to the resident magistrate in the district in which the wife resided in these terms¹:

'When any husband unlawfully deserts his wife or leaves her without means of support . . . if complaint thereof be made on oath to the resident magistrate of the district in which such wife . . . shall . . . reside . . . such resident magistrate . . . [may initiate the procedure leading to the making of the order].'

The metropolitan magistrate's view on this point of jurisdiction and the Divisional Court's opinion thereon are stated in the following passage of the judgment²:

'Upon the third point the opinion of the learned magistrate is stated in para. 7 (d) of the case as follows: "That the jurisdiction given by Act No. 7 of 1895 is not in the district in which a husband deserts or leaves his wife destitute, but in the district in which the wife (who has previously been deserted or left destitute, whether in that district or elsewhere) resides at the time of making her complaint." This Court must not be taken to assent to that proposition of law in the form in which it is expressed, but in our judgment the decision of the learned magistrate may be supported on other grounds.'

The 'other grounds' on which the Divisional Court supported the decision of the metropolitan magistrate were based on a finding of fact and law that 'the wife was deserted and left without means of support in East London'; that is, within the area of the court in South Africa which made the order.

The Divisional Court were not considering the English Acts of 1920 or of 1895, nor is their decision a binding authority on the point we have to decide. If they had considered the point in its relation to English law, the only conclusion they could have reached was that it was an essential requirement that the desertion or other cause of complaint must have arisen wholly or partly within the area of the court making the order, because in 1931 that was the sole ground giving jurisdiction under the English 1895 Act (except the place of conviction of the husband for assault).

The cruelty alleged by the wife took place, if at all, in the Isle of Man, and the inception of the alleged constructive desertion also took place there. There was evidence which, if accepted, and taken together with the husband's letters, might have supported a finding that desertion being a continuing offence, also arose while the wife was in Manchester. This aspect of desertion is fully considered, together with some of the authorities in the judgment of the court in *Re Wheat*³. As stated earlier the point plainly does not arise for decision before us, but in deference to the arguments addressed to us, and in view of the importance of the issue, we have thought it right to express an opinion on it. We are of opinion that, provided the complainant wife satisfies s 1 (2) (a) of the 1960 Act by proving that she or her husband ordinarily resides within the petty sessional area for which the court acts, that court has jurisdiction, notwithstanding that the cause of complaint arises wholly outside the area of that court, and even outside England or Wales altogether. No authority requires us to hold otherwise. Section 1 (2) of the 1960 Act specifies alternative grounds on which jurisdiction may be based, and to imply any condition such as that suggested involves disregarding the terms of the Act. No aspect of public policy seems to us to demand a different approach. The defendant's interests are protected by the machinery of the 1920 Act. In the wider field of divorce law, once a court (usually,

²⁰ [1932] 2 KB at 721, 722, [1932] All ER Rep at 52

¹ See [1932] 2 KB at 721, [1932] All ER Rep at 52

² [1932] 2 KB at 723, [1932] All ER Rep at 52, 53

³ [1932] 2 KB 723, 724, [1932] All ER Rep at 53

a but not always, the court of domicile of the parties) has jurisdiction, it has been a commonplace for a decree of dissolution of a marriage to be based on a finding of a matrimonial offence which took place wholly outside the territorial jurisdiction of the adjudicating court.

Finally, we find it difficult to think that when the legislature passed the 1960 Act it could have overlooked the interrelation of the 1920 Act with the Summary Jurisdiction Acts, which since 1949 had provided two distinct and alternative bases for jurisdiction. We recognise the force of a possible argument that when Parliament gave a court of summary jurisdiction power to adjudicate on the basis of the ordinary residence of the complainant or defendant, it was contemplated that the cause of complaint, though arising outside the petty sessional area of the court, at least arose within the territorial area of the United Kingdom. But, having regard to all the circumstances prevailing in 1960, including the long-standing provisions of the 1920 Act and the movements of population within the Commonwealth, we do not think that the courts should be astute to impose by implication a restriction which Parliament did not choose to express.

Appeal dismissed.

d Solicitors: *Waterhouse & Co*, agents for *Maddocks, Dodds & Miller*, Manchester (for the wife); *Rowlands*, Manchester (for the husband).

Alice Bloomfield Barrister.

Bunbury and others v Inland Revenue Commissioners

f CHANCERY DIVISION
PENNYCUICK V-C
8th OCTOBER 1971

g *Estate duty – Exemption and remission – Property which has borne duty on death of spouse – Settled property – Interest in expectancy – Duty paid on interest in expectancy on death of first spouse – Whether prior payment of duty on interest in expectancy qualifying for relief as payment in respect of settled property on death of surviving spouse – Finance Act 1894, s 5 (2) – Finance (1909-10) Act 1910, s 55 – Finance Act 1914, s 14, proviso (a).*

h Under the terms of a settlement made in his will, R, who died on 25th April 1914, provided that his residuary estate was to be divided into four equal parts, each part to be held in trust for each of his four children subject to the proviso that the share bequeathed to each daughter should not vest in her absolutely but should be retained on trust to pay the income to her, and after her death to her husband; after the husband's death or remarriage, each share was to be held in trust for the children of each of R's daughters who should attain 21 or, if female, should earlier marry. K, the wife of C, was one of R's four children. C and K had three children, one of whom, a daughter, P, died in 1941 unmarried and intestate having attained the age of 21 years. On her death P's interest in expectancy of one-third of K's share under R's will passed in equal shares to C and K, each of whom, therefore, had a one-sixth interest in expectancy under the will of R. C died on 24th June 1963 and duty was paid in his estate on his half share in P's interest in expectancy in K's share under R's will. K died on 25th September 1965 and the question then arose whether one-sixth of her share under R's will, i.e. half of P's share in that share, was exempt

from duty. It was contended by the executors of K that on the true construction of proviso (a) to s 14^a of the Finance Act 1914 (which preserved the relief from duty in respect of settled property contained in s 5 (2)^b of the Finance Act 1894 in cases where duty had been paid on the death of one of the parties to a marriage) the proviso applied where duty had been paid on an interest in expectancy in settled property since s 55^c of the Finance (1909-10) Act 1910, which excluded interests in expectancy from the ambit of s 5 (2) of the 1894 Act, had no application in the construction of s 14 of the 1914 Act and accordingly the relief under s 5 (2) was unaffected and therefore available in the present case by reason of the payment of duty in the estate of R.

Held—Since by the express provisions of the 1910 and 1914 Acts the relevant provisions of those Acts were to be construed together with the 1894 Act, it followed that s 14 of the 1914 Act was to be construed together with s 55 of the 1910 Act; accordingly the provision of s 55 of the 1910 Act to the effect that a payment of duty in respect of an interest in expectancy was not to be deemed to be a payment of duty in respect of settled property, had to be applied in the construction of proviso (a) to s 14 of the 1914 Act; since the duty paid on C's death on the one-sixth share was on an interest in expectancy, proviso (a) to s 14 of the 1914 Act was therefore inapplicable, and there was nothing to exclude or restrict the charge of duty on the death of K (see p 347 e to g, post).

Notes

For liability to pay estate duty when duty already paid on an interest in expectancy, see 15 Halsbury's Laws (3rd Edn) 50, 51, para 99, and for cases on the subject, see 21 Digest (Repl) 45-47, 184-192.

For the Finance Act 1894, s 5, see 12 Halsbury's Statutes (3rd Edn) 462, for the Finance (1909-10) Act 1910, s 55, see *ibid* 511, and for the Finance Act 1914, s 14, see *ibid* 522.

Case referred to in judgment

Inland Revenue Comrs v Priestley [1901] AC 208, 70 LJPC 41, 84 LT 700, 21 Digest (Repl) 15, 51.

Adjourned summons

By a summons dated 17th March 1971 the plaintiffs, Sir John William Napier Bunbury, Margaret Elinor Tomkin and Oliver Ronald Smith, the first and second named as executors of Dame Katherine Bunbury ('the deceased'), and the first and third named as trustees of the will and codicil of Herbert Edgar Reid ('the testator'), sought the determination of the court whether on the true construction of the relevant Acts a moiety of the share of the deceased's settled share of the testator's residuary estate which on the deceased's death passed into the estate of her deceased daughter Pamela was exempt from estate duty. The facts are set out in the judgment.

M J Fox QC and N C H Browne-Wilkinson for the plaintiffs.
P R Oliver QC and J P Warner for the Crown.

PENNYCUICK V-C. This summons raises a question as to the availability in circumstances which I shall mention of the exemption from estate duty on the death of the surviving party to a marriage. The facts may be stated as follows. Herbert Edgar Reid made his will on 12th September 1910. After giving certain limited interests during a specified period which has long since determined, the testator

a Section 14, so far as material, is set out at p 346 j to p 347 a, post

b Section 5 (2), so far as material, is set out at p 345 j, post

c Section 55, so far as material, is set out at p 346 f and g, post

a directed his trustees to divide his residuary estate into four equal parts and to hold one of such parts for each of his four children, subject to the proviso that the share bequeathed in trust for each daughter should not vest in her absolutely but should be retained by his trustees on trust to pay the income thereof to her, and after her death to pay such income to her husband until he should marry again; and after his re-marriage or death, to hold the share in trust for the daughter's child or children

b who, being a son or sons, attained 21 or, being a daughter or daughters, attained 21 or married, and if more than one in equal shares; and there was a provision for accrual.

Herbert Edgar Reid died on 25th April 1914. He had four children, one of whom was Katherine, the wife of Sir Charles Henry Napier Bunbury. Sir Charles and Lady Bunbury had themselves three children, namely, Sir John William Napier Bunbury, Mrs Margaret Elinor Tomkin and Miss Pamela Bunbury. Pamela died unmarried and intestate on 20th October 1941, having attained the age of 21 years. On her death her father and mother, i.e. Sir Charles and Lady Bunbury, became entitled to her estate in equal shares. Her estate consisted entirely of her interest in expectancy under the will of Herbert Reid. She left no debts. Sir Charles died intestate on 24th June 1963. Letters of administration to his estate were granted to Sir John Bunbury and Mrs Tomkin. Lady Bunbury died on 25th September 1965. Probate of her will was granted to Sir John Bunbury and Mrs Tomkin.

c

d

After the deaths of Sir Charles and Lady Bunbury letters of administration to the estate of Pamela were granted to Sir John Bunbury and Mrs Tomkin. That was on 24th May 1967. Duty was paid in the estate of Sir Charles on his half share in Pamela's estate, which consisted of her interest in expectancy in Lady Bunbury's share under the will of Herbert Reid. Sir John Bunbury and Mr Oliver Ronald Smith are the present trustees of Herbert Reid's will. Lady Bunbury's share under the will of Herbert Reid amounts to £629,000. The question which has arisen is whether one-sixth of that share, i.e. half of Pamela's share in that share, is exempt from duty by reason of the duty paid in Sir Charles's estate in respect of his interest in Pamela's estate.

e

f On the present originating summons the plaintiffs are Sir John Bunbury, Mrs Tomkin and Oliver Smith. The defendants are the Commissioners of Inland Revenue. The question raised by the summons is in these terms:

'That it may be determined whether, on the true construction of the Finance Act, 1894, and amending Acts and in the events which have happened, the exemption from estate duty in respect of settled property conferred by Section 5 (2) of the Finance Act, 1894, does, or does not, apply on the Deceased's death on the 25th September, 1965, to a moiety of the share of the Deceased's Settled Share of the residuary estate of Herbert Edgar Reid deceased which then passed into the estate of her deceased daughter Pamela, by reason of the payment of estate duty in respect of the estate of the said Herbert Edgar Reid deceased made on his death on the 25th April, 1914 and the payment of estate duty in respect of the estate of the Deceased's husband, Sir Charles Henry Napier Bunbury made on his death on the 24th June 1963.'

g

h

It will be necessary at this stage to refer to three statutory provisions and one decided case. Section 5 (2) of the Finance Act 1894 is in these terms:

'If Estate duty has already been paid in respect of any settled property since the date of the settlement, the Estate duty shall not . . . be payable in respect thereof, until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of such property . . .'

j

Duty having been paid on the death of Herbert Reid it is not in doubt that if this section had not been subsequently amended the exemption under it would have

been available quite irrespective of the payment of duty in the estate of Sir Charles.

I must next refer to the decision of the House of Lords in *Inland Revenue Comrs v Priestley*¹. The headnote runs as follows:

“By a marriage settlement personal property was settled in trust for the husband for life, after his death for the wife for life, and after the death of the survivor for such persons as the wife by deed or will should appoint. The wife died, having exercised the power of appointment by will. Upon her death estate duty was paid under the Finance Act, 1894, in respect of her expectancy, upon the principal value of the settled property, the value of her husband’s life interest being deducted. Upon the husband’s death the Crown claimed estate duty again upon the principal value of the settled property. The settlement trustees paid the claim, but afterwards petitioned for a return of the amount, less the value of the husband’s life interest, alleging that on his death estate duty became payable (if at all) only on the value of his life interest:—*Held*, that estate duty having been paid upon the settled property since the date of the settlement, namely, upon the wife’s death, s. 5, sub-s. (2), exempted the settled property from estate duty until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of the property, and that the husband not being such a person, the trustees were entitled to a return of the amount for which they petitioned, and that if they had claimed the return of the whole sum they had paid upon the husband’s death they would have been entitled to it.”

I need not read the speeches in that case. It will be sufficient to say that if s 5 (2) had not been amended the payment of duty in the estate of Sir Charles would have afforded a second ground of exemption from duty.

The next statutory provision is s 55 of the Finance (1909-10) Act 1910. That section, so far as material, provides as follows:

‘For the purpose of any claim to relief from estate duty under subsection (2) of section five . . . of the principal Act, in the case of persons dying on or after the thirtieth day of April nineteen hundred and nine, payment of or liability to duty, whether the payment was made or the liability attached before, on, or after that date, shall not be deemed to be a payment of or liability to duty in respect of settled property if the payment was made or the liability attached in respect of an interest in expectancy in any property on the death of a person other than the settlor.’

The negative deeming provision in that section disqualifies payment of duty on an interest in expectancy as a ground of exemption. Otherwise the section leaves intact the exception in s 5 (2) of the 1894 Act. Section 96 (3) of the 1910 Act provides that Part III of the Act, which includes s 55, shall be construed together with the 1894 Act.

Finally, one comes to s 14 of the Finance Act 1914. That section, so far as material, provides as follows:

‘Any relief from the payment of estate duty given by subsection (2) of section five, or by subsection (1) of section twenty-one of the Finance Act, 1894 (which relate to settled property) . . . shall cease in the case of any person dying after the fifteenth day of August, nineteen hundred and fourteen . . . Provided that —(a) nothing in this section shall affect the relief given by the above-mentioned provisions of the Finance Act, 1894, in cases where, before or after the passing of this Act, estate duty has been paid . . . or [is] payable upon the death of one

- a of the parties to a marriage, so far as respects the payment of estate duty on the death of the other party to the marriage . . .'

That section in the first place excludes any relief afforded by s 5 (2) of the 1894 Act. Then, the proviso saves that relief in the specified cases, namely, cases where estate duty has been paid on the death of one of the parties to a marriage, so far as respects the payment of estate duty on the death of the other party to the marriage. That is the familiar exemption habitually applied where property is settled in such a way that duty is payable on the first death of the one spouse, and the surviving spouse is not competent to dispose of it. Section 18 of the 1914 Act provides that Part III of that Act, which includes s 14, shall be construed together with the 1894 Act.

- b Counsel for the plaintiffs accepted that the expression in the proviso to s 14 'estate duty has been paid' must mean 'estate duty has been paid in respect of the settled property'. Counsel's contention on the effect of s 14 may be summarised as follows: 'Proviso (a) to s 14 must be construed according to the ordinary use of language, as explained in the *Priestley* case². The proviso therefore applies where duty has been paid on the death of one spouse on an interest in expectancy in the settled property. At this stage, s 55 of the 1910 Act has no application. Then one is thrown back on s 5 (2) of the 1894 Act, the relief under which is unaffected. This relief is available here
- c by reason of the payment of duty in the estate of Herbert Reid. At this stage s 55 of the 1910 Act would admittedly be applicable to disqualify the duty paid in the estate of Sir Charles, but the payment in the estate of Herbert Reid makes it unnecessary to have recourse to that payment.' If it were indeed legitimate thus to disregard s 55 of the 1910 Act in the construction of proviso (a) to s 14 of the 1914 Act, the rest of the argument would, it seems to me, be valid; but I do not think that it is legitimate thus to disregard s 55.

- By the express statutory provisions to which I have referred in the 1910 Act and the 1914 Act, the relevant parts of the 1894 Act, the 1910 Act, and the 1914 Act must be construed together. Section 5 (2) of the 1894 Act, s 55 of the 1910 Act and s 14 of the 1914 Act are all concerned with the same subject-matter, namely, relief from duty in respect of settled property. It necessarily follows that s 14 of the 1914 Act
- f must be construed not only together with s 5 (2) of the 1894 Act, but also with s 55 of the 1910 Act. Once this is accepted it seems to me to follow inescapably that the negative deeming provision in s 55 must be applied in the construction of proviso (a) to s 14 and thus disqualifies the payment of duty on an interest in expectancy from the ambit of the cases where duty has been paid on the death of one of the parties to a marriage for the purpose of that proviso. I find it impossible to construe the proviso (a) in s 14 without regard to s 55. So, in the present case proviso (a) is inapplicable and there is nothing to exclude or restrict the charge of duty on the death of Lady Bunbury.

- The issue by common consent falls within a narrow compass; i e in effect whether in construing proviso (a) to s 14 of the 1914 Act it is or is not proper to take into account the negative deeming provision in s 55 of the 1910 Act. It is not possible to elaborate
- h the point. I am informed that the estate duty office has until recently accepted that exemption from duty is available in comparable cases. It is not, however, contended that this practice of the estate duty office in any way invalidates the contention now advanced by the Crown.

- An alternative contention was advanced by counsel for the Crown, i e that inasmuch as the relevant asset in the estate of Sir Charles at the date of his death was not a share in the settled property in specie but an interest in the unadministered estate of Pamela, which included that share, the payment of duty on his death was, in any event, not a payment in respect of the settled property. There was considerable argument on this point and I was referred to a number of cases of high authority. This point raises an issue of considerably wider importance than that raised by the

first point, and since my decision on the first point concludes this case I think it better not to express any conclusion obiter on the second point. a

Order accordingly.

Solicitors: *Vizard*s (for the plaintiff); *Solicitor of Inland Revenue*.

Richard J Soper Esq Barrister. b

R v Morgan

COURT OF APPEAL, CRIMINAL DIVISION

STEPHENSON LJ, THOMPSON AND BRIDGE JJ

28th OCTOBER, 23rd NOVEMBER 1971 c

Criminal law – Assisting offender – Indictment – Form of indictment – Necessity for count to specify particular offence committed by principal offender – Criminal Law Act 1967, s 4 (1), (3).

Criminal law – Indictment – Uncertainty or ambiguity – Assisting offender – Principal offender charged with murder – Possibility of conviction of manslaughter – Charge against assistant alleging principal offender guilty of ‘unlawful killing’ – Irregularity of no practical importance – Conviction of principal offender of murder making clear gravity of assistant’s offence – No miscarriage of justice – Criminal Law Act 1967, ss 4 (1), (3), 6 (3). d

P and W stabbed C to death, K being present at the time but taking no part in the killing. The appellant, knowing what had happened, provided or arranged a hideout for P and K. P, W and K were indicted for the murder of C. The appellant was charged in count 2 of the indictment with contravening s 4 (1)^a of the Criminal Law Act 1967, the particulars of the count alleging that he ‘without lawful authority or reasonable excuse . . . arranged for [P] and [K] to stay in a flat with intent to impede their apprehension for the arrestable offence of murder which they had then committed’, the appellant then knowing or believing them to be guilty of the said offence. At the end of the prosecution case K was acquitted on the judge’s direction, and count 2 was amended by deleting references to K. P’s defence was that he had been provoked by C and the jury were invited to return a verdict of manslaughter. In consequence counsel for the Crown sought, and was given leave, to amend count 2 by substituting ‘unlawful killing’ for ‘murder’. In due course P was convicted of murder and the appellant was convicted on count 2. The appellant appealed against conviction on the ground that count 2, as amended, was defective in that there was no arrestable offence of unlawful killing known to the law, and that it was essential when charging an offence under s 4 (1) of the 1967 Act to specify correctly the particular offence actually committed by the person whom the accused had assisted. e

Held – (i) Although under s 4 (1) it mattered not that the assistant did not know the nature of the other person’s offence, it was nevertheless necessary to specify in the charge the particular offence committed so that the court’s jurisdiction to entertain it and the maximum punishment to which the accused would be liable under s 4 (3)^b f

^a Section 4 (1) is set out at p 350 c, post

^b Section 4 (3), so far as material, provides: ‘A person committing an offence under subsection (1) above with intent to impede another person’s apprehension or prosecution shall on conviction on indictment be liable to imprisonment according to the gravity of the other person’s offence, as follows:—(a) if that offence is one for which the sentence is fixed by law, he shall be liable to imprisonment for not more than ten years; (b) if it is one for which a person (not previously convicted) may be sentenced to imprisonment for a term of fourteen years, he shall be liable to imprisonment for not more than seven years . . .’ j

a might be known at the outset; accordingly, count 2, as amended, was defective (see p 350 j to p 351 c, post).

(ii) No amendment of count 2 was in fact necessary at the trial since, by virtue of s 6 (3)^c of the 1967 Act, the jury could have been properly directed to convict the appellant if satisfied (a) that P was guilty of murder or manslaughter; (b) that the appellant knew or believed that P was guilty of one or other of those offences or of any arrestable offence, and (c) that the appellant had assisted P with intent to impede his apprehension (see p 351 d f and g, post).

b (iii) The vice of uncertainty or ambiguity in the amended count was of no practical importance, because the jury's verdict that P was guilty of murder made clear, for the purposes of s 4 (3) of the 1967 Act, the scale of gravity of the appellant's offence of assisting him; the appellant was in no way prejudiced by the circumstance that the route to his conviction was technically a deviation; the correct route, had it been followed, would inevitably have led to the same result; accordingly there had been no miscarriage of justice and the appeal would be dismissed (see p 351 g and h, post).

c Per Curiam. A count in an indictment particularising an offence under s 4 (1) of the 1967 Act will be sufficient if it states that the other person has committed a specified arrestable offence and that the accused, knowing or believing him to be guilty of that or some other arrestable offence, has without lawful authority or reasonable excuse done the act particularised with intent to impede the other person's apprehension or prosecution (see p 352 b, post).

Notes

e For penalties for assisting offenders, see Supplement to 10 Halsbury's Laws (3rd Edn) 55, para 561A.

For conviction of an offence different from that charged, see 10 Halsbury's Laws (3rd Edn) 428-430, para 791.

For the Criminal Law Act 1967, ss 4 and 6, see 8 Halsbury's Statutes (3rd Edn) 555, 557.

f Authority cited in argument

Archbold's Criminal Pleading, Evidence and Practice, 37th Edn, 1969, paras 4149, 4150.

Appeal

g On 15th February 1971 at the Central Criminal Court before Thesiger J and a jury the appellant, Martin Meldrum Morgan, was convicted on count 2 of an indictment charging that he without lawful authority or reasonable excuse arranged for one Phillips (charged on count 1 with murder) and a Miss Kiley (also charged with the same murder) to stay in a flat 'with intent to impede their apprehension for the arrestable offence of murder which they had then committed, [the appellant] knowing or believing them to be guilty of the said arrestable offence or some other arrestable offence'. The appellant pleaded guilty to a second indictment charging him with burglary (count 1) and robbery (count 3). He was sentenced to four years' imprisonment on the first indictment, to three years on the burglary count and to seven years on the robbery count, all the sentences to run consecutively, making 14 years' imprisonment in all. The appellant appealed against his conviction on count 2 of the first indictment. At the end of the prosecution case, the trial judge had directed the jury to return a verdict of not guilty of murder in respect of Miss Kiley, and the indictment was amended to delete Miss Kiley's name from it. Leave was also given on an application by counsel for the Crown to amend count 2 by substituting 'unlawful killing' for 'murder'. The appellant's ground of appeal on this count was that, as amended, it was defective, in that there was no arrestable offence of 'unlawful

c Section 6 (3), so far as material, is set out at p 351 e, post

killing' known to the law and that in the circumstances the count disclosed no offence. He also appealed generally against sentence. The facts are set out in the judgment of the court.

N T Salts for the appellant.

D B Watling for the Crown.

Cur adv vult

23rd November. **BRIDGE J** read the judgment of the court at the invitation of Stephenson LJ. The appellant was convicted at the Central Criminal Court on 15th February 1971 of an offence under s 4 (1) of the Criminal Law Act 1967 which provides:

'Where a person has committed an arrestable offence, any other person who, knowing or believing him to be guilty of the offence or of some other arrestable offence, does without lawful authority or reasonable excuse any act with intent to impede his apprehension or prosecution shall be guilty of an offence.'

Three co-accused, Phillips, Walsh and Kiley, were indicted for the murder of one Cunningham. The appellant was charged with the offence under s 4 of the 1967 Act in a second count of the indictment, the particulars alleging that he—

'without lawful authority or reasonable excuse... arranged for Phillips and Kiley to stay in a flat with intent to impede their apprehension for the arrestable offence of murder which they had then committed.'

the appellant then knowing or believing them to be guilty of the said arrestable offence.

Phillips and Walsh stabbed Cunningham to death at his flat. Kiley was present but took no part in the killing. The appellant with knowledge of what had happened provided or arranged a hideout for Phillips and Kiley where the police eventually found them. At the close of the case for the prosecution Kiley was acquitted by direction of the judge and at some time count 2 against the appellant was consequentially amended by deleting the reference to Kiley. Phillips's defence was that he had been provoked by Cunningham and the jury were invited on his behalf to return a verdict of manslaughter. In the light of this, counsel for the Crown, before the defence of the appellant was presented, proposed to amend count 2. He apprehended that if the count stood unamended and Phillips was convicted of manslaughter, or conversely if the count was amended to refer to Phillips's offence as manslaughter and Phillips was then convicted of murder, it might be technically impossible in either case to convict the appellant. He sought escape from this dilemma by proposing to amend the particulars by substituting 'unlawful killing' for 'murder', and leave to make this amendment was granted. In the circumstances the phrase 'unlawful killing' was no doubt intended and understood as a convenient shorthand to cover murder or manslaughter. In due course Phillips was, in fact, convicted of murder and the appellant was convicted on count 2. The appellant now appeals against that conviction by leave of the full court on the ground that count 2 as amended was defective 'in that there is no arrestable offence of "unlawful killing" known to the law'.

The submission made on behalf of the appellant is that it is essential when charging an offence under s 4 (1) of the 1967 Act to specify correctly the particular offence actually committed by the person whom the accused has assisted. It is common ground that under the old law when charging an accessory after the fact to felony it was necessary to specify both the particular felony which had been committed and that this was known to the accessory. The Act clearly changes the law in the latter respect. Under s 4 (1) it matters not that the assistant does not know the nature of the other person's offence. But we see nothing in the language of the subsection to suggest an intention to change the law so that it should no longer be

a necessary to specify the particular offence committed. In any event, the later provisions of s 4, in our judgment, really put the matter beyond doubt. Under s 4 (3) a scale of maximum penalties is laid down for offences under sub-s (1), which varies 'according to the gravity of the other person's offence'. Thus, for example, to assist a murderer carries a maximum of ten years' imprisonment; to assist a manslaughterer a maximum of only seven years. Again, by s 4 (5) it is the character of the offence committed by the person who receives assistance which determines whether or not the assistant may be tried summarily. It must follow that the actual offence needs to be specified in the charge so that the court's jurisdiction to entertain it and the maximum punishment to which the accused will be liable on conviction may be known at the outset. Accordingly, counsel for the appellant makes good his complaint that count 2 as amended was defective. The next question is whether this irregularity led to any miscarriage of justice.

b We have heard argument as to what steps in relation to the appellant ought to have been taken to cover the contingency that Phillips might be convicted of either murder or manslaughter. Counsel for the appellant at one stage submitted that the contingency could only be met by alternative counts. He said that at the stage of this trial when the question arose, it was too late to amend the indictment to introduce a new count against the appellant. In the end, however, counsel on both sides before us have accepted that in truth no amendment was necessary, because the situation was covered by s 6 (3) of the 1967 Act, which provides, so far as material:

c 'Where, on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence . . .'

e This language is applicable to the situation envisaged because the allegation 'A having killed B with intent (murder) you, X, assisted A' obviously includes the allegation 'A having killed B without intent (manslaughter), you, X, assisted A'.

f Accordingly, if the court had been referred to s 6 (3) instead of being asked to allow the offending amendment, the jury could have been properly directed to convict the appellant, if satisfied (1) that Phillips was guilty of murder or manslaughter; (2) that the appellant knew or believed that Phillips was guilty of one or other of those offences or of any other arrestable offence, and (3) that the appellant assisted Phillips with intent to impede his apprehension. In fact, the directions given by the learned judge to the jury in relation to count 2 as amended were in substance either to that effect or (insofar as they differed) to an effect more favourable to the appellant. The vice of uncertainty or ambiguity in the amended count was of no practical consequence, because the jury's verdict that Phillips was guilty of murder on the first count made clear for the purposes of s 4 (3) the scale of gravity of the appellant's offence of assisting him. The appellant was in no way prejudiced by the circumstance that the route to his conviction was technically a deviation. The correct route, had it been followed, would inevitably have led to the same result. In our judgment there was no miscarriage of justice. We uphold the conviction.

g We wish to refer to a further submission made by counsel for the appellant. He says that in any case under s 4 (1) the court must know before passing sentence not only what offence was committed by the person assisted, but also what the assistant knew or believed it to be; and to this end, he submits, the jury must be asked for a special verdict. We cannot accept this. It appears to us that the deliberate policy of the legislature embodied in s 4 is that those who assist fugitives from justice act at their peril. The graver the fugitive's offence the heavier is the punishment to which the assistant renders himself liable irrespective of his state of knowledge. We do not, of course, mean to imply that the state of mind of the accused may not be a material factor in mitigation or that the court might not in an exceptional case

think it useful to invite the jury to return a special verdict on the point. But this cannot be the norm and it was wholly unnecessary in the present case. a

It is fair to add, however, that counsel for the appellant's submission on this point derives some support from the actual form of the indictment, which, by alleging that the appellant acted with intent to impede Phillips's apprehension 'for the arrestable offence of murder', appeared to make the appellant's knowledge of the nature of the offence material. This allegation went beyond what was necessary to prove an offence under the subsection. A count in an indictment particularising an offence under s 4 (1) will be sufficient if it states that the other person has committed a specified arrestable offence and that the accused, knowing or believing him to be guilty of that or some other arrestable offence, has without lawful authority or reasonable excuse done the act particularised with intent to impede the other person's apprehension or prosecution. For the reasons stated earlier in this judgment, the appeal against conviction is dismissed. b
c

[The court then heard submissions on appeal against sentence.]

STEPHENSON LJ delivered the judgment of the court on sentence. The appeal of this appellant against conviction having been dismissed, we now have to consider whether the appeal against sentence should be allowed, and we think it should. d The sentences passed on this appellant were four years for the offence of assisting two villains who were convicted of murder; three years for burglary, and seven years for robbery, all consecutive. In passing that total of 14 years on this 19 year old appellant, the judge said:

'... I simply pass the appropriate sentence for each of the three offences which, in my view, should be consecutive sentences because each offence followed upon but was independent of the other. The sentence on the count of the indictment relating to the theft in Sussex of weapons is three years' imprisonment, the sentence for going and taking part in the armed robbery afterwards is seven years' imprisonment, consecutive, and the sentence for trying to hide two brutal murderers is four years' imprisonment. They will be consecutive sentences, making fourteen years...' e
f

Counsel for the appellant has stressed on us the youth of this appellant, the fact that he comes from a home where his brothers, much older than himself, have been involved in serious trouble with the criminal law, and his statement that all he was doing as regards the first offence was helping a friend or friends. This court does not wish to go again into the facts of the offences. Suffice it to say that the offences of burglary and robbery were grave offences, and this court cannot do other than take a very serious view in these days. Of the offence of assisting a murderer or murderers to avoid apprehension, even if friendship is the principal motive, this court finds it impossible to thwart the logic of the trial judge. Looked at logically, this court thinks that of these sentences, each is individually right and ought to be made consecutive. But bearing in mind the matters which have been urged on us by counsel for the appellant, in particular the youth of the appellant, this court thinks that the right course is to make the sentences for the burglary and robbery concurrent, but consecutive to the sentence of four years for the offence of assisting the murderers, with the result that the total period of the appellant's imprisonment will be reduced from 14 to what is still a long sentence, but a long sentence for three very serious crimes, a sentence of 11 years' imprisonment. The appeal against sentence will be allowed to that extent. g
h
j

Appeal against conviction dismissed. Appeal against sentence allowed in part. Sentence varied.

Solicitors: *Sampson & Co* (for the appellant); *Director of Public Prosecutions*.

N P Metcalfe Esq Barrister.

a

R v Brittain and others

COURT OF APPEAL, CRIMINAL DIVISION

CAIRNS AND ORR LJ AND KILNER BROWN J

9th DECEMBER 1971

b

Criminal law – Forcible entry – No intention to occupy premises – Whether intention to occupy an essential element of offence – Forcible Entry Act 1381.

It is not an essential element of the offence of forcible entry under the Forcible Entry Act 1381^a that there should be an intention to occupy the premises entered (see p 354 e and p 355 f and g, post).

c

Notes

For forcible entry, see 10 Halsbury's Laws (3rd Edn) 590-592, paras 1100-1103, and for cases on the subject, see 15 Digest (Repl) 795-800, 7493-7567.

For the Forcible Entry Act 1381, see 18 Halsbury's Statutes (3rd Edn) 405.

d Case referred to in judgment

R v Smyth (1832) 5 C & P 201, 1 Mood & R 155, 15 Digest (Repl) 796, 7504.

Cases also cited

Button v Director of Public Prosecutions [1965] 3 All ER 587, [1966] AC 591.

Milner v MacLean (1825) 2 C & P 17.

e

R v Bathurst (1755) Say 225.

R v Blake (1731) 3 Burr 1731.

R v Mountford [1971] 2 All ER 81, [1971] 2 WLR 1106.

R v Storr (1765) 3 Burr 1698.

R v Wilson (1799) 8 Term Rep 357.

Thompson v Park [1944] 2 All ER 477, [1944] 1 KB 408.

f

Appeals

Raymond Brittain, Derek Brittain and Charles Trevor Henderson appealed against their conviction on 2nd February 1971 at Maidstone Assizes of forcible entry contrary to the Forcible Entry Act 1381. The facts are set out in the judgment of the court.

M Gale for the appellants.

g

K T Simpson for the Crown.

CAIRNS LJ delivered the judgment of the court. On 2nd February 1971 at Maidstone Assizes the three appellants, Raymond Brittain, Derek Brittain and Charles Trevor Henderson, together with a man called Day, were convicted of forcible entry contrary to the Forcible Entry Act 1381. The three appellants were sentenced by John Stephenson J to nine months' imprisonment in respect of the forcible entry. By leave of the single judge they appeal against conviction.

h

The ground on which it is contended that they were wrongly convicted of that crime is that it is said that here, although there was an entry by the appellants, and although the entry was made by force, it was not made with the intention of entering into occupation of the premises. It was contended at the trial, and the contention has been renewed in this court, that the offence of forcible entry under the Act has as one essential element in it the intention to enter into occupation of the premises.

j

The circumstances were these. A Mr and Mrs Brooker lived in a house in Gillingham, Kent. On the night of 31st October 1970 they were giving a bottle party there.

^a The Act is set out at p 354 d, post

The three appellants and Mr Day went to the house with the intention of joining the party. They apparently thought that one of the Brittaines had been invited and that possibly Mr Day also might have been invited. Raymond Brittain carried some sort of container and at least one other man had a pint mug with him. On arrival at the house they were refused admission by Mr and Mrs Brooker. They took that badly and, having momentarily withdrawn using obscenities and abuse, one of them threw a pint mug through a window and they then tried to rush into the house, the door of which had been opened after the noise of the window breaking had been heard. When inside they were met by a large force of guests. a

A submission of no case was made and rejected by the trial judge. Insofar as this was a submission on the facts, there is no appeal on it because, as has already been indicated, it is conceded that there was an entry into the premises in the sense that the three appellants, in fact, went over the threshold of them and that that entry was effected by force. But the argument is that although the Act does not say anything about an intention to occupy, nevertheless it must be taken that at the time of the passing of the Act entry meant entry with a view to going into occupation and that the statute has been interpreted in that way ever since. b

The actual language of the Act translated from the Norman French is as follows:

‘... None from henceforth make any entry into any lands or tenements, but in case where entry is given by the law; and in such cases not with strong hand, nor with multitude of people, but only in peaceable and easy manner. And if any man from henceforth do the contrary, and thereof be duly convicted, he shall be punished by imprisonment . . .’ c

Certainly on the face of it unless the word ‘entry’ can be given a meaning other than its ordinary meaning, the section is prohibiting not merely forcible entry with the intention of going into occupation but any forcible entry. Is there any reason to suppose that the word ‘entry’ was intended to be construed in the restricted way contended for on behalf of the appellants here? This court can see no possible reason why it should be. d

The common law forbade forcible entry by people who were not entitled to enter. The weakness of the common law was that the peace might be broken by people who were entitled to enter going in with force and terror. The Act was passed, therefore, to include, as its terms indicate, both the case of persons who had no lawful right to enter and those who had, and, in the view of this court, the intention of the Act was to prevent breaches of the peace in the case of forcible entry whether or not the person entering had a right to enter peaceably and that it was quite immaterial whether it was the intention to occupy or not. e

The strongest point that can be made by counsel for the appellants, who has argued the case most persuasively, is that from 1381 to 1971 no case is to be found in the reports in which anybody has been convicted of forcible entry when he has not apparently entered with the intention of occupying. In the great majority of cases what has actually happened is that the person entering has by force expelled the original occupier and taken up occupation himself. It is conceded by counsel on behalf of the appellants that the intention to expel or an actual expulsion of the occupier is not a necessary ingredient of the offence. For that proposition it is sufficient, since it is conceded by the appellants, to refer to Archbold¹ which sets out the proposition that expulsion is not a necessary element of the offence. A form of indictment containing these particulars of offence is set out²: f

‘A B, on the—day of—, in the county of—, with many other persons unknown, made a forcible entry upon the freehold land of J N, of which J N was in occupation, and expelled him from the possession thereof.’ g

¹ Criminal Pleading Evidence and Practice, 37th Edn, p 1160, para 3604

² Page 1158, para 3601 h

a It being conceded that the expulsion is not a necessary element, there is no indication in that form of indictment of any necessity to show an intention that the accused person means to go into occupation.

b In the authorities that the court has looked at the matter that was normally being discussed was whether there was such a degree of force as constituted forcible entry, never the question whether the defendant intended to go into occupation. Thus in *R v Smyth*³ the person who was charged with forcible entry was a married woman who had entered her husband's house. She contended that she could not be guilty because a wife could not be a trespasser in her husband's house. Lord Tenterden CJ in summing up said⁴:

c 'An indictment for a forcible entry cannot be supported by evidence of a mere trespass, but there must be proof of such force, or at least such a shew of force, as is calculated to prevent any resistance.'

Similarly in *Russell*⁵ that same proposition is repeated that mere trespass is not sufficient to constitute a forcible entry: there must in addition be a show of force. To quote *Russell*:

d '... whether he causes such a terror by carrying with him an unusual number of servants, or by arming himself in such a manner as plainly indicates a design to back his pretensions by force, or by actually threatening to kill, maim or beat those who shall continue in possession, or by giving out such speeches as plainly imply a purpose of using force against those who shall make any resistance.'

e Nowhere is there any suggestion that if those elements are present the entry will be deemed not to be a forcible entry unless there is an intention to occupy. One further sentence may be quoted from *Russell*⁶: 'It is a forcible entry for a man to enter by force to distrain for arrears of rent . . .' If that is right (and we think it is) it is one example of a person entering otherwise than with the intention of occupying.

f This court can see no reason why the Act should not apply in the case of persons who enter by force for the purpose of seeking to attend a party on the premises, whether indeed they have been invited to it or not. The matter was dealt with by John Stephenson J, when the submission was made to him in the court below, in one sentence which this court adopts. He said:

g 'The authorities cited to me show the Act in operation in cases where there was an assertion of right and an intention either to gain possession or to resist the resumption of possession, but I see no reason why I should limit the words of the Act to such cases, and good reason in this day and age why I should give the words their plain meaning.'

For these reasons the appeal against conviction is dismissed.

h *Appeal dismissed. Leave to appeal to the House of Lords refused but the court certified under s 33 (2) of the Criminal Appeal Act 1968 that a point of law of general public importance was involved, i.e. whether on a count laid under the Forcible Entry Act 1381, the Crown must prove as an essential element of the charge that the defendant occupied or intended to occupy the premises.*

j Solicitors: Stigant, Son & Taylor, Chatham (for the appellants); A C Staples, Maidstone (for the Crown).

Francesca Durley Barrister.

3 (1832) 5 C & P 201

4 (1832) 5 C & P at 204

5 12th Edn, vol 1, p 285

6 See pp 284, 285

Owen v Burden (Inspector of Taxes)

COURT OF APPEAL, CIVIL DIVISION

SALMON, BUCKLEY AND ORR LJJ

20th OCTOBER 1971

Income tax – Deductions in computing profits – Expenses incurred ‘wholly, exclusively and necessarily in the performance of . . . duties’ – Conference expenses – County surveyor – Attendance at conference – By-pass scheme proposed by county council – Surveyor attending international conference abroad in hope of obtaining first class opinion on merits of scheme – Attendance during period of annual leave and without obtaining authority of county council – Whether expense of attending conference necessarily incurred in performance of his duties – Income Tax Act 1952, Sch 9, r 7.

The taxpayer was an engineer and the county surveyor for Denbighshire. He prepared an alternative scheme to that of Flintshire County Council for the construction of a by-pass for Bangor-on-Dee partly in Denbighshire and partly in Flintshire. His scheme involved deflecting the River Dee away from the by-pass instead of constructing a bridge over the river. He considered that his scheme would be cheaper and avoid the flooding of the Denbighshire side of the by-pass resulting from the Flintshire scheme. His scheme was supported by Denbighshire County Council, but the Flintshire scheme was adhered to by Flintshire County Council and preferred by the river authority and by the Secretary of State for Wales. Without obtaining special leave or the authority of his county council, the taxpayer attended on his own initiative and during his ordinary period of annual leave a world road conference in Tokyo, in the hope of obtaining an independent first class opinion on whether his scheme was preferable, from delegates from all over the world with wide experience of bridge building. In computing his income under Sch E for income tax purposes he claimed to be entitled to deduct from his salary as expenses under r 7 of Sch 9^a to the Income Tax Act 1952 the cost of attending the conference.

Held – The taxpayer was not entitled to deduct the cost of attending the conference because, even though advantages accrued to his employers from the expenditure, it was impossible to say that the expenses were necessarily incurred in the performance of his duties within r 7 of Sch 9 to the 1952 Act; it was not necessary for him to undertake the journey for the purpose of the office he was occupying (see p 358 e to g and j and p 359 a, post).

Notes

For expenses deductible from the emoluments of offices and employments for income tax purposes, see 20 Halsbury's Laws (3rd Edn) 326-329, paras 598-602, and for cases on the subject, see 28 (1) Digest (Reissue) 347-355, 1253-1302.

For the Income Tax Act 1952, Sch 9, r 7, see 31 Halsbury's Statutes (2nd Edn) 524.

For 1970-71 and subsequent years of assessment, r 7 of Sch 9 to the Income Tax Act 1952 has been repealed, and replaced by s 189 (1) of the Income and Corporation Taxes Act 1970.

Appeal

The taxpayer, Caradoc Morris Owen, appealed to the General Commissioners of Income Tax for Ruthin against an assessment to income tax under Sch E to the Income Tax Act 1952 made on him for 1967-68 on remuneration as the county surveyor for Denbigh, on the ground that an allowance had not been given in respect of certain expenses incurred by him in a visit to the Far East to attend a world road congress.

^a Schedule 9, r 7, is set out at p 358 c, post

- a* The question for determination was whether those expenses were allowable deductions under 17 of Sch 9 to the Income Tax Act 1952 as money expended by the taxpayer wholly, exclusively and necessarily in the performance of his duties as county surveyor. The commissioners were not satisfied that the expenses claimed had been incurred wholly necessarily and exclusively in the performance of the taxpayer's duties and they therefore granted no allowance in respect of the expenses and confirmed the assessment. On 23rd March 1971 Plowman J dismissed the taxpayer's appeal by way of case stated against that decision. The taxpayer appealed to the Court of Appeal. The facts appear in the judgment of Salmon LJ.
- b*

The taxpayer appeared in person.

Sir George Honeyman QC and P W Medd for the Crown.

- c* **SALMON LJ.** The appellant taxpayer is an engineer. He holds and has held for many years the office of county surveyor for the county of Denbighshire. In 1966 a by-pass scheme for Bangor-on-Dee was put forward by Flintshire County Council. This scheme involved a by-pass which would have been constructed partly in Flintshire and partly in Denbighshire. The taxpayer tells us, and we of course accept, that about half the by-pass would have been in the one county and half in the other.
- d* The scheme put forward by Flintshire County Council involved carrying the by-pass over the River Dee by means of a bridge. Apparently that scheme received the approval of the Secretary of State for Wales. Its estimated cost was originally £400,000. It was later reduced to £300,000. The taxpayer took the view that this scheme could be vastly improved on. There is no doubt that he genuinely held that view and for all I know he was absolutely right. The improvement, as he saw it, which should be effected was that the bridge carrying the by-pass should not be in the river but that the river should be diverted so that it was directed away from the by-pass. The advantages which he saw for his scheme were, first, that it would be much cheaper than the other scheme to which I have referred and, secondly, that the other scheme would have resulted in a good deal of flooding on the Denbighshire side of the by-pass whereas his scheme would avoid that flooding. Denbighshire County Council agreed with their surveyor and apparently favoured his scheme. However Flintshire County Council appear to have remained adamant in favour of their scheme which also appears to have been preferred by the river authority and the Welsh Office who were both naturally also concerned.
- e*
- f*

- Nothing had been finally decided by the autumn of 1967. The taxpayer discovered that a world road conference was to be held in Tokyo from 1st November until 23rd November 1967. He believed, and no one doubts that he genuinely believed, that it would be very much in the interests of all concerned if he were to attend that conference. The reasons for his belief were that there were likely to be delegates there from all over the world with wide experience of building bridges such as the bridge which would be built as part of the Bangor by-pass. He considered that he would there in Tokyo be able to get a first class opinion and an entirely independent opinion whether his views about how the bridge should be constructed were to be preferred to those of Flintshire County Council. It is to be observed that he was not going there to get any opinion or information for the purpose of persuading his own county council because they had already expressed their agreement with his views. He no doubt thought that, if he could return armed with the opinion which he believed that he could obtain, then Flintshire County Council, the river authority and the Welsh Office would agree that the construction should take place in accordance with his own ideas.
- g*
- h*
- j*

The taxpayer did not ask for special leave to go to Tokyo. He had not in that year in any event availed himself of his leave and there was a sufficient period of leave due to him to enable him to go to Tokyo for the necessary period. He did not, perhaps unfortunately, go to his county council and ask them for authority to go to Tokyo

and incur the expenses of that journey. Had he obtained their authority no doubt they would have paid for the expedition. Still less was he ordered or requested by his county council to go to Tokyo. It is difficult to see how one could fault the view that he went of his own volition. I would like to emphasise that no one doubts his motives. They were of the highest. No one doubts that it may well be that his journey to Tokyo would bring advantages to his employers because it would increase his general knowledge and experience. That however, unfortunately for him, is not the test whether the cost of the expedition can be deducted for the purpose of tax.

The statutory language to be considered is very well known and has stood for many, many years. It appears in r 7 of Sch 9 to the Income Tax Act 1952, and applies to allowances under Sch E. The paragraph provides as follows:

'If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to expend money wholly, exclusively and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed.'

That passage has been considered times without number. It has been frequently criticised but the legislature has always retained it and the courts have never departed from the view that they were compelled to apply this strict language used by the legislature.

The General Commissioners of Income Tax came to the conclusion that the taxpayer had not satisfied them that the expenses that he claimed had been incurred wholly, exclusively and necessarily in the performance of his duties. He appealed against that decision to Plowman J who, in a short and lucid judgment, explained the reasons why it was impossible to differ from the commissioners. It is really only out of respect for the courteous, interesting and skilful argument presented by the taxpayer that I have not contented myself by saying that I agree with the judgment of Plowman J and cannot improve on it by substituting any words of my own.

I am afraid that, sympathetic as I am to the taxpayer, it would be quite impossible to say that, on the facts as found, the expenses which he is claiming were necessarily incurred in the performance of his duties. He was no doubt doing his best, and in a broad sense his duty, but it was not necessary for him to incur the expenses of this journey for the purpose of the office he was occupying. For those reasons I would dismiss the appeal.

BUCKLEY LJ. I agree. The point before us is a very short one. It can be stated as being whether the taxpayer as county surveyor for the county of Denbigh was necessarily obliged to incur the expenditure of the £485 in question as travelling expenses in the performance of his duties in that office or whether he was necessarily obliged otherwise to spend the money wholly, exclusively and necessarily in the performance of his duties. Although there were no doubt advantages in the taxpayer's attending the world road conference in Tokyo on 1st November 1967 to 23rd November 1967 in which respect the expenditure was incurred, and advantages which accrued for the benefit of his employers as well as to him personally, I do not feel able to see how on the facts as found in the case it could be said that he was necessarily obliged to undertake this journey or to attend this conference or that the money was necessarily expended in the performance of his duties. Moreover, I think it would be difficult on the facts stated in the case to reach the conclusion that the expenditure was incurred wholly and exclusively in the performance of his duties.

Like Salmon LJ, I find no grounds for criticising the judgment of the learned judge

- a in any respect, or the decision of the commissioners, and I agree that the appeal should be dismissed.

ORR LJ. I agree.

Appeal dismissed. Leave to appeal to the House of Lords refused.

- b Solicitor: Solicitor of Inland Revenue.

F A Amies Esq Barrister.

c **George Lee & Sons (Builders) Ltd v Olink
(personal representative of Eduard Willem
Olink (deceased)) and Edward Moeran
& Partners (garnishee)**

- d COURT OF APPEAL, CIVIL DIVISION
RUSSELL, PHILLIMORE AND BUCKLEY LJJ
2nd, 3rd DECEMBER 1971

- e *Administration of estates – Order of application of assets – Judgment creditor obtaining garnishee order nisi against solicitors of executrix – Doubt whether estate solvent – Danger of preferring judgment creditor to other creditors of estate – Procedure – Payment of amount of judgment debt into court – Garnishee order not to be made absolute pending outcome of enquiry to determine whether estate solvent.*

- f The plaintiff was owed money by O in respect of the building of a house. O died and his widow was granted probate of his will. The plaintiff sued the widow as executrix for the balance due and was given judgment for a sum of £1,243 and some £22 costs. He was paid part of this sum but £340 remained outstanding. On the basis of that outstanding amount he applied for, and was granted, a garnishee order nisi against the firm of solicitors who were acting for the widow in the administration of O's estate. Subsequently he applied to have the order made absolute. At the time of the application there was a very serious doubt whether the estate was solvent. g The district registrar stated that he was not convinced that the estate was insolvent and he therefore held that the judgment creditor was entitled to the garnishee order absolute. The garnishee appealed.

- h **Held** – In view of the serious doubt whether the estate was solvent or insolvent the district registrar ought not to have made the garnishee order absolute, thus running the risk of preferring one creditor against others should the estate prove insolvent. The proper course for him to have adopted in the circumstances was to have ordered the money to be paid into court to abide the outcome of an enquiry whether the estate was solvent or insolvent. Accordingly the garnishee order absolute would be set aside; the garnishee would be ordered to pay into court the sum in question and there would be an enquiry by the district registrar for his decision whether the estate was solvent or insolvent (see p 361 c and f and p 362 b, post).

- j *Roberts v Death* [1881-85] All ER Rep 849 applied.

Notes

For garnishee proceedings generally, see 16 Halsbury's Laws (3rd Edn) 79, 80, paras 119, 120, and for cases on the subject, see 21 Digest (Repl) 714-716, 2152-2174.

For the administration of insolvent estates, see 16 Halsbury's Laws (3rd Edn) 311-314, paras 600-605. a

Cases referred to in judgment

Martin v Nadel [1906] 2 KB 26, [1904-07] All ER Rep 827, 75 LJKB 620, 95 LT 16, 21 Digest (Repl) 740, 2282.

Pritchard v Westminster Bank Ltd [1969] 1 All ER 999, [1969] 1 WLR 547, Digest (Cont Vol C) 342, 2159a. b

Roberts v Death (1881) 8 QBD 319, [1881-85] All ER Rep 849, 5 LJQB 15, 46 LT 246, 21 Digest (Repl) 729, 2241.

Cases also cited

Kennett v Westminster Improvement Comrs (1855) 11 Exch 349.

Pink, Re [1927] 1 Ch 237. c

Appeal

This was an appeal by Edward Moeran & Partners, the garnishee, from an order of the Southampton District Registrar (Mr Registrar Rhodes) dated 23rd July 1971, making a garnishee order absolute in respect of funds in the hands of the garnishee, on the application of George Lee & Sons (Builders) Ltd, the judgment creditor. The garnishee were a firm of solicitors acting in the administration of the estate of Eduard Willem Olink, deceased, for his widow, Margaret Olink, the executrix and judgment debtor, and they had in their hands money belonging to the estate. The facts are set out in the judgment of Russell LJ. d

Peter Langan for the garnishee.

B Coles for the judgment creditor. e

RUSSELL LJ. This is an appeal from an order of the district registrar at Southampton who, on the application of a judgment creditor, made a garnishee order absolute in respect of funds in the hands of the garnishee, a firm of solicitors. The firm of solicitors acts in the administration of the estate of a Mr Olink, deceased, for his widow, the executrix. They have in their hands moneys belonging to the estate, resulting from the sale of a house that formed part of the estate. As I have said, the district registrar made the garnishee order absolute, and the question is whether, in the circumstances of this estate, he was right in doing so. f

Mr Olink died in June 1967 and his widow was granted probate of his will. In December 1968 the judgment creditor issued a writ against the widow as executrix for a balance due of an account in respect of the building of the house belonging to Mr Olink; and in March 1969 there was judgment given under RSC Ord 14 for a sum of £1,243 and some £22 of costs. In December 1970 the judgment creditor was paid two sums of £932 and £82, and at the end of 1970 there was still about £340 owing; and on the basis of that outstanding amount an application was made for a garnishee order nisi. As I have indicated, after considering the evidence the district registrar made the garnishee order absolute. Perhaps I might just add this, that although before the district registrar and before us the garnishee, the firm of solicitors alone, strictly speaking, appear, nevertheless it is right to regard them as also informally representing the executrix of the estate. g

We were taken in some detail through the particulars of the estate so far as they are known, and I do not think for present purposes that I need go into those particulars in great detail. The district registrar in giving the reasons for his judgment said: h

'I am not convinced that this estate is insolvent. It is not at present being administered under Section 34 of the Administration of Estates Act [1925] or otherwise under the Rules of Bankruptcy. This being so, I find that the judgment creditor is entitled to his garnishee order absolute with costs.'

a On the facts the substance of the matter in this case is that here, on the evidence, there is a very serious doubt whether this estate is solvent, and on full enquiry it may well be that it is insolvent. And the evidence at present is not, in my view, such as really enables us now to come to a definite conclusion.

b *Pritchard v Westminster Bank Ltd*¹ in this court, to which our attention was drawn, shows that where an estate which is the judgment debtor's is insolvent, never mind precisely under what rules or how it has been administered, then a garnishee order nisi should not be made absolute, because an equitable remedy such as a garnishee order should not be given if the effect will be to prefer one creditor over another. But as I have said, it is not established whether this estate is insolvent or whether it is solvent.

c So what is the right course to adopt in such a case as the present where, as I have said, there is on the present evidence a very serious doubt whether this estate is solvent? One solution in such a case might be to say that unless it is shown that the estate is insolvent then the garnishee order should be made absolute. But it seems to me that where there is a doubtful case such as the present that would be to run the grave risk of preferring one creditor over others, which would be wrong. Another solution might be to refuse to make the garnishee order absolute unless it is shown at the time of the application for it that the estate is solvent. But this might place an undue obstacle in the way of the judgment creditor when he seeks his garnishee order absolute.

d In this field it seems to me that it is proper to seek an equitable and fair answer: for example, in *Martin v Nadel*² it was not thought proper to make the garnishee order absolute when it might be unfair to the garnishee because there was a risk that the garnishee might in that case have to account a second time for the same sum in the courts of another country. In *Roberts v Death*³ the order was not made absolute because there was a suggestion that the money due from the garnishee to the judgment debtor was due to the latter as trustee for another.

e In my view the proper course in a case such as this is one which is analogous to that adopted in *Roberts v Death*³, where the money due from the garnishee was ordered to be paid into court to abide the outcome of an enquiry into the suggestion that the sum was due to the judgment debtor as trustee for another. Accordingly, in my view in this case the order absolute should be set aside; the garnishee should be ordered to pay into court the sum in question; there should be ordered an enquiry by the district registrar for his decision whether this estate is solvent or insolvent, the enquiry to be conducted with all speed—and when I say 'with all speed' I wish to indicate this also: that of course the full facts about the estate are in the hands of the garnishee and his client and it would be possible for them no doubt, if they wished, to drag their feet about producing the full facts on the enquiry to the prejudice of the judgment creditor. But that possibility can readily be avoided, because if it is appreciated by the district registrar that conduct of that kind was taking place he would be well entitled to say: 'Since I am not getting the information which I should get from the personal representative and the garnishee about the condition of the estate I will conclude that the estate is in fact solvent, and, therefore, I will make the garnishee order absolute.'

g If the district registrar decides that the estate is insolvent, then the garnishee order nisi should be set aside and the funds in court paid out to the garnishee. If the district registrar decides that the estate is solvent, then the garnishee order nisi should be made absolute and the funds in court paid out to the judgment creditor.

j There is, however, one point that I think must be mentioned. It is, I suppose, conceivable that, for example, another creditor may start proceedings for the administration of this estate. If that were to happen before the conclusion of the enquiry

1 [1969] 1 All ER 999, [1969] 1 WLR 547

2 [1906] 2 KB 26, [1904-07] All ER Rep 827

3 (1881) 8 QBD 319, [1881-85] All ER Rep 849

by the district registrar, clearly there should not be a duplication of the investigation, and the outcome as to the garnishee order absolute and payment out of court would, in those circumstances, have to abide the ascertainment of the solvency or insolvency in the administration proceedings. a

PHILLIMORE LJ. I agree. b

BUCKLEY LJ. I also agree.

Appeal allowed.

Solicitors: *Edward Moeran & Partners* (for the garnishee); *James Weeks*, Southampton (for the judgment creditor). c

Mary Rose Plummer Barrister.

McG (formerly R) v R d

FAMILY DIVISION

SIR GEORGE BAKER P

18th OCTOBER 1971

Divorce – Separation – Two year separation – Parties having lived apart for two years and consented to divorce – Consent – Consent a positive requirement – Absence of objection to decree being granted not amounting to consent – Divorce Reform Act 1969, s 2 (1) (d). e

The wife petitioned for divorce under s 2 (1) (d)^a of the Divorce Reform Act 1969 on the ground that the marriage had irretrievably broken down, it being alleged that the parties had lived apart for a continuous period of at least two years and the husband had consented to a decree being granted. The petition was filed three days after the coming into force of the 1969 Act. In accordance with s 2 (6)^b of the 1969 Act and r 12 (6) of the Matrimonial Causes Rules 1968^c, as amended in consequence of the coming into force of the 1969 Act, the wife was required to send to the husband with the notice of proceedings an acknowledgment of service in the form^d prescribed in Appendix II to the 1968 rules containing the question: 'Do you consent to a decree being granted?' By mischance the wife's solicitors sent a form of acknowledgment in the old form which had been in force prior to the commencement of the 1969 Act and which contained no reference to the husband's consent. There was no evidence that the husband was opposed to or consented to a decree except a letter from his solicitors stating that he 'simply wants this affair to be brought to finality as soon as possible'. It was contended by the wife that compliance with the rules concerning the proper form of acknowledgment was not mandatory and that the letter from the husband's solicitors amounted to a consent for the purposes of s 2 (1) (d) of the 1969 Act. f

Held – Whether or not compliance with the rules was mandatory, it could not be inferred from the fact that the husband had not objected to a decree being granted g

^a Section 2 (1), so far as material, is set out at p 363 f, post

^b Section 2 (6) is set out at p 363 h, post

^c SI 1968 No 219 as amended by SI 1970 No 1349. The 1968 rules were replaced by the Matrimonial Causes Rules 1971 (SI 1971 No 953) as from 12th July 1971

^d Form 4, as substituted by SI 1970 No 1349; since replaced by form 6 in Appendix 2 to the 1971 rules h

- a** that he had thereby 'consented' within the meaning of s 2 (1) (d), for consent was a positive requirements (see p 363 g and p 364 d e and f, post).

Notes

For a decree of divorce on proof that the parties have been living apart, see Supplement to 12 Halsbury's Laws (3rd Edn) para 437A, 5.

- b** For the Divorce Reform Act 1969, s 2, see Halsbury's Statutes (3rd Edn) 1969 vol, p 1328.

Petition

The wife petitioned, inter alia, for a decree of divorce on the ground that her marriage to the husband had irretrievably broken down. The facts are set out in the judgment.

- c** *P W Esling* for the wife.

L J Blom-Cooper QC and *Gordon Slynn* for the Attorney-General as amicus curiae.

SIR GEORGE BAKER P. In this petition the wife seeks first a declaration that her marriage to the husband which took place on 5th February 1966 in Bulawayo, Southern Rhodesia, was validly dissolved by a decree in the courts of Rhodesia in 1969. On this issue I would prefer to put my reasons into writing and deliver a considered judgment in due course.

- d** As an alternative the petition alleges that the marriage has irretrievably broken down, the parties have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition, i e since 24th May 1967, and that the husband consents to a decree being granted. On that counsel for the wife seeks a decree of divorce for the wife.

The evidence in the wife's affidavit is clear except in one vital respect; there is no consent from the husband to a decree being granted. The relevant provision of the Divorce Reform Act 1969 is in s 2 (1):

- f** 'The court . . . shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts . . . (d) that the parties . . . have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted . . .'

- g** 'Consents' is a positive requirement. It may be contrasted with what I cannot help knowing was originally in the Bill, i e the words 'does not object to a decree being granted'. Section 2 (6) provides:

- h** 'Provision shall be made by rules of court for the purpose of ensuring that where in pursuance of subsection 1 (d) of this section the petitioner alleges that the respondent consents to a decree being granted the respondent has been given such information as will enable him to understand the consequences to him of his consenting to a decree being granted and the steps which he must take to indicate that he consents to the grant of a decree.'

The machinery in the rules for meeting the requirements of that section of the Act was to be found in r 12 (6) and forms 3 and 4 of the Matrimonial Causes Rules 1968, as amended. Rule 12 (6) requires that on the filing of the petition the registrar shall annex to every copy of the petition for service a notice in form 3 with form 4 attached. Form 4 was the acknowledgment of service and question 5 in that form reads:

- j** '[In the case of a petition alleging any such fact as is mentioned in section 2 (1) (d) of the Divorce Reform Act 1969 (two years' separation and consent of respondent)]: Do you consent to a decree being granted?'

And in form 3, para 4, appear these words: 'If the reply to Question 5 in the acknowledgment is Yes the consequences to you are that', and then are set out four consequences, the fourth of which reads:

'(d) apart from the consequences listed above there may be others applicable to you depending on your particular circumstances. About these you should obtain legal advice from a solicitor.'

Now this petition was filed on 4th January 1971, i.e. three days after the coming into force of the Divorce Reform Act 1969, and as the husband lived in Bulawayo the solicitors for the wife sent an acknowledgment of service form on that day to the solicitors for the husband in Bulawayo. Unfortunately they sent the old form, i.e. the form which was in force before 1st January 1971, and of course there was nothing in that form about consenting to a petition on the ground of two years' separation. Counsel for the wife who has argued this matter with vigour and ability suggests to me that it will suffice that the petition states that the husband consents to a decree being granted. That document was also sent out to the husband's solicitors. I do not think that that is enough. There has not been compliance with the rules in that the proper forms were not sent. I reserve the question of whether these rules are mandatory or not. There may be circumstances in which it would be right to waive strict compliance and not to require the forms to be sent, for example, when there is no place to which they can be sent because the whereabouts of the respondent are unknown, but the respondent has already signed a declaration or document that he or she consents to the decree. That will have to be decided when it arises. Suffice to say that in the present case I am unable to spell out or imply a consent by the husband. It is said that a letter of 16th March 1971 from his solicitors amounts to a consent. It reads:

'[The husband] is not in the least concerned with the procedural problems that have arisen. [The husband] simply wants this affair to be brought to finality as soon as possible.'

That, says counsel for the wife, is a consent. I agree that it may be an indication that the husband does not object to the wife having the alternative relief prayed for in this petition and being granted a decree of divorce, but, although I have the greatest sympathy for the wife and would help in any way I can, I am unable to find that there or anywhere else is a *consent* by the husband. Now that is by no means the end of the matter. It is not a fatal hurdle because it is possible for the solicitors for the wife to communicate with the solicitors for the husband, preferably sending the husband form 3 and obtaining his written consent to this decree, before I deliver the reserved judgment. Indeed, if it is not available by then, no doubt it will be available soon after, and if all fails, of course there are other possibilities, other facts, which apparently can be proved, which would entitle the wife to a decree. The only other matter that I need mention at this stage is that I am satisfied that the marriage to which I have referred was a valid marriage and for that I will give my reasons in due course.

Ruling accordingly.

Solicitors: King & Co, Bristol (for the wife); Treasury Solicitor.

Alice Bloomfield Barrister.

a Thomas Bishop Ltd v Helmville Ltd

COURT OF APPEAL, CIVIL DIVISION

SALMON, BUCKLEY AND ORR LJJ

5th, 18th NOVEMBER 1971

b Practice – Service – Writ – Service on company – Service by post – Date of service – Writ endorsed with claim for liquidated demand – Judgment in default of appearance – Copy of writ not received by company 14 days prior to judgment – Application to set aside judgment – Service deemed to have been effected on date when letter would have been received in ordinary course of post – Date of deemed service 14 days prior to date of judgment – Proof to the contrary – Proof that writ never delivered at company's registered office – Interpretation Act 1889, s 26.

The plaintiffs issued a specially endorsed writ claiming £8,152.05 from the defendants, a limited company, as the price of goods sold and delivered, and their solicitors served a copy of the writ on the defendants by post in accordance with s 437 (1)^a of the Companies Act 1948. The writ was posted on 3rd June 1971 and so, by virtue of s 26^b of the Interpretation Act 1889, service was deemed to have been effected, unless the contrary was proved, on the date when the letter would have been delivered in the ordinary course of post, i.e. 4th June. No appearance was entered by the defendants within the time limited for appearance under RSC Ord 13, r 1, i.e. 14 days after service, and so, on 18th June, the plaintiffs obtained final judgment against them for the amount claimed. The defendants sought to have the judgment set aside for irregularity on the ground that the writ had not been served on them. Their application was supported by an affidavit of their managing director in which he swore that no copy of the writ had ever been received by the defendants. The plaintiffs did not challenge the facts deposed to in the affidavit but contended that, the writ having been posted on 3rd June, it was in law deemed to have been served on 4th June.

f **Held** (Orr LJ dissenting) – Since the evidence of the defendants' managing director was undisputed, the court was bound to assume that the writ had not been delivered at the defendants' registered office at all; it could not therefore be presumed, under s 26 of the 1889 Act, that it had been delivered in the ordinary course of post, for the contrary had been proved. It was immaterial that the letter had not been returned undelivered and that no one was aware until after judgment had been entered that the writ had not been received by the defendants. The plaintiffs therefore had no legal right to sign judgment in default of appearance and the defendants were entitled to have the judgment set aside in its entirety (see p 367 g, p 368 j, p 370 a, and p 372 f, post).

h *R v Appeal Committee of County of London Quarter Sessions, ex parte Rossi* [1956] 1 All ER 670 and *Hewitt v Leicester City Council* [1969] 2 All ER 802 applied.

Moody v Godstone Rural District Council [1966] 2 All ER 696 and *Cooper v Scott-Farnell* [1969] 1 All ER 178 distinguished.

Dictum of Denning LJ in *R v Appeal Committee of County of London Quarter Sessions, ex parte Rossi* [1956] 1 All ER 676 disapproved.

j Per Salmon and Buckley LJ. Whenever defendant companies seek to rely on affidavits to rebut the strong presumption that a writ has been delivered in the ordinary course of post plaintiffs would be well advised to give notice to cross-examine the deponents of such affidavits. Save in the most exceptional cases there should not be any question of an issue being set down to be tried. It would only be necessary

^a Section 437 (1) is set out on p 367 d, post

^b Section 26, so far as material, is set out on p 367 e, post

for the deponent to the affidavit to be present for cross-examination at the hearing of the summons to set the judgment aside (see p 370 f and g and p 373 h, post). a

Notes

For service of a writ on a company, see 6 Halsbury's Laws (3rd Edn) 17, para 12, 435, para 842.

For the Interpretation Act 1889, s 26, see 32 Halsbury's Statutes (3rd Edn) 452, and for the Companies Act 1948, s 437, see 5 *ibid* 422. b

Cases referred to in judgments

Anlaby v Prætorius (1888) 20 QBD 764, 57 LJQB 287, 58 LT 671, 50 Digest (Repl) 138, 1217.

Cooper v Scott-Farnell [1969] 1 All ER 178, [1969] 1 WLR 120, Digest (Cont Vol C) 178, 514b. c

Hewitt v Leicester City Council [1969] 2 All ER 802, [1969] 1 WLR 855, 133 JP 452, Digest (Cont Vol C) 135, 537a.

Moody v Godstone Rural District Council [1966] 2 All ER 696, [1966] 1 WLR 1085, 130 JP 332, Digest (Cont Vol B) 693, 90b.

R v Appeal Committee of County of London Quarter Sessions, ex parte Rossi [1956] 1 All ER 670, [1956] 1 QB 682, [1956] 2 WLR 800, 120 JP 239, 16 Digest (Repl) 473, 2929. d

T O Supplies (London) Ltd v Jerry Creighton Ltd [1951] 2 All ER 992, [1952] 1 KB 42, 9 Digest (Repl) 725, 4816.

White v Land and Water Co [1883] WN 174, 50 Digest (Repl) 314, 498.

White v Weston [1968] 2 All ER 842, [1968] 2 QB 647, [1968] 2 WLR 1459, Digest (Cont Vol C) 177, 514a. e

Interlocutory appeal

This was an appeal by the defendants, Helmville Ltd, against the order of Mr Commissioner Eastham QC in chambers on 4th October 1971, dismissing the defendants' appeal against the order of Master Elton in chambers dated 30th July 1971 that the judgment dated 18th June 1971 given for the plaintiffs, Thomas Bishop Ltd, in default of the defendants' appearance to a specially endorsed writ issued by the plaintiffs claiming £8,152.05 from the defendants as the price of goods sold and delivered and interest thereon, be set aside as to £1,152.05 part thereof and that the residue of the judgment should stand. The defendants claimed to have the whole judgment set aside for irregularity. The facts are set out in the judgment of Salmon LJ. f

S J Burnton for the defendants.

Henry Brooke for the plaintiffs. g

Cur adv vult

18th November 1971. The following judgments were read. h

SALMON LJ. On 3rd June 1971 the plaintiffs issued a specially endorsed writ claiming £8,152.05 from the defendants as the price of goods sold and delivered. On the same day the plaintiffs posted a prepaid letter containing a copy of the writ properly addressed by first class mail to the defendants at their registered office, 5 Lloyds Avenue, London EC3. In the ordinary course of post this letter would have reached the defendants' registered office on the following day, 4th June. An appearance to a writ must be entered within 14 days after service, inclusive of the day on which it is served. On 18th June, no appearance having been entered by the defendants, the plaintiffs obtained final judgment against them in default of appearance under RSC Ord 13, r 1, for the amount claimed. On 29th June the defendants applied under RSC Ord 2, r 2, to have this judgment set aside for irregularity on the ground i

a that the writ had not been served on them. This application was supported by an affidavit of the defendants' managing director in which he swore 'quite categorically' that no copy of the writ had been received by the defendants. The plaintiffs did not challenge the facts deposed to in this affidavit, but argued that nevertheless, the writ having been posted on 3rd June, it was, in law, deemed to have been served on 4th June.

b The master accepted the plaintiffs' argument and accordingly refused to set the judgment aside for irregularity, but, exercising his discretionary powers under RSC Ord 13, r 9, he varied the judgment by allowing it to stand in the reduced sum of £7,000, concluding that the defendants had made out no arguable defence as to that amount but only as to the balance of the claim, namely, £1,152.05. The defendants appealed from the master and that appeal was dismissed by the learned commissioner. The defendants now appeal to this court from that decision. They

c contend that they are entitled to have the whole judgment set aside *ex debito justitiae*.

The Companies Act 1948, s 437 (1), provides as follows:

'A document may be served on a company by leaving it at or sending it by post to the registered office of the company.'

d It is well settled that a writ is a document within the meaning of this section, as it was under the corresponding sections of earlier Companies Acts which it replaced: see *White v Land and Water Co*¹. Section 437 (1) of the 1948 Act must be read in the light of s 26 of the Interpretation Act 1889, which, in so far as it is material, provides as follows:

e 'Where an Act passed after the commencement of this Act authorises or requires any document to be served by post . . . then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post.'

f Looking at the question raised in this appeal, unassisted by authority, the unchallenged facts deposed to by the defendants' managing director seem to me clearly to prove that the writ in this case was not, and, therefore, cannot be deemed to have been served on 4th June. If the writ never reached the defendants' registered office, obviously it did not arrive there on 4th June. Accordingly, the time for entering an

g appearance to the writ cannot have expired by 18th June and judgment entered that day in default of appearance was irregular.

The plaintiffs, however, argue that unless the party posting a document has notice that it has not been received by the addressee at the time it would be delivered in the ordinary course of post, then it is assumed to have been delivered in the ordinary course of post and any judgment or order by default obtained on the faith of that

h assumption is perfectly regular, and will not as a rule be set aside except on payment of costs and showing of merit. The plaintiffs rely for this proposition on *R v Appeal Committee of County of London Quarter Sessions, ex parte Rossi*². In my judgment, that authority decided nothing of the kind, although there is a passage at the end of Denning LJ's judgment which supports the proposition for which the plaintiffs contend. In my view, however, that passage goes further than was necessary for the purpose

j of deciding the case and I am afraid that, in spite of the great respect I have for any obiter dictum of Lord Denning's, I cannot accept it. The decision in *ex parte Rossi*² is accurately set out in the headnote³ as follows:

1 [1893] WN 174

2 [1956] 1 All ER 670, [1956] 1 QB 682

3 [1956] 1 QB at 683, 684

'... the primary obligation under section 3 (1) [of the Summary Jurisdiction (Appeals) Act 1933] to "give notice in due course" had not been satisfied by adopting the permissive method of sending the notice by [registered] post in a letter which was proved never to have been received by the party interested. The words imported the requirement that the notice given should be received by the party interested within a reasonable time; and interpreted in the light of section 26 of the Interpretation Act, 1889 . . . the service of this notice could not be "deemed to be effected" in the ordinary course of post, because it was proved never to have been effected in time or at all. Accordingly, there had been a defect in procedure and an order of certiorari should be granted to quash the proceedings.'

In that case the notice, being sent by registered post, had been returned undelivered. It followed that at the time of the hearing the appeals committee and the appellant knew that it had not been delivered, but neither Morris LJ nor Parker LJ relied on this fact in any way for their decision; indeed, Morris LJ did not even mention it in his judgment. Parker LJ stated⁴:

'The second part [of s 26 of the Interpretation Act 1889] provides that, unless the contrary is proved, service is [deemed to be] effected on the day when in the ordinary course of post the document would be delivered. This second part, therefore . . . comes into play, and only comes into play, in a case where under the legislation to which the section is being applied the document has to be received by a certain time. If in such a case "the contrary is proved", i.e., that the document was not received by that time or at all, then the position appears to be that, though under the first part of the section the document is deemed to have been served, it has been proved that it was not served in time.'

*Hewitt v Leicester City Council*⁵ is another example of a case in which this court has held that when the date of the service of a notice by post is relevant (in that case a notice to treat), proof that it was never delivered at all satisfies the requirement of the second part of s 26 by showing that it was not delivered in the ordinary course of post, and, therefore, not in time.

In *Moody v Godstone Rural District Council*⁶ an enforcement notice had been sent by prepaid registered post to the owner of a caravan site at his correct address, and there was a certificate of delivery purporting to be signed by the addressee. He was prosecuted for failing to comply with the notice and was fined. He appealed to the Divisional Court⁶ by way of case stated. He had sworn (and he had not been cross-examined) that the signature on the certificate of delivery was not his, since he had been out of the country at the time. The Divisional Court⁶, dismissing the appeal, held that the notice had been properly served. I am not prepared to accept all the reasons given for that decision in the judgment. The decision itself, however, was no doubt correct. It seems clear that the notice was delivered in the ordinary course of post at the appellant's correct address. The appellant's case was based merely on the assertion that the notice had not come to his knowledge because he was abroad when it was served. This afforded no defence to the information brought against him for failing to comply with the enforcement notice, but might well have founded a strong plea in mitigation and justified a nominal fine.

The date of the service of a writ may in many cases be immaterial. In the present case, however, the plaintiffs had no legal right to sign judgment in default of appearance on 18th June if the writ had not been served on or before 4th June. Unless the contrary was proved, service of the writ would be deemed to have been effected on 4th June. But the contrary was proved, namely, that the letter containing the writ had not been delivered at the defendants' registered office on that day or at all. Accordingly, the judgment signed in default of appearance is in my view defective.

⁴ [1956] 1 All ER at 681, [1956] 1 QB at 700 ⁶ [1966] 2 All ER 696, [1966] 1 WLR 1085

⁵ [1969] 2 All ER 802, [1969] 1 WLR 855

a The plaintiffs, however, contend that whatever may be the true view in relation to the service by post of notices of the hearing of an appeal, or notices to treat, or enforcement notices, the view which I have expressed should not be accepted in relation to the service by post of writs or county court summonses, firstly because this view is inconsistent with the decision of this court in *Cooper v Scott-Farnell*⁷, and secondly, because it would be extremely inconvenient and, indeed, would amount to a charter to unscrupulous defendants to evade the consequences of service of process on them. I cannot accept these contentions.

b In *Cooper v Scott-Farnell*⁷ the plaintiff issued a county court summons claiming damages from the defendant as a result of a road accident. The summons was served by post in accordance with CCR Ord 8, r 8 (2). The summons arrived at the defendant's address in the ordinary course of post more than 14 clear days before the return day, and thus r 8 (4) was complied with. Owing to the defendant's absence abroad, c unknown to the plaintiff, on a prolonged holiday the summons did not, however, come to his notice until he found it in his letterbox on his return home. In the meantime the trial had taken place and judgment had been given against him in his absence. The county court judge exercising his discretion under CCR Ord 37, r 6 (1) (which gave him power to set aside a judgment obtained in default where it later d appeared that the summons had not come to the knowledge of the defendant in time), set aside the judgment and ordered the costs of the first trial and the application to be costs in the cause. The defendant appealed, contending that he was entitled to have the judgment set aside *ex debito iustitiae*. The appeal was dismissed. Willmer LJ pointed out⁸:

e '... in the absence of proof to the contrary (and there was no proof to the contrary), the service must be deemed to have been effected at the time when the letter would be delivered in the ordinary course of post.'

This is plainly right. The summons was correctly addressed to the defendant at his home and it went through his letterbox a day or so after it was posted. In such circumstances, I do not think that a defendant is entitled to have a default judgment f against him set aside as of right on the ground that he had no knowledge of the summons either because he forgot to look in his letterbox or was away from home, or his wife or child or servant destroyed or lost it, or for any other reason. The crucial distinction between *Cooper v Scott-Farnell*⁷ on the one hand and *ex parte Rossi*⁹ and the present case on the other is that in *Cooper v Scott-Farnell*⁷ the summons was delivered in time at the defendant's proper address but in *ex parte Rossi*⁹ the notice, and, in the present case, the writ, was not delivered in time or at all. In my view, g unless the contrary is proved, service is deemed to be effected on the day when a letter containing a writ, prepaid, properly addressed and posted, would be delivered at the defendant's correct address in the ordinary course of post. If it is so delivered, the defendant is not entitled to have judgment in default of appearance set aside as of right on the ground that the document did not come to his knowledge. When h time of delivery is relevant, he is entitled to have such a judgment set aside if he can prove that the writ was not delivered at his address in time or at all. This view seems to me to be consistent with the statute, authority and good sense. Section 26 of the Interpretation Act 1889 cannot in my view be given a special construction in relation to the service of a High Court writ or county court summons; it is not a chameleon; it cannot take on a different colour or meaning, according to the statute in connection with which it is being considered. In my view, the plaintiffs could i succeed only by re-writing the section and substituting for the words 'unless the contrary is proved' the words 'unless the contrary is proved to be known to the sender'.

7 [1969] 1 All ER 178, [1969] 1 WLR 120

8 [1969] 1 All ER at 181, [1969] 1 WLR at 125

9 [1956] 1 All ER 670, [1956] 1 QB 682

In the present case, the plaintiffs had the option of delivering a writ by hand at the registered office of the defendants or delivering it there by post. Having chosen to adopt the latter course, the writ is presumed to have been delivered in the ordinary course of post unless the contrary is proved. And here the contrary was proved. It is unnecessary to consider whether, in a case in which the date of service is irrelevant, it would be open to a defendant to rebut the presumption under the first part of s 26 that service had been effected. It seems strange should he not be entitled to do so, but the language of the statute may create difficulties which the present case does not, however, make it necessary for me to attempt to resolve.

I do not agree that the construction which I adopt of s 26 need lead to any inconvenience, still less that it amounts to a charter to unscrupulous defendants to evade service. In spite of the occasional vagaries of the modern postal services, the onus on a defendant company which seeks to rebut the presumption that the service of a writ was effected in the ordinary course of post is a heavy one, especially, perhaps, when there is apparently no arguable defence to the bulk of the plaintiffs' claim. Notice to cross-examine Mr Alachouzos, the defendants' managing director, was not given. It could have been. No one can criticise the plaintiffs' advisers for not giving such a notice. They naturally relied on the passage in the leading judgment in *ex parte Rossi*¹⁰, with which I have dealt. If Mr Alachouzos had been cross-examined, he might have so much impressed the master with his candour and the accuracy of his information that the master might have made the same order as he in fact made. On the other hand, he might not. Normally it would be very difficult to discharge the onus of proving that a writ, properly addressed, posted and prepaid, had not been delivered at a defendant's registered office in the ordinary course of post. Writs may well be lost or mislaid in the registered office of a defendant company or for one reason or another fail to come to the attention of the management; and all those possibilities would have to be negated to the master's satisfaction before the judgment could be set aside as of right. In the future, whenever defendant companies seek to rely on affidavits to rebut the strong presumption that a writ has been delivered in the ordinary course of post, it would, as a rule, be wise for the plaintiffs to give notice to cross-examine the deponents of such affidavits. I should be surprised if the onus of 'proving the contrary' under the second part of s 26 would often be discharged. I do not think that, save perhaps in the most exceptional circumstances, there should be any question of an issue being set down to be tried. All that would be necessary would be for the deponent to the defendant company's affidavit to be present for cross-examination at the hearing of the summons to set the judgment aside.

For the reasons I have given, I feel forced to the conclusion, with some reluctance in this case, that the appeal must be allowed.

BUCKLEY LJ. I need not recapitulate the facts which have already been stated by Salmon LJ. To justify their having entered judgment in default of appearance the plaintiffs must establish that the writ was served on the defendants, or must be taken to have been served on the defendants, not later than 4th June 1971. This burden rests on them and, if they fail to discharge it, the defendants are entitled to have the judgment set aside in its entirety *ex debito justitiae*.

The Companies Act 1948, s 437, permits service of any document on a company by sending it by post to the registered office of the company. The Interpretation Act 1889, s 26, provides that, where an Act of Parliament authorises service of any document by post, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

¹⁰ [1956] 1 All ER 670, [1956] 1 QB 682

a For the defendants it is submitted that, if it is proved that the writ was never delivered at the defendants' registered office, there has been no actual service of the writ on the defendants and moreover service of the writ is not to be deemed to have been effected at any particular time or, indeed, at all under s 26 of the Interpretation Act 1889 because the contrary is proved. For the plaintiffs it is contended that the defendants' only right in the circumstances is to seek to have the judgment set aside under
b RSC Ord 13, r 9, in the exercise of the court's discretion and on such terms as the court thinks just. The question for decision, accordingly, is whether in the circumstances of the case the defendants are entitled as of right to have the entire judgment set aside as irregularly obtained. In many cases in this and other courts it has been stressed that (to borrow the language of Denning LJ, in *R v Appeal Committee of County of London Quarter Sessions, ex parte Rossi*¹¹):

c '... it is a fundamental principle of our law that no one is to be found guilty or made liable by an order of any tribunal unless he has been given fair notice of the proceedings so as to enable him to appear and defend them.'

There are, of course, necessary exceptions to the general principle that a defendant should always have actual notice of proceedings against him. An obvious example
d is substituted service, where it is unnecessary to establish that notice of the proceedings has in fact reached the defendant. We have to consider whether the present case is such an exception.

Much reliance was placed on behalf of the plaintiffs on certain dicta of Denning LJ in *R v Appeal Committee of County of London Quarter Sessions, ex parte Rossi*¹². In that case the court was concerned with the service of a notice of hearing pursuant to the
e Summary Jurisdiction (Appeals) Act 1933, s 3, which permits notice of such a hearing to be served by registered letter addressed to the other party at his last or usual place of abode. Notice had been served in this manner, but before the date of hearing the letter had been returned to the sender marked 'Undelivered... no response'. The returned letter was actually before the court at the hearing to which it related. The court was consequently apprised of the fact that the respondent had not received
f notice of the hearing. The court held that the notice could not be deemed to have been served on the respondent in ordinary course of post under s 26 of the Interpretation Act 1889 because it was proved never to have reached him at all. The proceedings were consequently quashed. Denning LJ said¹²:

g 'To sum up, when service of process is allowed by registered post, without more being said on the matter, then if the letter is not returned, it is assumed to have been delivered in the ordinary course of post and any judgment or order by default obtained on the faith of that assumption is perfectly regular. It will not as a rule be set aside except on payment of costs and showing of merits: see *T.O. Supplies (London), Ltd. v. Jerry Creighton, Ltd*¹³. If, however, the letter is returned undelivered and nevertheless, notwithstanding its return, a judgment or order by default should afterwards be obtained, it is irregular and will be
h set aside *ex debito justitiae*. The order of quarter sessions here was irregular because there was no proper service and it should be set aside.'

It is said that in the present case, because at the date when the plaintiffs entered judgment there was nothing to indicate that the writ had not been received in the
i ordinary course of post by the defendants, judgment was entered regularly and will only be set aside in the discretion of the court and subject to such conditions as the court thinks just. In the observations which I have just read, which were obiter dicta, Denning LJ was speaking of a registered letter which was not returned to the sender.

11 [1956] 1 All ER 670 at 674, [1956] 1 QB 682 at 691

12 [1956] 1 All ER at 676, [1956] 1 QB at 694

13 [1951] 2 All ER 992, [1952] 1 KB 42

This would be a strong indication that the letter had at least been delivered at the address to which it was directed. Even in such a case, if it were afterwards established that the letter had not in fact reached its destination in consequence, for example, of its being stolen or accidentally destroyed en route, the question whether judgment in default of appearance had been 'regularly' obtained would, I think, require careful consideration. In the present case the plaintiffs can only show that the judgment which they entered was regularly obtained if they can discharge the burden to which I referred earlier.

The facts are not in dispute. The letter was despatched on 3rd June 1971, but was never received by the defendants. Should the defendants nevertheless be treated as having been served with the writ and, if so, when? This depends on the true effect of s 26 of the Interpretation Act 1889. That section has two parts, one concerned with method and the other with time. In the present case the requirements of the first branch are satisfied. The question is whether, in the events which happened, the writ is to be deemed to have been served at the time at which the letter would have been delivered in the ordinary course of post, or whether the contrary is proved. The undisputed evidence of the defendants' managing director is that the letter was not received, and I ask myself how in these circumstances it can be said that this does not constitute proof to the contrary for the purposes of the second provision of the section.

In *ex parte Rossi*¹⁴, Morris LJ said:

'Here, however, the contrary was proved. It was proved not merely that the letter was not delivered in the ordinary course of post but that the letter was not delivered at all. Service cannot in this case be deemed "to have been effected" at some particular time, i.e., in the ordinary course of post: service was proved not to have been effected at all.'

That language, it seems to me, is precisely applicable in the present case. It is true that in *ex parte Rossi*¹⁵ the court was aware of the non-delivery of the letter there in question when the case came before it, whereas in the present case no one was aware that the writ had not been received by the defendants until some time after judgment had been entered, but I cannot myself see that this can make any difference. As matters now stand it has been proved that the letter was not delivered in the ordinary course of post or at all.

In *White v Weston*¹⁶ judgment was obtained against a defendant in a county court in his absence, the defendant never having received any notice of the proceedings. The summons had been sent by post to an address believed to be that of the defendant, but he had left that address some months before. The county court judge at the time of the trial had no reason to doubt the propriety of the service by post under the relevant provisions of the County Court Rules. Nor had the plaintiff any reason at that time to suppose that the letter had been mis-addressed. The defendant was held to be entitled as of right to have the judgment set aside. The decision is, however, of only limited assistance in the present case, for it seems to have gone mainly on the fact that the summons was posted to an address which was no longer the address of the defendant. As Russell LJ said¹⁷:

'A summons addressed to an address with which the defendant has had no connexion for five months or more, however, cannot be said to be properly addressed.'

In *Cooper v Scott-Farnell*¹⁸ a county court summons was served on the defendant

¹⁴ [1956] 1 All ER at 679, [1956] 1 QB at 697

¹⁵ [1956] 1 All ER 670, [1956] 1 QB 682

¹⁶ [1968] 2 All ER 842, [1968] 2 QB 647

¹⁷ [1968] 2 All ER at 845, [1968] 2 QB at 658

¹⁸ [1969] 1 All ER 178, [1969] 1 WLR 120

a by post in accordance with the County Court Rules. It arrived at his address, but since he had in the meantime gone abroad for a prolonged holiday, he did not receive it in time. The trial took place while he was still abroad and judgment was obtained against him in default. The county court judge later, in the exercise of his discretion, set aside the judgment but penalised the defendant in costs. The defendant appealed on the ground that he was entitled as of right to have the judgment set aside, but his appeal failed. The plaintiff in that case had fulfilled all the requirements of the code of procedure provided by the County Court Rules. The summons was delivered b in the ordinary course at the defendant's residence. The fact that the defendant did not receive it in time was due to his own failure to ensure that his mail was forwarded to him. It was not proved that the letter containing the summons was not delivered in the ordinary course of post.

c In *Moody v Godstone Rural District Council*¹⁹ an enforcement notice was served under the Town and Country Planning Act 1962 by registered post properly addressed to the addressee in accordance with s 214 (1) (c) of the Act. The addressee denied that he or any agent of his ever received the notice. He was held nevertheless to have been duly served. It was not incumbent on the planning authority to show that the notice had been served on any particular day or by any particular time. Consequently, the Divisional Court¹⁹ proceeded on the basis that the second branch d of s 26 of the Interpretation Act 1889 was not called into play. I am not entirely satisfied that it is right to divorce the two parts of s 26 in this way, but in the present case the time of service is certainly important, for it is essential to the regularity of the plaintiffs' judgment.

e By way of contrast to the case last cited, *Hewitt v Leicester City Council*²⁰ relates to the service of a compulsory purchase order. The amount of compensation payable to the owner of the land purchased depended on the date at which the notice was served. The earlier of two notices was sent to the owner by recorded delivery service at an address where she was no longer living and was returned marked 'undelivered'. Lord Denning MR said¹:

f "This is a case like *Rossi's case*² where the time of service was important. The valuation depended on it. Once it appeared that the letter of 20th May 1965 was returned through the post marked "gone away", then it was quite plain that it was not served at all. We are not bound to "deem" a notice to be served at a particular time, when we know that in fact it was not served at all."

g Just so, in my judgment, in the present case, accepting as we are bound to do the evidence of the defendant company's managing director at its face value, we know that the writ was not served at all. We cannot deem service to have been effected on 4th June, for we know that in fact it was not. The contrary is proved. For these reasons, the defendants are, in my judgment, entitled as of right to have the judgment set aside in its entirety. Whether this would be the case if the defendants' managing director had been cross-examined on his affidavit, I cannot tell. In any similar case h the plaintiff would be well advised to test the defendant's evidence of non-receipt with the utmost rigour.

For these reasons, I would allow this appeal.

j **ORR LJ.** The sole issue in this appeal is whether the defendants were entitled as of right to have the judgment for £8,152, signed in default of appearance on 18th June 1971, set aside. If they were so entitled, it is common ground that the appeal must succeed. If they were not so entitled, and the master had a discretion in the

¹⁹ [1966] 2 All ER 696, [1966] 1 WLR 1085

²⁰ [1969] 2 All ER 802, [1969] 1 WLR 855

¹ [1969] 2 All ER at 804, [1969] 1 WLR at 858

² [1956] 1 All ER 670, [1956] 1 QB 682

matter, it has not been contended for the defendants that the order setting aside the judgment as to £1,152 but directing that it should stand as to the balance of £7,000, was a wrong exercise of discretion; and, in my judgment, as a matter of discretion, that order was fully justified by the evidence contained in the plaintiffs' secretary's affidavit that, although the writ was not issued until over seven months after the despatch of the last consignment of the goods sold, the defendants had only made complaints as to the quality or fitness of goods of a total price of some £1,150, and had made no complaint as to the residue of the goods of which the total price was some £7,000. a

The defendants, however, claim that they were entitled to have the whole judgment set aside on the ground that they were not served with the writ in proper time (that is, 14 days before the judgment was signed) or at all. The evidence for the plaintiffs as to service is contained in an affidavit filed pursuant to RSC Ord 13, r 7 (1), and sworn by Mr Evans, a partner in the London firm of solicitors acting for the plaintiffs, in which he deposes to the copy of the writ having been posted as first class ordinary mail on 3rd June 1971, duly addressed to the defendants' registered office in London and prepaid. For the defendants their managing director, Mr Alachouzou, deposed that he was able to say 'quite categorically' that no copy of the writ had been received by the defendants, and this statement, although unsupported by any more detailed evidence and untested, must in my judgment be accepted as true for the present purposes. b

The matter at issue turns on the construction of RSC Ord 65 (which deals with service) read in conjunction with s 437 of the Companies Act 1948, and s 26 of the Interpretation Act 1889, and also RSC Ord 13 which deals with proceedings in default of appearance. We have been referred in the course of argument to a number of decided cases as to the effect in different contexts of s 26 of the Interpretation Act 1889 or corresponding wording contained in particular Acts of Parliament, and it has been stressed in many of the judgments that the effects may differ according to the context. I propose to refer to only three of the cases, which seem to me to have the most direct bearing on the present issue. c

In *R v Appeal Committee of County of London Quarter Sessions, ex parte Rossi*³, a registered letter from the clerk of the peace, giving notice to the respondent to an appeal in bastardy proceedings of the date fixed for an adjourned hearing of the appeal, was posted to the respondent but returned undelivered before the date fixed for the hearing and was on that date placed before the appeals committee, but they acceded to an argument for the appellant that the respondent was evading service and proceeded to hear the appeal in the absence of the respondent and to make an order against him. Certiorari was refused by the Divisional Court but was granted on appeal to this court. The judgment of Denning LJ contained the following passages⁴: d

I would just add this: if the order had been *regularly* obtained (as the Divisional Court thought) then I would agree that there would be no ground for certiorari: and Mr. Rossi's only remedy would be by application to quarter sessions to set aside the order made in his absence and to re-hear the appeal . . . Suppose, for instance, that Mr. Rossi had received proper notice of the date of the hearing, but failed to attend because he was ill; and the court, not knowing of it, heard the appeal in his absence and decided against him. Or suppose that the registered letter had not been returned undelivered, so that the court were entitled to assume that it had been delivered in the ordinary course of post. In each of those cases the order of quarter sessions would be *regularly* obtained: but Mr. Rossi would be able to have it set aside on such terms as the court thought fit and he could be let in to defend on the merits . . . To sum up, when service e

³ [1956] 1 All ER 670, [1956] 1 QB 482

⁴ [1956] 1 All ER at 675, 676, [1956] 1 QB at 693, 694 f

- a of process is allowed by registered post, without more being said on the matter, then if the letter is not returned, it is assumed to have been delivered in the ordinary course of post and any judgment or order by default obtained on the faith of that assumption is perfectly regular. It will not as a rule be set aside except on payment of costs and showing of merits: see *T.O. Supplies (London), Ltd. v. Jerry Creighton, Ltd.*⁵ If, however, the letter is returned undelivered and
b nevertheless, notwithstanding its return, a judgment or order by default should afterwards be obtained, it is irregular and will be set aside *ex debito justitiae*.'

Neither Morris nor Parker LJ referred at all in their judgments in that case to default proceedings in civil actions, and the above passage in which Denning LJ did so was obiter dictum, but it was accepted as correct by the Court of Appeal in the most recent of the three cases to which I shall refer, *Cooper v Scott-Farnell*⁶,
c where the view was also taken, with which I agree, that nothing could turn on whether the service was by registered or by ordinary post.

In the interval between these two decisions *White v Weston*⁷ came before Russell and Sachs LJ. The facts of that case were that a summons giving notice of county court proceedings was sent by post to the defendant on 28th October 1966 at an address which he had left some five months before, and it was eventually returned
d undelivered. In the meantime, on 25th November 1966, in the absence of the defendant who had no knowledge of the proceedings, the county court judge gave judgment for the plaintiff. The defendant having applied to set aside the judgment, the judge set it aside but ordered that the costs of the November hearing should be costs in the cause, and on the defendant appealing to this court against that order
e as of right to have the judgment set aside without the imposition of any order as to costs or otherwise. Russell LJ in his judgment said⁸ with reference to the requirement of s 26 of the Interpretation Act 1889 that a document sent by post must be 'properly' addressed but:

f 'A summons addressed to an address with which the defendant had had no connexion for five months or more, cannot be said to be properly addressed.'

And Sachs LJ said⁹:

'I can find no warrant in any of the County Court Rules or in s. 26 of the Interpretation Act, 1889, for holding that service in purported pursuance of C.C.R., Ord. 8, r. 3, at an address which at the relevant time was not the abode,
g residence, or place of business of a defendant, is good service should the relevant document not in fact reach him.'

In *Cooper v Scott-Farnell*¹⁰ Willmer LJ, with whose judgment the other members of the court agreed, took the view that the ratio of *White v Weston*⁷ is contained in these passages, and with that view I respectfully agree.

h The facts of *Cooper v Scott-Farnell*⁶ were that a county court summons in respect of a road accident claim was sent to the defendant by post in accordance with the County Court Rules and was delivered at his home, but he did not, owing to his being away on holiday, receive it until after the hearing at which judgment was given against him in his absence. On his subsequent application, the judge set aside the judgment but ordered that he should pay the costs of the first hearing. On appeal by
j the defendant, the Court of Appeal⁶ (Willmer, Edmund Davies and Phillimore LJ) held

5 [1951] 2 All ER 992, [1952] 1 KB 42
6 [1969] 1 All ER 178, [1969] 1 WLR 120
7 [1968] 2 All ER 842, [1968] 2 QB 647
8 [1968] 2 All ER at 845, [1968] 2 QB at 658
9 [1968] 2 All ER at 847, [1968] 2 QB at 661
10 [1969] 1 All ER at 182, [1969] 1 WLR at 127

that all the processes constituting service under the County Court Rules had been properly carried out and that the defendant was not entitled to have the judgment set aside as of right. Willmer and Edmund Davies LJJ expressly, and I think Phillimore LJ impliedly, accepted as correct the views expressed in the last of the passages I have quoted from *Rossi's case*¹¹, and all three rejected an argument advanced for the defendant that in *White v Weston*¹² Russell and Sachs LJJ had held that there can never be service where the defendant has not received, and, therefore, has no knowledge of, a summons. They took the view that the question before them was one of construction of the provisions of CCR Ord 8 which provided in effect a self-contained code for regulating the service of documents in county court proceedings, and, construing those rules in conjunction with s 26 of the Interpretation Act 1889, held that the summons having been duly addressed, prepaid and posted was to be deemed good service on the defendant, although he did not receive it until later, and that in the absence of proof to the contrary it must be taken to have been delivered in the ordinary course of post. With regard to those passages in *Rossi's case*¹¹ and other cases in which stress has been laid on the importance of the defendant knowing of the service before the hearing, Edmund Davies LJ took the view that these statements are to be understood as relating to what has to be done before a judgment is to be finally binding, and in this respect all three members of the court accepted that the discretionary powers of setting aside a judgment, contained in the County Court Rules, provided a fully sufficient safeguard for the defendant.

*Cooper v Scott-Farnell*¹³ differed from the present case in that there the summons had in fact been delivered at the defendant's home, whereas in the present case receipt of the copy writ at the defendants' registered office must be taken to have been negatived. It is also true that in that case Phillimore LJ stressed that the county court is much concerned with debt collecting and with cases in which there is not going to be any defence, and that Willmer and Edmund Davies LJJ were influenced by the specific discretionary power to set aside a judgment contained in CCR Ord 37, r 6, entitled 'Setting aside on failure of postal service'.

I do not consider that the second and third of these matters provide a sufficient ground for distinguishing the present case from *Cooper v Scott-Farnell*¹³ and, as regards the point of difference that in that case the summons had been delivered to the defendant's home, much of the reasoning, with which I agree, in the judgments in *Cooper v Scott-Farnell*¹³ could, it seems to me, equally support a decision in the plaintiffs' favour in the present case.

We are concerned in the present case with a code for the service of process in the High Court comparable to the code with which the court were concerned in *Cooper v Scott-Farnell*¹³, and also with a code for process in default of appearance which is not to be found in the county court procedure but which leads to a result comparable to the obtaining of a county court judgment in default of attendance by the defendant at the trial. In my judgment there is no material difference for the present purposes between the two codes as to service, both of which incorporate s 26 of the Interpretation Act 1889. As to the effects of a judgment signed in default of appearance in the High Court or obtained in default of the defendant's attendance in the county court, the statement, which I have earlier quoted, of Denning LJ in *Rossi's case*¹⁴ involves that the point of time to be looked at in deciding whether the judgment was regularly obtained is the time when the judgment was given or signed, and that if at that time there is nothing known to the court (or to the plaintiff whose duty it would be to communicate it to the court) which indicates that the relevant process has not been delivered in the ordinary course of post, it is to be deemed to have been so delivered for the purposes of that judgment, although it will be open to the defendant to apply

¹¹ [1956] 1 All ER 670, [1956] 1 QB 682

¹² [1968] 2 All ER 842, [1968] 2 QB 647

¹³ [1969] 1 All ER 178, [1969] 1 WLR 120

¹⁴ [1956] 1 All ER at 675, 676, [1956] 1 QB at 693, 694

a to have the judgment set aside in the court's discretion on the ground, inter alia, that he was not served or was not served in time. In my judgment, on a true construction of RSC Ord 65, read with s 437 of the Companies Act 1948, and s 26 of the Interpretation Act 1889, and RSC Ord 13, this statement, as applied to the facts of this case, correctly expresses the law.

b RSC Ord 13, so far as relevant, provided by r 1 that in the case of a liquidated claim the plaintiff may enter 'final judgment' after failure of the defendant to enter an appearance within the time limited for that purpose; by r 7, that in order to obtain judgment the plaintiff must file an affidavit 'proving due service of the writ'; and by r 9 that the court may on such terms as it thinks fit set aside any judgment entered in pursuance of the order, in which respect the judgment, although classified as 'final', is not finally binding. In the present case the affidavit as to due posting of the copy writ contained no incorrect statement and concealed nothing which c ought to have been disclosed, and by virtue of the presumption contained in s 26 of the Interpretation Act 1889 the requirements both of r 1 and r 7 were satisfied. In my judgment, both the effect and the scheme of the order is that if the defendant has not received the copy writ, his remedy is to apply to set it aside under r 9. The case is wholly different from *Anlaby v Prætorius*¹⁵ (cited under RSC Ord 13, r 9, in d the Supreme Court Practice 1970¹⁶) where, because of a mistake of law, judgment in default was signed before the expiry of a ten day period prescribed by the rules and it was held that the obtaining of the judgment was a wrongful act not done within any of the rules. In the present case, in my judgment, what was done was within the rules.

e I reach this conclusion without regret because of the obvious danger that, if a defendant is entitled by a denial of postal delivery to have a judgment set aside as of right, delivery will in many cases be falsely denied in order to gain time. I agree that this danger could be met in part by requiring the deponent who denies postal delivery to attend for cross-examination, but this in itself would cause delay and, once investigation has been entered on, I find it difficult to see how it could be limited without the consent of both parties to anything short of the trial of an issue. Where the denial f of postal receipt is in general terms, as in the present case, the plaintiff might well wish to cross-examine other persons or the defendant to call them, and there might also be cases where the plaintiff would be able, and wish, to adduce evidence. All this, and it may be subsequent processes of appeal invoked by the defendant to gain further time, would involve considerable delay and, where the denial is false, injustice to the plaintiff. These considerations would be of no weight if the law as I have g construed it involves injustice to defendants, but I cannot see that any injustice is involved. The most that can be said for the defendants is that they have been deprived by the failure of postal service of the opportunity of resisting, up to the RSC Ord 14 stage but probably no longer, that part of a claim to which they are unable to put forward any defence.

h For these reasons, differing from *Salmon and Buckley LJJ* in what I have not found an easy case, I for my part would have dismissed this appeal.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *M A Jacobs & Sons* (for the defendants); *Wilde, Sapte & Co* (for the plaintiffs).

Mary Rose Plummer Barrister.

j
15 (1888) 20 QBD 764

16 See Vol 1, p 117, para 13/9/4

Church of Scientology of California v Johnson-Smith

QUEEN'S BENCH DIVISION

BROWNE J

6th NOVEMBER 1970

Libel – Privilege – Absolute privilege – Proceedings in Parliament – Evidence of words spoken in Parliament in support of claim – Words complained of spoken by member of Parliament in television interview – Defence of fair comment in good faith and without malice – Evidence of words spoken by defendant in Parliament adduced in order to prove malice – Evidence inadmissible.

The plaintiffs brought an action for libel against the defendant, a member of Parliament, for defamatory remarks made by the defendant during a television interview. The defendant pleaded fair comment and privilege. In order to defeat those pleas the plaintiffs by their reply alleged malice and in order to establish that the defendant had acted with malice they sought to adduce evidence, including extracts from Hansard, of what the defendant had done and said in Parliament.

Held – What was said or done in Parliament in the course of proceedings there could not be examined outside Parliament for the purpose of supporting a cause of action even though the cause of action itself arose out of something done outside Parliament; consequently the evidence sought to be given must be excluded (see p 381 c and p 382 c, post).

Stockdale v Hansard (1839) 9 Ad & El 1, *Bradlaugh v Gossett* (1884) 12 QBD 271, and *Dingle v Associated Newspapers Ltd* [1960] 1 All ER 294 applied.

Notes

For privilege in respect of proceedings in Parliament of reports thereof, see 24 Halsbury's Laws (3rd Edn) 52, 53, paras 93, 94, and for cases on the subject, see 32 Digest (Repl) 126-128, 1483-1494.

Cases referred to in judgment

Bradlaugh v Gossett (1884) 12 QBD 271, 53 LJQB 209, 50 LT 620, 36 Digest (Repl) 394, 415.

Dingle v Associated Newspapers Ltd [1960] 1 All ER 294, [1960] 2 QB 405, [1960] 2 WLR 430; *varied* CA [1961] 1 All ER 897, [1961] 2 QB 162, [1961] 2 WLR 523; *aff'd* HL sub nom *Associated Newspapers Ltd v Dingle* [1962] 2 All ER 737, [1964] AC 371, [1962] 3 WLR 229, Digest (Cont Vol A) 1223, 415a.

Stockdale v Hansard (1839) 9 Ad & El 1, 8 LJQB 294, 112 ER 1112, 32 Digest (Repl) 127, 1493.

Wason, ex parte (1869) LR 4 QB 573, 38 LJQB 302, 16 Digest (Repl) 366, 1423.

Cases also cited

Dillon v Balfour (1887) 20 LR Ir 600.

Parliamentary Privilege Act 1770, *In the matter of the* [1958] 2 All ER 329, [1958] AC 331.

R v Creevey (1813) 1 M & S 273.

Action

This was an action by the plaintiffs, the Church of Scientology of California, whose world headquarters were in East Grinstead, for damages for libel published on

a 25th July 1968 by the defendant, Geoffrey Johnson-Smith, the member of Parliament for East Grinstead, in an interview on the BBC television programme, '24 Hours', and an injunction to restrain the defendant from publishing any similar libel concerning the plaintiffs. The plaintiffs alleged that in the interview the defendant implied that the plaintiffs' organisation was harmful. By his defence the defendant denied the plaintiffs' allegations and pleaded justification and fair comment. The defendant claimed, inter alia, that the words complained of were fair comment made in good faith and without malice on the House of Commons Reports (Hansard), which document was absolutely privileged. By para 4 of their reply the plaintiffs alleged malice, and by sub-paras (ix) and (x) thereof they particularised the facts on which they intended to rely as establishing that the defendant had acted with malice as follows:

c '(ix) The defendant asked for an inquiry into scientology on 5th December 1966 (Hansard, 5th December 1966, Written Answer 81, Column 183), which was refused. Thereafter the defendant has consistently attacked the plaintiffs in Parliament. It was in answer to, and as a result of, the defendant's Parliamentary question on 25th July 1968 that [the Minister of Health] announced a ban on all alien scientologists.

d '(x) The defendant's attack in Parliament on the plaintiffs on each occasion preceded rather than followed adverse correspondence which he received concerning the plaintiffs. The plaintiffs will rely on the contents, nature and timing of the letters so received, and on the activities, letters and statements of the defendant in relation thereto.'

e During the trial of the action counsel for the defendant suggested that the court might infringe the privileges of Parliament if those sub-paragraphs of the reply were inquired into, and accordingly the court invited the Attorney-General's assistance in determining the question whether Parliamentary privilege might be infringed. The case is reported on that issue only.

f *R Shulman and A R H Newman* for the plaintiffs.
Sir Elwyn Jones QC, R G Waterhouse QC and B Braithwaite for the defendant.
The Attorney-General (Sir Peter Rawlinson QC) and Gordon Slynn as amici curiae.

g **BROWNE J.** In the course of the hearing yesterday counsel for the defendant suggested that there was a danger that in the course of this case we might, all of us, infringe the privileges of Parliament. I should say at once that counsel made it quite clear in taking that point and drawing our attention to it that he was not doing so by way of objection on the part of the defendant to the admission of any evidence or other matters but doing it really as amicus curiae so that all of us would avoid committing any breach of privilege. It is quite plain of course, that the privilege of Parliament is the privilege of Parliament as a whole and not the privilege in any individual member. As a result of that I asked the Attorney-General if he would be good enough to come here, or send somebody here, to help us in this matter and he has been so very good as to come here himself and deal with the matter this morning.

h The principle as to the privilege of Parliament is, of course, entirely clear. It comes for modern purposes from art 9 of the Bill of Rights (1688) which provides:
 i "That the freedom of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament." I have been referred to a number of authorities but I think it is enough for present purposes if I read a short passage from one of the judgments in the Queen's Bench Division in *Bradlaugh v Gossett*¹ where previous statements of the principle are quoted. That

case was decided by a Divisional Court, consisting of Lord Coleridge CJ, Mathew and Stephen JJ. The actual subject of that case was quite different from this case. What had happened was that the Speaker had declined to allow Mr Bradlaugh to take the oath and the House resolved 'that the Serjeant-at-Arms do exclude Mr. Bradlaugh from the House until he shall engage not further to disturb the proceedings of the House.' The actual proceeding in that case was an action by Mr Bradlaugh for an injunction to restrain the Serjeant-at-Arms from carrying out the resolution of the House. And the decision, as stated in the headnote, was:

'... that, this being a matter relating to the internal management of the procedure of the House of Commons, the Court of Queen's Bench had no power to interfere.'

The principles which I propose to quote were stated by Stephen J. Having stated that the court had no power he said²:

'I think that the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute-law which has relation to its own internal proceedings, and that the use of such actual force as may be necessary to carry into effect such a resolution as the one before us is justifiable. Many authorities might be cited for this principle; but I will quote two only . . . Blackstone says³: "The whole of the law and custom of Parliament has its original from this one maxim, 'that whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere.'" This principle is re-stated nearly in Blackstone's words by each of the judges in the case of *Stockdale v. Hansard*⁴. As the principal result of that case is to assert in the strongest way the right of the Court of Queen's Bench to ascertain in case of need the extent of the privileges of the House, and to deny emphatically that the Court is bound by a resolution of the House declaring any particular matter to fall within their privilege, these declarations are of the highest authority. Lord Denman says⁵: "Whatever is done within the walls of either assembly must pass without question in any other place." Littledale, J., says⁶: "It is said the House of Commons is the sole judge of its own privileges; and so I admit as far as the proceedings in the House and some other things are concerned." Patteson, J., said⁷: "Beyond all dispute, it is necessary that the proceedings of each House of Parliament should be entirely free and unshackled, that whatever is said or done in either House should not be liable to examination elsewhere." And Coleridge, J., said⁸: "That the House should have exclusive jurisdiction to regulate the course of its own proceedings, and animadvert upon any conduct there in violation of its rules or derogation from its dignity, stands upon the clearest grounds of necessity."

It is quite clear, therefore, that no action for defamation could be brought in respect of anything said in the House of Commons itself. The Attorney-General says that the privilege goes further and that what is said or done in the House in the course of any proceedings there cannot be examined outside Parliament for the purpose of supporting a cause of action, even though the cause of action itself arises out of something done outside the House. The question in this particular case arises primarily

² (1884) 12 QBD at 278, 279

³ Commentaries, 17th Edn, 1830, vol 1, p 163

⁴ (1839) 9 Ad & El 1

⁵ (1839) 9 Ad & El at 114

⁶ (1839) 9 Ad & El at 162

⁷ (1839) 9 Ad & El at 209

⁸ (1839) 9 Ad & El at 233

- a on para 4 (ix) and (x) of the reply; although it is also suggested that some parts of the defence and one paragraph of the particulars delivered pursuant to RSC Ord 82, r 7, as to mitigation of damages may also be involved. The defendant in his defence here pleaded fair comment and privilege. Privilege, of course, in the ordinary sense in which that word is used in the law of defamation and not Parliamentary privilege. And the purpose of para 4 of the reply is that the plaintiffs are alleging malice in order to defeat those pleas. The particulars under para 4 of the reply, including sub-paras (ix) and (x) are particulars of the facts on which the plaintiffs intend to rely as establishing that the defendant acted with malice, in other words, that he acted with some sort of improper motive.

- b In my view sub-paras (ix) and (x) must involve a suggestion that the defendant was, in one way or another, acting improperly or with an improper motive when he did and said in Parliament the things referred to in those sub-paragraphs. I accept the Attorney-General's argument that the scope of Parliamentary privilege extends beyond excluding any cause of action in respect of what is said or done in the House itself. And I accept his proposition which I have already tried to quote, that is, that what is said or done in the House in the course of proceedings there cannot be examined outside Parliament for the purpose of supporting a cause of action even though the cause of action itself arises out of something done outside the House. In my view this conclusion is supported both by principle and authority.

- c It will be observed, and, indeed, the Attorney-General said, that the basis on which Blackstone puts it⁹ is that anything arising concerning the House ought to be examined, discussed, and adjudged in that House and not elsewhere. The House must have complete control over its own proceedings and its own members. I also accept the other basis for this privilege which the Attorney-General suggested, which is, that a member must have a complete right of free speech in the House without any fear that his motives or intentions or reasoning will be questioned or held against him thereafter. So far as the authorities are concerned it will be seen that the words used are very wide. In the Bill of Rights (1688) itself the word is 'questioned': 'freedom of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament.' Blackstone uses the words 'examined discussed or adjudged': they ought not to be examined discussed or adjudged elsewhere than in the House. In Lord Denman CJ's judgment in *Stockdale v Hansard*¹⁰, which I quoted, the words are that 'whatever is done within the walls of either assembly must pass without question in any other place' and in the same case Patteson J said¹¹ 'that whatever is done or said in either House should not be liable to examination elsewhere'. It seems to me that *Ex parte Wason*¹² gives some support to that view although the facts are not altogether clear. That was an attempt to launch a prosecution against three members of the House of Lords for conspiracy to make false statements in the House or outside the House. It is not clear whether the conspiracy was alleged to have been entered into inside the House. But it seems to be more likely that the conspiracy alleged was outside the House although, of course, it was a conspiracy to make false statements in the House. I refer, without reading, to the judgments of Cockburn CJ and Blackburn J in that case, but I notice that Lush J said at the end of his judgment¹³:

- d 'I am clearly of opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House.'

9 Commentaries, 17th Edn, 1830, vol 1, p 163

10 (1839) 9 Ad & El at 114

11 (1839) 9 Ad & El at 209

12 (1869) LR 4 QB 573

13 (1869) LR 4 QB at 577

The most recent case to which I was referred was *Dingle v Associated Newspapers Ltd*¹⁴. The plaintiff's claim in that case was in respect of an article which had appeared in a newspaper which he said was defamatory of him. It was held in that case that the court could not enquire into the validity of a select committee of the House of Commons on which the article complained of had apparently been partly based. The invalidity suggested in that case seems to have been a suggestion that there was some sort of procedural defect in the proceedings of the committee, which of course is quite a different set of facts from the present case. But it seems to me that it really involved the same principle as is involved in this case. As I understand it the plaintiff there was trying to question proceedings in Parliament in order to support in certain respects his case based on a libel published outside Parliament and was held not entitled to do that. By analogy with this case it seems to me that the plaintiffs here are trying to use what happened in Parliament in order to support a part of their case in respect of this libel published outside Parliament in the television broadcast.

I am quite satisfied that in these proceedings it is not open to either party to go directly, or indirectly, into any question of the motives or intentions, of the defendant or Mr Hordern or the then Minister of Health or any other member of Parliament in anything they said or did in the House. So far as the extracts from Hansard are concerned, which were read without objection yesterday, the Attorney-General says that the parties here ought to have petitioned the House for leave before referring to those extracts from Hansard. But he said that where parties agreed, as they have here, the House would be unlikely to take any objection even though there had not been a petition. He limits that in a way I will refer to in a moment. In *Dingle's* case¹⁴, to which I have already referred, Sir Jocelyn Simon, who was then the Solicitor-General, came and helped the court in the same way the Attorney-General has helped us here, and in the course of that case he did say, and the Attorney-General said that this was still the position¹⁵:

'It was important to remember that the House had never formally waived its privilege to prevent publication of its proceedings. There was, however, little doubt that if a petition had been made for the production of the minutes of evidence, as it had been for the copies of official reports of debates, it would have been granted. It therefore seemed that the court could safely consider a transcript of the evidence [i.e. of the proceedings in committee not in the full House] without any practical risk of collision with the House; but, in his submission, the proper procedure in future cases would be to present a petition.'

Well, if counsel for the plaintiffs or counsel for the defendant want to refer any further to anything which was said in Parliament no doubt they will consider the question of whether they should present a petition to the House. But the Attorney-General limited what he said about the probable attitude of Parliament to the use of Hansard by agreement by saying that Hansard could be read only for a limited purpose. He said it could be read simply as evidence of fact, what was in fact said in the House, on a particular day by a particular person. But, he said, the use of Hansard must stop there and that counsel was not entitled to comment on what had been said in Hansard or to ask the jury to draw any inferences from it. I can foresee that we may get into difficulties later on in this case about this matter. But the general principle is quite clear, I think, and that is that these extracts from Hansard which have already been read must not be used in any way which might involve questioning, in a wide sense, what was said in the House of Commons as recorded in Hansard.

Coming back to the pleadings in this case the result is that in my judgment the matters referred to in para 4 sub-paras (ix) and (x) of the amended reply must

¹⁴ [1960] 1 All ER 294, [1960] 2 QB 405

¹⁵ [1960] 2 QB at 412 (footnote), cf [1960] 1 All ER at 297 (footnote)

a be excluded from the evidence in this case. So far as the defence is concerned the Attorney-General, I think, makes no objection to para 5 (a), para 5 (b) (i) or (ii) but sub-para (iii) does make a reference to what the Minister of Health thinks. The Attorney-General thought that that was trespassing on dangerous ground and counsel for the defendant said that he was prepared to abandon that part of para 5 (b) (iii), i.e. the reference to what the Minister thinks.

b The other matter to which counsel for the plaintiffs referred as a possible breach of privilege was in a sub-paragraph in the particulars pursuant to RSC Ord 82, r 7, i.e. the particulars of the facts and matters relied on by the defendant in mitigation of damages. That read:

c 'The statement of the Minister of Health referred to in paragraph 5 (b) (iii) of the defence was widely reported in the press shortly after the same was made in response to the Minister's expressed hope that the debate would be widely reported . . .'

d The Attorney-General said that he did not regard that paragraph as involving any danger or encroachment on Parliamentary privilege; I am bound to say that I take the same view. Accordingly, I am not going to impose any limitation under that sub-paragraph.

e A question was raised whether the extracts from Hansard which were read yesterday should not be given in the form of a copy to the jury. I think there are arguments both ways about this. But counsel for the plaintiffs says that at any rate, at this stage, he does not want to put them before the jury, and I think this matter can be reconsidered later, if it arises. Counsel for the defendant was disposed to say that they should go before the jury. I have still got an open mind about it myself, although on the whole I am rather inclined to think that they ought not to go before the jury, although this would be an exception to the general rule, I think, that the jury ought to have a copy of any agreed document. In the special circumstances of this case I should be happier if they did not; however, I am perfectly prepared to reconsider this matter later on in the case if it arises.

f *Ruling accordingly.*

Solicitors: *Stephen M Bird*, East Grinstead (for the plaintiffs); *Lawford & Co* (for the defendant); *Treasury Solicitor*.

Mary Rose Plummer Barrister.

R v Morris

COURT OF APPEAL, CRIMINAL DIVISION

LORD WIDGERY CJ, SACHS LJ AND ACKNER J

22nd NOVEMBER 1971

Road traffic – Driving with blood-alcohol proportion above prescribed limit – Evidence – Provision of specimen – Breath test – Requirement to take test – Accident owing to presence of motor vehicle on road – Accident – Unintended occurrence having an adverse physical result – Broken down car being pushed by second car – Bumpers of two cars becoming interlocked – Both vehicles slightly damaged and could not be separated – Whether an ‘accident’ – Road Safety Act 1967, s 2 (2).

The applicant was at the wheel of a car which had broken down and was being pushed by a friend's car, when the front bumper of the latter car slipped under the rear bumper of the applicant's car. The two vehicles became locked and could not be separated. Both cars were also slightly damaged. The police arrived and administered a breath test to the applicant which proved positive. Accordingly he was charged with contravening s 1 (1)^a of the Road Safety Act 1967. He was convicted and applied for leave to appeal on the ground that the police had no right to administer the breath test because there had been no ‘accident’ such as would entitle a constable under s 2 (2)^b of the 1967 Act to require the applicant to provide a specimen of breath for a breath test.

Held – The word ‘accident’ in s 2 (2) should as far as possible be given its ordinary, rather than a technical, meaning, i.e. an unintended occurrence which had an adverse physical result; on the evidence in the present case, as the consequences were too severe to justify the dismissal of the case under the de minimis rule, there had been an ‘accident’, for although the initial operation of one car pushing the other was deliberate, the interlocking of the bumpers was an unintended occurrence which had an adverse physical result; the case therefore came within s 2 (2) and the applicant had been rightly convicted (see p 386 e and h, and p 387 a to c, post).

Dictum of Lord Lindley in *Fenton v Thorley & Co Ltd* [1903] AC at 453 applied.

Notes

For the meaning of accident, see 22 Halsbury's Laws (3rd Edn) 293-295, paras 585, 586.

For the power to require a breath test, see Supplement to 33 Halsbury's Laws (3rd Edn) para 1061A, 3.

For the Road Safety Act 1967, ss 1 and 2, see 28 Halsbury's Statutes (3rd Edn) 459, 462.

Cases referred to in judgment

Fenton v Thorley & Co Ltd [1903] AC 443, 72 LJBK 787, 89 LT 314, 34 Digest (Repl) 359, 2727.

R v Seward [1970] 1 All ER 329, [1970] 1 WLR 323, 134 JP 195, 54 Cr App Rep 85, Digest (Cont Vol C) 937, 322gg.

Cases and authorities also cited

R v Pico [1971] RTR 500.

Trim Joint District School Board of Management v Kelly [1914] AC 667.

^a Section 1 (1), so far as material, provides: ‘If a person . . . attempts to drive a motor vehicle on a road . . . having consumed alcohol in such a quantity that the proportion thereof in his blood . . . exceeds the prescribed limit . . . he shall be liable . . . (b) on conviction on indictment, to a fine or imprisonment for a term not exceeding two years or both.’

^b Section 2 (2), so far as material, is set out at p 386 b, post

- a Stroud's Judicial Dictionary (3rd Edn) vol 1, pp 20, 21.
Wilkinson's Road Traffic Offences, 6th Edn, 1970, pp 165, 166, 243.
Words and Phrases Legally Defined (2nd Edn), pp 15, 16.

Application

- b This was an application by Kenneth Morleen Morris for leave to appeal against his conviction on 20th December 1970 at Buckinghamshire Quarter Sessions before the deputy chairman (L J Verney Esq) and a jury of attempting to drive a motor vehicle on a road when he had a blood-alcohol concentration above the prescribed limit contrary to s 1 (1) of the Road Safety Act 1967. He was fined £50 and disqualified for 12 months. He also applied for leave to appeal against sentence. The facts are set out in the judgment of the court.

- c M R Bowley for the applicant.
G F B Laughland for the Crown.

- d **LORD WIDGERY CJ** delivered the judgment of the court. In December 1970 at Buckinghamshire Quarter Sessions the applicant was convicted of attempting to drive a motor vehicle with a blood-alcohol concentration above the prescribed limit, contrary to s 1 (1) of the Road Safety Act 1967. He was sentenced to be fined and disqualified from driving. He now seeks leave to appeal against his conviction and sentence.

- e It was an unusual case, the circumstances of which were these, that shortly before 1.30 am on Monday, 16th February 1971, the applicant was at the steering wheel of a Vanden Plas car of which he was in charge, which was being pushed along Queen's Road, High Wycombe, as its engine would not start. It was being pushed by a Ford Consul which was driven by Mr Travis, a friend of the applicant, who was obviously trying to help the applicant out of the difficulty caused by the reluctance of the engine to start. To that end, Mr Travis drove his own car up to the back of the applicant's, so that they were bumper to bumper, and then proceeded to push the applicant's car for a distance. Nothing untoward happened for the first part of the journey, but when the applicant sought to make a turn into a side road, the bumper of the Consul slipped under the rear bumper of the Vanden Plas, and the two cars became locked together, locked together to such a degree that it ultimately took five or six men to separate them.

- g There was some dispute at the trial as to the extent to which the vehicles had been physically damaged as a result of this. There was some evidence of broken glass in the headlights and broken plastic in the rear off-side indicator of the applicant's car, but for reasons which will appear later the court is not concerned with the degree of any minor damage of that kind which there may have been. The police arrived shortly after the event, when the cars were still locked together, and, suspecting that the applicant had alcohol in his blood, they invited him to take a breath test. With similar suspicion in regard to Mr Travis, they invited him to take a breath test too.
- h The tests were both positive, both men were arrested, they were taken to the police station, and on a laboratory sample being taken, pursuant to s 3 of the 1967 Act each was found to have a blood-alcohol concentration very much above the authorised limit of 80 milligrammes of alcohol per 100 millilitres of blood.

- j The whole question in this case turns on whether the arrest of the applicant and the subsequent procedure in the police station were valid, having regard to the terms of s 2 of the Act. As is now well known, before the procedure in s 3 can be undertaken, it is necessary to show that the initial breath test at the roadside was properly taken in accordance with s 2. In this case it was not suggested that the police officer requesting the sample of breath at the roadside was acting on the basis that he had suspected the presence of alcohol whilst the applicant was driving or attempting to drive—the police arrived at a time when it was too late to suggest that the applicant

was driving or attempting to drive—and furthermore no one seems to have thought it appropriate to justify the initial breath test on the footing that the applicant had committed a moving traffic offence. The justification, if any, for the initial breath test had therefore to be found in s 2 (2) which provides:

‘If an accident occurs owing to the presence of a motor vehicle on a road or other public place, a constable in uniform may require any person who he has reasonable cause to believe was driving or attempting to drive the vehicle at the time of the accident to provide a specimen of breath for a breath test . . .’

It was on that footing, namely, on the footing that there had been an accident, and that the applicant was driving or attempting to drive at the time of the accident that the justification for the taking of the breath sample was placed.

Counsel for the applicant, who has argued his case with clarity and economy of language, does not seek to criticise the terms of the deputy chairman’s summing-up in detail because he says that there was really a fundamental error in the approach to this case which vitiated the verdict of the jury. His submission is that if an act is deliberately done but has unexpected consequences, those unexpected consequences cannot amount to an accident. Accordingly, he says that since the initial manoeuvre of pushing the applicant’s car by means of the presence of Mr Travis’s car behind it was deliberate and intentional, one cannot say that the unexpected consequence of the interlocking of the bumpers was an accident within the meaning of the section.

The court is of the opinion that the word ‘accident’ in s 2 (2) should as far as possible be given its ordinary rather than a technical meaning. The word ‘accident’, unhappily, is well known in the context of road use and motor cars, and we would deplore any technical meaning being attached to this simple, ordinary word in the context in which it appears. It is evident that the accident referred to in the subsection is something which can happen when a person is driving or attempting to drive a car, and furthermore that it must be an accident which occurs owing to the presence of a motor vehicle on a road. Several attempts at definitions of the word ‘accident’ have been made in the course of argument. We have been referred in particular to the words of Lord Lindley in *Fenton v Thorley & Co Ltd*¹, a case on the Workmen’s Compensation Act 1897, in which the word ‘accident’ was a prominent word. In that case Lord Lindley said²:

‘The word “accident” is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss.’

Sachs LJ in the course of the argument supplied an alternative, with which the other members of the court agree, in which he suggested that ‘accident’ in the present context means an unintended occurrence which has an adverse physical result. We think that it would be wrong to construe ‘accident’ in this context too narrowly. We are conscious of the fact that this is an interference with the liberty of the subject, but the Act does not make the having of an accident an offence, it merely provides it as a qualification for the taking of a breath test, and the underlying conception of s 2 (2) is that if some unintended occurrence which has adverse physical result arises out of the presence of a motor vehicle on a road, that is a fair basis on which a police officer may request the provision of a breath sample. Such an occurrence is one in which *prima facie* at any rate the circumstances of the occurrence, and of the driver involved in it, deserve consideration by authority, and accordingly we think that the definition suggested by Sachs LJ is one which fits the intention of Parliament

¹ [1903] AC 443

² [1903] AC at 453

a and will not open the door unduly widely to the suggestion that random breath tests can be taken in purported consequence of it.

When one approaches the present case on that basis, it is quite true, as counsel for the applicant says, that the initial operation of pushing one car with the other was deliberate, but the interlocking of the bumpers—and not merely a mild interlocking but one which involved very considerable efforts of a number of men to disentangle them—was we think an unintended occurrence which had adverse physical result.
b We think therefore it comes within the meaning of the words in s 2 (2).

One ought to add, for completeness sake, that there will of course always be room for a *de minimis* argument, if the adverse physical result is so trivial that no ordinary person considering the circumstances would regard the occurrence as an accident at all, but we are quite satisfied that the consequences in this case, whether
c there was minor damage to the headlamp glass or not, is too severe to justify its dismissal on the ground of *de minimis* in any event.

In our judgment, therefore, the learned deputy chairman gave a direction which was a perfectly fair and proper direction in the circumstances of this case. We would add only one other point on this aspect of the case. It is now recognised and has been recognised in a number of instances that there will be cases under this section
d where the primary facts are not in dispute, and when the question of accident or no becomes a pure matter of law, in the same way that cases sometimes arise where the primary facts are not in dispute and in which the question of whether a person is driving or not becomes a pure matter of law. We think in this case that the learned deputy chairman would not have erred if he had directed the jury in that sense. We do not criticise him for not taking that line—he may well have been wise in seeking the
e verdict of the jury on the facts before it—but cases of this kind where there really is no factual dispute left, and the matter is one of law only, are cases in which the presiding judge can, if he thinks fit, give a ruling to that effect. If there is a dispute as to fact the issue must, of course, be left to the jury (see *R v Seward*³).

The only other point taken by counsel for the applicant in support of this application is that he says that the verdict of guilty against this applicant is unsatisfactory
f because Mr Travis, who was charged on another occasion before a different deputy chairman, was acquitted. We are told that although the terms of the two summings-up naturally differed at various points, the issue was really the same in each case, and counsel for the applicant says, not without justification, that the applicant will at least think himself somewhat unlucky if, having been convicted of this offence, he finds that Mr Travis was acquitted of a comparable offence. That the applicant
g may think himself unlucky we would not seek to dispute, but there is no support for the proposition that in a case of this kind the acquittal of one defendant necessarily makes the conviction of the other unsafe or unsatisfactory. On the contrary, on the view which we have taken the conviction of the applicant is right, and it may well be that it follows that the acquittal of Mr Travis was wrong. Be that as it may, the acquittal of Mr Travis in our judgment does not justify any disturbance of the verdict
h of the jury in this case.

We would accordingly refuse the application. The application for leave to appeal against sentence is abandoned.

Application dismissed.

j Solicitors: *Allan Janes, Britnell & Co*, High Wycombe (for the applicant); *J Malcolm Simons*, Kidlington, Oxford (for the Crown).

N P Metcalfe Esq Barrister.

R v Blackpool Justices, ex parte Beaverbrook Newspapers Ltd

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, CAIRNS LJ AND KILNER BROWN J

3rd DECEMBER 1971

Criminal law – Committal – Preliminary hearing before justices – Publicity – Order lifting restrictions – Application before commencement of taking depositions – Subsequent joinder of further accused – Order applicable to totality of proceedings – Accused subsequently joined subject to order as if they had applied for it – Criminal Justice Act 1967, s 3 (2).

Three accused appeared before the respondent justices and were remanded on charges of contravening s 4 (1)^a of the Criminal Law Act 1967, by assisting in impeding the apprehension of one S after an armed robbery during which shots were fired and a police officer killed. On 8th September 1971, the remand date, they applied for an order under s 3 (2)^b of the Criminal Justice Act 1967 to remove publicity restrictions, and this was granted by the justices. Meanwhile between 24th August and 29th November S and a number of other accused were charged with various offences connected with the robbery. On 29th November all the accused were brought before the justices for the purpose of taking depositions. The justices then ordered that the proceedings should be subject to the publicity restrictions imposed by s 3 (1)^c of the Criminal Justice Act 1967. On 1st December 1971 the applicant newspaper proprietors applied ex parte for an order of certiorari to quash the order of 29th November, and for an order of mandamus directing the justices to make an order under s 3 (2) of the Criminal Justice Act 1967. All the accused opposed the application contending, inter alia, that the 8th September order was ineffective because the Director of Public Prosecutions ('the director') had not authorised the prosecution under s 4 (1) of the Criminal Law Act 1967, as required by s 4 (4)^d.

Held – (i) Where a number of persons were concerned in committal proceedings affecting them all and one of them asked for an order under s 3 (2) lifting restrictions, an order had to be made and it applied to all the accused including those who were joined in the proceedings at a later stage (see p 391 b, p 392 b and c and p 393 g, post); *R v Russell, ex parte Beaverbrook Newspapers Ltd* [1968] 3 All ER 695 applied.

(ii) An application for and grant of an order for lifting publicity restrictions could be made as soon as the accused were brought before the court and before committal proceedings proper, i.e. the taking of depositions, had begun (see p 391 f and p 393 g, post); *R v Bow Street Magistrate, ex parte Reginald Kray* [1968] 3 All ER 872 applied.

(iii) Accordingly since the 8th September order applied to the committal proceedings against the three accused who sought the order, being proceedings in respect of a charge under s 4 (1) of the 1967 Act, and those proceedings included, embraced and were merged with the committal proceedings in respect of all the accused, they were all subject to the 8th September order as if they had all applied for it under s 3 (2) (see p 392 d and e and p 393 g, post); furthermore, even if the director had not given his consent to the proceedings under s 4 (1) until after the making of the 8th September order, it did not follow that that order was ineffectual, because the arrest

^a Section 4 (1) provides: 'Where a person has committed an arrestable offence, any other person who, knowing or believing him to be guilty of the offence or of some other arrestable offence, does without lawful authority or reasonable excuse any act with intent to impede his apprehension or prosecution shall be guilty of an offence.'

^b Section 3 (2) is set out at p 390 h, post

^c Section 3 (1) is set out at p 390 f, post

^d Section 4 (4) is set out at p 392 f, post

- a** and charging of the accused under s 4 (1) was legal in advance of the director's consent by virtue of the proviso to s 4 (4) (see p 393 b and g, post).

(iv) Since the justices had been wrong in law in making the purported order of 29th November, certiorari would be granted to quash it but an order for mandamus was unnecessary because the 8th September order under s 3 (2) was still a valid order (see p 393 f and g, post).

b Notes

For restrictions on reports of criminal proceedings, see Supplement to 10 Halsbury's Laws (3rd Edn) para 663A.

For the Criminal Justice Act 1967, s 3, see 21 Halsbury's Statutes (3rd Edn) 368.

For the Criminal Law Act 1967, s 4, see 8 Halsbury's Statutes (3rd Edn) 555.

c Cases referred to in judgment

R v Bow Street Magistrate, ex parte Reginald Kray [1968] 3 All ER 872, [1969] 1 QB 473, [1968] 3 WLR 1111, 133 JP 54, Digest (Cont Vol C) 193, 1797d.

R v Russell, ex parte Beaverbrook Newspapers Ltd [1968] 3 All ER 695, [1969] 1 QB 342, [1968] 3 WLR 999, 133 JP 27, Digest (Cont Vol C) 193, 1797c.

d Cases also cited

R v Angel [1968] 2 All ER 607n, [1968] 1 WLR 669.

Secretary of State for Defence v Wain [1968] 2 All ER 300, [1970] AC 394.

Motion for certiorari and mandamus

This was an application by way of motion on behalf of Beaverbrook Newspapers

- e** Ltd (i) for an order of certiorari to bring up and quash a decision of the Blackpool justices dated 29th November 1971 whereby it was ordered that s 3 (1) of the Criminal Justice Act 1967 should apply to the reporting of committal proceedings against Frederick Joseph Sewell, Charles Henry Haynes, Dennis George Bond, John Patrick Spry, Thomas Farrell Flannigan, Irene Jermain, Barbara Adeline Palmer, Eugene Francis Kerrigan, Panayiotis Nicou Panayiotou and Nitsa Stavrou, on the following
- f** grounds: (a) on 8th September 1971, pursuant to s 3 (2) of the Criminal Justice Act 1967, the justices ordered on the application of counsel for Irene Jermain, Barbara Adeline Palmer and Eugene Francis Kerrigan, that the provisions of s 3 (1) should not apply to reports of the proceedings against them; (b) the order of 8th September applied to committal proceedings being heard on 29th November 1971 at Blackpool Magistrates' Court against the said persons, and against Frederick Joseph Sewell,
- g** Charles Henry Haynes, Dennis George Bond, John Patrick Spry, Thomas Farrell Flannigan, Panayiotis Nicou Panayiotou and Nitsa Stavrou; and (c) the magistrates therefore had no power to make their purported decision of 29th November 1971; alternatively the applicants sought an order of mandamus directed to the Blackpool justices to order that s 3 (1) of the Criminal Justice Act 1967 should not apply to reports of committal proceedings being heard in Blackpool Magistrates' Court against the
- h** aforesaid Sewell, Haynes, Bond, Spry, Flannigan, Jermain, Palmer, Kerrigan, Panayiotou and Stavrou. The facts are set out in the judgment of Lord Widgery CJ.

L Brittan for the applicants.

H E P Roberts QC and *F E Hiorns* for the accused Sewell, Bond, Flannigan, Jermain, Palmer, Kerrigan, Panayiotou and Stavrou.

J Rogers for the accused Spry.

- i** *J M Cope* for the accused Haynes.

H K Goddard for the respondent justices.

I R Taylor for the Director of Public Prosecutions.

LORD WIDGERY CJ. In these proceedings counsel moves on behalf of Beaverbrook Newspapers Ltd for an order of mandamus addressed to the justices for the

petty sessional division of Blackpool requiring them to order that s 3 (1) of the Criminal Justice Act 1967 should not apply to certain committal proceedings currently being heard before those justices; alternatively he asks for an order of certiorari to bring up to this court and quash a decision of those justices made on 29th November 1971 whereby it was ordered that s 3 (1) of the Criminal Justice Act 1967 should apply to the reporting of the said proceedings. a

The facts on which this case depends are brief and not in dispute. On 24th August 1971 three men, Bond, Spry and Flannigan appeared before the Blackpool justices on charges of robbing one Lammond of watches and rings, and they were remanded in custody until 27th August. These charges arose out of an armed robbery of a jeweller in Blackpool, after which, or in the course of which, shots were fired and a police officer was killed. On 24th August, as I have said, three men were before the justices charged with that robbery. On 27th August at the same court another man called Haynes was charged with robbing Lammond, and he also was remanded in custody. Three days later, on 30th August, Bond, Spry and Flannigan were remanded until 8th September, and Haynes was remanded for periods which subsequently extended to 8th September also. On that day, 8th September, which is a significant date, Bond, Spry, Flannigan and Haynes were brought before the justices and charged with additional offences of attempting to murder a police constable, and of possessing firearms with intent to endanger life. On 3rd September, meanwhile, Barbara Palmer was charged with assisting one Sewell with intent to impede his apprehension; one Kerrigan was similarly charged with assisting Sewell, and a woman called Irene Jermain was also charged with assisting Haynes and Sewell to impede Sewell's apprehension and prosecution. These charges arose out of the same incident to which I have referred. On 8th September, which is as I have said a significant day in the history of this matter, these three accused were also brought before the justices and pursuant to applications by them or some of them, who it matters not, the justices made an order under s 3 (2) of the Criminal Justice Act 1967 that the restriction imposed by s 3 (1) of the said Act should not apply to reports of the proceedings against Palmer, Kerrigan and Jermain. b
c
d
e

I pause to remind myself of the terms of s 3. Subsection (1) of the section provides: f

‘... it shall not be lawful to publish in Great Britain a written report, or to broadcast in Great Britain a report, of any committal proceedings in England and Wales containing any matter other than that permitted by subsection (4) of this section.’

However there are exceptions created by sub-ss (2) and (3); the important provision in this case is s 3 (2): g

‘A magistrates’ court shall, on an application for the purpose made with reference to any committal proceedings by the defendant or one of the defendants, as the case may be, order that the foregoing subsection shall not apply to reports of those proceedings.’ h

So, on 8th September at the instance of Palmer, Kerrigan and Jermain an order was made by the justices under s 3 (2).

Events were still moving. Other accused were being apprehended, and by 29th November, which was the first day on which the justices were ready to start taking depositions additional persons were before the court. At this time Sewell, Haynes, Bond, Spry and Flannigan were accused of the murder of the police officer who was killed, the attempted murder of other officers and the robbery of Lammond. Jermain, Palmer and Kerrigan were charged in terms not significantly different from those to which I have already referred, and a number of other accused were also charged with playing a minor part in the affair. On the morning of 29th November j

a when the taking of depositions was to begin, questions arose whether the press were to be at liberty to report the proceedings or not, and, of course, the answer to that question depended on the extent of the effect of the order made on 8th September under s 3 (2) in respect of the three accused to whom I have referred.

There is some authority to assist in the interpretation of this section, although it is still a relatively new one. The first case is a case in the Divisional Court of *R v Russell, ex parte Beaverbrook Newspapers Ltd*¹. I find it unnecessary to refer to the judgment in detail, and I think it suffices to say that the effect of that decision is that where there are a number of accused concerned in committal proceedings affecting them all, that if one such accused asks for an order under s 3 (2), that order must be made and will apply to all the accused concerned in those proceedings. It is, I think, clear from *Russell's* case¹ that there can be no instance in which in any one set of committal proceedings, restrictions on reporting apply to some accused and not to others. The stark choice of whether in such an instance reporting shall be permissible in respect of all, or in respect of none, is taken by the Act, and the effect of the Act is that if one accused applies for an order and gets it, as he must on application, all other accused involved in those committal proceedings are also subject to the full glare of publicity which used to apply to all accused before 1967.

d There is, I should say, one further authority which has been referred to, and is of some relevance here; it is *R v Bow Street Magistrate, ex parte Reginald Kray*², again a decision of the Divisional Court. For present purposes the importance of that decision is that it lays down that an application for an order under s 3 (2), and the grant of such an order, may be made before the committal proceedings proper have begun. I use the phrase 'committal proceedings proper' because, by virtue of s 35 of the Criminal Justice Act 1967, when an accused person is brought before the magistrates' court charged with an indictable offence, the justices are to be treated as sitting as examining magistrates as soon as the accused appears or is brought before the court. In one sense, and for certain purposes, the committal proceedings may, therefore, be said to begin as soon as the accused is brought before the court, but I am referring in the phrase 'committal proceedings proper' to the moment when the taking of the depositions begins and the decision of this court in *Kray's* case² shows that an order under s 3 can be sought and granted before the committal proceedings proper have begun. Furthermore, *Kray's* case² is authority for this proposition, that when an order is made under s 3 (2), the proceedings to which it relates, that is to say the particular committal proceedings to which it relates, must be ascertained in the light of the circumstances prevailing at the time when the order was made. In *Kray's* case² this was a difficult and somewhat complex problem; in the present case g in my judgment it represents no problem at all.

h Counsel who appears for eight of the accused, and who seeks to uphold the justices' order denying the right of publication, has made a number of points. I begin with his second one, which in substance is this. He says that it is not practicable for one accused effectively to elect to ask for publicity for the proceedings until all the accused who are to be concerned in those proceedings are identified and known. He puts forward what are no doubt very sound practical reasons for saying that it is difficult or inconvenient for such a decision to be made by one accused when he is still unaware of the full scope of the intended committal proceedings, and still unaware of precisely who will share the dock with him when those proceedings begin. He says, therefore, that we ought to take the view that any order applied for or made under s 3 (2) before the identity of all the accused is known should either j be regarded as an ineffectual order or one which the justices can withdraw on application if they think fit.

For my part I can find no substance in that argument at all. It may well be that

1 [1968] 3 All ER 695, [1969] 1 QB 342

2 [1968] 3 All ER 872, [1969] 1 QB 473

there are inconveniences in an accused making a decision to apply for an order under s 3 at an early stage in the proceedings, but the answer must surely be that he can wait until it is convenient. The section does not provide that the application must be made at any particular time, and an accused who wishes to bide his time, should bide his time, and that seems to me to meet counsel's contention that difficulties will arise if a view other than that is taken. Furthermore, on the authority of *R v Russell*¹³ it is abundantly clear that if one begins with ten accused, and one or some opt for publicity, the others must fall into line, and for my part I cannot see any reason why there should be a difference in this respect merely because some of the accused are only joined in the proceedings at a later stage. I cannot follow the argument that because some of the accused here came into the proceedings later, that this in any way gives them rights which they would not have enjoyed had they been in the proceedings from the beginning. In that latter event *R v Russell*¹³ is authority for the proposition that the election of these three accused to have publicity for their proceedings would have bound the lot.

The question as it has been posed by counsel on behalf of the applicants may really be expressed thus: what are the proceedings to which the order made on 8th September applies? In my judgment there is no doubt at all about what those proceedings are. They are committal proceedings against the three accused who sought the order, Palmer, Kerrigan and Jermain, and they are committal proceedings in respect of a charge under s 4 of the Criminal Law Act 1967 against those three persons. Those proceedings, so defined, now include and embrace and are merged with the committal proceedings in respect of all the accused. The consequence, as in the case of *R v Russell*¹³, is that all the accused in my judgment are now open to the publication of the details of their cases as though they themselves had applied for an order under s 3. However, counsel for eight of the accused says that there is a further special reason in the present case why that general proposition should not apply, and the special reason is this. The charge against the three accused who opted for publicity was a charge under s 4 (1) of the Criminal Law Act 1967. By s 4 (4) it is provided:

'No proceedings shall be instituted for an offence under subsection (1) above except by or with the consent of the Director of Public Prosecutions: Provided that this subsection shall not prevent the arrest, or the issue of a warrant for the arrest, of a person for such an offence, or the remand in custody or on bail of a person charged with such an offence.'

The argument, which indeed is an ingenious one, is this. It is said that the Director of Public Prosecutions did not authorise these prosecutions until 15th October. The correctness of that assertion is not proved before us beyond doubt, but there was apparently some remark made in the course of the proceedings yesterday which entitles counsel for eight of the accused to say that he understands that to be so. Given that fact, he says that the order under s 3 sought and made on 8th September is an ineffectual order because it was made in respect of the accused charged under s 4 of the Criminal Law Act 1967 at a time before the director had authorised the institution of proceedings.

I think, myself, that if one examined these circumstances in full detail, it would become abundantly apparent that the Director of Public Prosecutions had taken up this case and had assumed the obligation to prosecute long before 15th October. As soon as the director decides to prosecute, then no further consent on his part to the bringing of the prosecution is required, and from what we have been told I am personally left in little doubt that the director assumed control over this matter long before 8th September.

a However, even if that is wrong, I still find no substance in counsel's argument, because the proposition, which is derived from *R v Bow Street Magistrate, ex parte Reginald Kray*⁴, that the application for an order under s 3 can be made at any time, and even prior to the beginning of committal proceedings proper, means to me that such an order could have been made on 8th September even though at that time the director had not given his consent to the proceedings. The accused would have been in custody by virtue of the warrant of arrest, and the proviso to s 4 (4) makes it perfectly clear that the arrest and charge of such person is legal even in advance of the consent of the director. For one, or other, or both of these reasons, I am satisfied that there is no objection to this application on the special basis derived from s 4 (4) of the Criminal Law Act 1967.

b There remains only the question whether this court in its discretion should grant the relief which is sought. Some complaint has been made that the applicants were slow in bringing these proceedings. I find little substance in that. The order complained of was made on 29th November and the applicants were before this court seeking leave to move at 2.00 pm on 1st December. That is not the kind of delay which should deny an applicant a discretionary remedy. It is said with perhaps rather more force that the first two days of the committal proceedings, indeed the first three days of the committal proceedings, were carried on in circumstances in which it was assumed that there would be no publicity, and that the nature of the proceedings and the conduct of the proceedings was affected by that assumption. It is said now that certain disadvantages will flow because the accused did not know in time that this application was to be made. I think that the blow, if one may so describe it, contained in that allegation is much softened by what counsel has told us on behalf of the director, namely that facilities will be granted for the recall of witnesses if required, but I think in the end the reason for my view that the order of certiorari applied for should go is simply this. The law, as I have endeavoured to explain it, shows that the justices were wrong in the purported order which they made on 29th November purporting to restrict publication of these proceedings. It may be that the simple fact that this court has said so, would be enough to authorise the press to go ahead and report the proceedings. But if that result would follow in any event, it seems to me to be a futile exercise to talk about refusing the order itself on any discretionary ground. Accordingly, I for my part would allow the order of certiorari to go to set aside the justices' purported order of 29th November. I see no reason for mandamus to go because the original order under s 3 (2) with the consequences which I have endeavoured to explain is still in my judgment a valid order.

c **CAIRNS LJ.** I agree.

d **KILNER BROWN J.** I also agree.

e **Certiorari granted. Mandamus refused.**

f The court certified under s 2 (1) of the Administration of Justice Act 1960, that a point of law of general public importance was involved, namely, whether a magistrates' court has jurisdiction to make an order under s 3 (2) of the Criminal Justice Act 1967 before the committal proceedings proper have begun and, if so, whether in the event of such an order being made at the instance of one accused to committal proceedings, it remains effective if, subsequent to the making of that order, other accused are brought before the court in the course of the same proceedings; and whether the proprietors of a newspaper have a sufficient interest in the making or purported making of an order under s 3 to apply for certiorari; but the court refused leave to appeal to the House of Lords.

18th January 1972. *The appeal committee of the House of Lords refused leave to appeal.* a

Solicitors: *Oswald Hickson, Collier & Co* (for the applicants); *Sampson & Co* (for the accused Sewell, Bond, Flannigan, Jermain, Palmer, Kerrigan, Panayiotou and Stavrou); *Baldwin Mellor & Co* (for the accused Spry); *Montague Gardner & Howard* (for the accused Haynes); *Cuddy, Woods & Co*, Blackpool (for the respondent justices); *Director of Public Prosecutions*.

N P Metcalfe Esq Barrister. b

Re Park (deceased) (No 2) Inland Revenue Commissioners v Park and others c

COURT OF APPEAL, CIVIL DIVISION
RUSSELL, PHILLIMORE AND BUCKLEY LJJ
29th, 30th NOVEMBER, 9th DECEMBER 1971 d

Estate duty – Exemption and remission – Gift in consideration of marriage – Marriage settlement – Settlement expressed to be made in consideration of marriage of settlor's grandson – Settlor's desire to benefit family and avoid heavy estate duty – Grandson after his marriage settling substantial part of property comprised in first settlement on discretionary trusts for benefit of children and remoter issue other than himself – Whether first settlement 'made in consideration of marriage' – Whether purpose or motive of settlor relevant – Finance (1909-10) Act 1910, s 59 (2). e

The settlor, P, who was 92, had two sons and four grandchildren. He had assets of about £100,000. It was pointed out to P that duty of about £40,000–£50,000 would be payable on his estate on his death and he was advised that the impending marriage of his grandson, R, the first defendant, provided him with an opportunity to avoid such payment and also to provide for other members of his family whom he was anxious to benefit. Acting on legal advice he, therefore, on 25th May 1962, made a gift by way of a settlement of investments worth £80,000 on R. In the recital, the settlement was expressed to be made in consideration of R's intended marriage, and the operative part provided that the trustees should hold the trust fund, and the income thereof, on trust for P until the marriage had taken place and that thereafter they should hold the capital and income on trust for R absolutely. The marriage took place in September 1962, and in March 1963 the whole of the property comprised in the settlement was transferred to R by the trustees. On 16th August 1963 R made a settlement, the trustees of which were the second and third defendants. The settlement was in the form of a discretionary trust for the benefit of the children and remoter issue of P, other than R himself. All the property transferred into that settlement consisted of assets, worth about £55,000, comprised in the first settlement. P died in September 1963. On his death, the Crown claimed that the property formerly comprised in the first settlement was chargeable to estate duty under s 2 (1) (c) of the Finance Act 1894 as property taken under a gift inter vivos made by him within five years of his death (as the period then was), and that the property was not, as the defendants contended, exempted from such charge by the provisions of s 59 (2) of the Finance (1909-10) Act 1910, as the settlement of 25th May 1962 was not a settlement 'made in consideration of marriage' within the meaning of s 59 (2). The trial judge held that estate duty was payable on the property given away by the settlor in 1962 because his prime motive in making the settlement was to save estate duty and to benefit his family as a whole, and the marriage was the occasion for the gift and not the consideration for it. On appeal, f
g
h
j

- a** **Held** – (i) No estate duty was payable in respect of the property given away by the settlor in 1962 because the settlement was made in consideration of marriage within the terms of the exemption from s 2 (1) (c) of the 1894 Act enacted by s 59 (2) of the 1910 Act since (a) when it took effect it did so absolutely in favour of R and the settled property became his absolute property with no qualification known to law; (b) the gift was contingent on R's marriage taking place; (c) the gift was to take effect on the celebration of the marriage and (d) it was a gift to one of the parties to the marriage and to nobody else (see p 397 a and b, p 398 c and p 399 c, post).
- b** (ii) The purpose or motive of the settlor was irrelevant where a settlement was expressed to be made in consideration of marriage and the sole absolute beneficiary under the settlement was a spouse of the marriage in question (see p 399 b, post); *Inland Revenue Comrs v Lord Rennell* [1963] 1 All ER 803 explained.
- c** (iii) Accordingly the appeal would be allowed.
Decision of Foster J [1971] 2 All ER 161 reversed.

Notes

For exemption from estate duty of gifts made in consideration of marriage, see 15 Halsbury's Laws (3rd Edn) 37, 38, para 73.

- d** For the Finance Act 1894, s 2, see 12 Halsbury's Statutes (3rd Edn) 456, and for the Finance (1909-10) Act 1910, s 59, see *ibid* 513.

Case referred to in judgment

Inland Revenue Comrs v Lord Rennell [1963] 1 All ER 803, [1964] AC 173, [1963] 2 WLR 745; *affg* [1961] 3 All ER 1028, [1962] Ch 329, [1961] 3 WLR 1322, Digest (Cont Vol A) 510, 95.

e Appeal

This was an appeal by the defendants, Robert Anthony Park, Charles Anderson Hinks and Antony Bartliff Little from an order of Foster J dated 12th February 1971 and reported at [1971] 2 All ER 161 that the defendants should deliver to the plaintiffs, the Commissioners of Inland Revenue, accounts of the property comprised in a settlement made on 25th May 1962 by Henry James Park ('the settlor') on the first defendant and the subject of a settlement made by the first defendant on 16th August 1963 of which the second and third defendants were the trustees.

- f** In March 1962 it had been suggested to the settlor, who was then aged 92 and who had a fortune amounting to some £100,000, that in order to save estate duty (which would amount to about £40,000 to £50,000) it would be advantageous for him to take advantage of the impending marriage of his grandson, the first defendant, to Miss Stockwell and to settle £80,000 on the first defendant in consideration of that marriage. The first defendant could then voluntarily make to all the other members of the settlor's family (the settlor having two sons and four grandchildren) gifts out of the £80,000. The settlor, who was anxious to benefit all his family, agreed to such a scheme after his solicitor, the second defendant, had pointed out to him the element of risk involved in that something might happen to the first defendant either before or after he had shared out the money which as gifts would be subject to the five year rule; alternatively the first defendant might not make the gifts, so the money would be lost to the rest of the family. The settlement made on 25th May 1962 between the settlor of the one part and Henry William Allan Park and John Raymond Park ('the original trustees') of the other part read, so far as material, as follows:

- j** 'WHEREAS (1) A marriage has been agreed upon and is intended shortly to be solemnised between the Settlor's Grandson [the first defendant] of Flat G Pampisford Road South Croydon in the County of Surrey . . . and Susan Mary Stockwell of 38 Whitgift Avenue Croydon in the . . . County of Surrey. (2) The Settlor has agreed with the [first defendant] that in consideration of the said marriage duly taking place he will make provision for the [first defendant] and

has in pursuance of the said agreement caused to be transferred into the joint names of the Trustees the property specified in the Schedule hereto. (3) The Settlor has been advised by his Solicitors that unless he reserves a power of revocation this Settlement will be irrevocable but well understanding such advice he has decided to reserve no power of revocation whatever. Now in consideration of the said intended marriage THIS SETTLEMENT WITNESSETH and it is hereby agreed and declared as follows:—1. THE Original Trustees or other the trustees or trustee for the time being hereof (hereinafter called “the Trustees”) shall hold the property specified in the Schedule hereto and the property or money for the time being representing the same (hereinafter called “the Trust Fund”) and the income thereof Upon Trust for the Settlor until the said intended marriage. 2. FROM and after the solemnisation of the said intended marriage the Trustees shall hold the capital and income of the Trust Fund upon Trust for the [first defendant] absolutely. . .’

The assets which went into that settlement were of a value of £80,000. The marriage between the first defendant and Miss Stockwell was duly solemnised on 8th September 1962. On 22nd March 1963 the whole of the property comprised in the settlement was transferred to the first defendant by the original trustees. On 16th August 1963 the first defendant made a settlement, the trustees of which were the second and third defendants. It was in the modern form of a discretionary trust, the beneficiaries being—

‘(i) all the children and remoter issue other than [the first defendant] of [the first defendant’s] grandfather [the settlor] of Cotherstone Milbank Road Darlington . . . whether now living or whensoever hereafter born and (ii) the respective wives husbands widows and widowers of such children and remoter issue other than [the first defendant], PROVIDED nevertheless that the Trustees may if in their uncontrolled discretion they think fit at any time during the Trust Period by writing under their hands declare that any widow of [the first defendant] shall be added to the class of Beneficiaries and this settlement shall thenceforth take effect accordingly.’

All the property transferred into that settlement could be identified as being assets comprised in the first settlement and the value of the property so transferred was about £55,000. The settlor died on 22nd September 1963. The Crown claimed that the property formerly comprised in the first settlement was chargeable to estate duty on the death of the settlor under s 2 (1) (c) of the Finance Act 1894 as property taken under a gift inter vivos made by him within five years (as the period then was) before his death and that it was not, as the defendants contended, exempted from such duty by virtue of s 59 (2) of the Finance (1909-10) Act 1910. They had accordingly applied to the court for an order for the delivery of accounts and payment of estate duty in respect of the property comprised in the settlement made by the settlor on 25th May 1962 and the subject of the settlement made by the first defendant on 16th August 1963.

S W Templeman QC and M Nesbitt for the defendants.
G B H Dillon QC and J P Warner for the Crown.

Cur adv vult

9th December. **RUSSELL LJ** read the following judgment of the court. The facts in this appeal are fully set out in the report of the case before Foster J¹. The question for decision is whether the gift of assets worth some £80,000 by the settlor to his grandson, the first defendant, constituted by the settlement dated 25th May 1962 and the subsequent marriage on 8th September 1962 of the grandson to Miss Stockwell, was ‘a gift made in consideration of marriage’. If so, the contents of the gift are

a exempt from estate duty in respect of the death of the settlor on 22nd September 1963. Foster J² held that it was not such a gift so that the exemption did not apply.

There are some matters that are perfectly plain. First, when the gift took effect it did so absolutely in favour of the grandson, and the settled property became his absolute property with no qualifications known to the law; second, it was a gift contingent on the marriage of the grandson and Miss Stockwell taking place; third, b it was a gift to take immediate effect on the celebration of that marriage; fourth, it was a gift to one of the parties to that marriage and to nobody else. We ask ourselves how can such a gift be other than a gift made in consideration of marriage when it has those four qualities? It is perfectly true that the second recital in the document is not correct. That recital reads as follows:

c 'The Settlor has agreed with the [grandson] that in consideration of the said marriage duly taking place he will make provision for the [grandson] and has in pursuance of the said agreement caused to be transferred into the joint names of the Trustees the property specified in the Schedule hereto.'

There was no *agreement*. But in ascertaining whether the gift be within the language d of the exemption it would have been no different had the recital been 'The settlor having determined that if and when the said marriage duly takes place he will (etc) and has in pursuance of the said determination caused etc'. Similarly if the later phrase in the document had been 'Now therefore' instead of 'Now in consideration of the said intended marriage'.

Reliance is placed by the Crown on what was said in *Inland Revenue Comrs v Lord e Rennell*³ in this court and the House of Lords. It is important to notice that in that case no one within the marriage consideration was given any *right* to receive any benefit under the settlement; they were only included with other members of the settlor's family in a discretionary class. Apart from the fact that the settlement was contingent and operative on a marriage of two of the discretionary class there was no gift related to a marriage, although the settlement was expressed to be in f consideration of the marriage. The first contention of the Crown was that the settlement could not in law involve a gift made in consideration of marriage (for purposes of exemption) unless it was exclusively for the benefit of persons within the marriage consideration as that phrase is generally understood by the law, subject perhaps to ultimate remainders in default of such persons to take. The House of Lords by a majority did not accept that contention. The next question was whether g on the facts of that case it could properly be said that the gift involved in the settlement was made in consideration of marriage. At this point counsel for the taxpayer was faced with the problem of finding some definition or limitation that would fit the facts of the case without having to contend that *every* gift to *anyone* effective and contingent on *any* marriage was within the exemption. For this reason he made the submission that there was a third requirement, that the gift must be h made for the purpose of or with a view to encouraging or facilitating the particular marriage. Proceeding on that submission the taxpayer contended that the history of the case began with an idea of the settlor to make a settlement of a more ordinary kind on his daughter on her marriage, and that what happened was that on the suggestion of the solicitor the idea was expanded to embrace more money and more members of the family. The majority of the House of Lords expressed themselves as content to accept this third requirement in that case, and considered that the i settlor's original purpose sufficiently remained to make the settlement a gift made in consideration of the marriage, notwithstanding the addition of money and of beneficiaries outside the marriage consideration, and the wish to save estate duty.

2 [1971] 2 All ER 161, [1971] 1 WLR 710

3 [1961] 3 All ER 1028, [1962] Ch 329, on appeal [1963] 1 All ER 803, [1964] AC 173

In those circumstances it does not seem to us that the *Rennell* case³ in any way suggests that in the present case the settlement did not involve a gift made in consideration of marriage. Indeed, our impression is that it would never have occurred to any of their Lordships that anything said by them would suggest for a moment that the facts in our case involved anything other than a relevant gift made in consideration of marriage. Indeed, if anything, the decision is an extension of the ambit of that phrase beyond the facts in this case.

It was argued for the Crown that the *Rennell* case⁴ totally jettisoned the conception of persons ordinarily regarded by the law as within the marriage consideration as relevant to this exemption; and that consequently the circumstances in all cases must be fully investigated in order to probe the motive or main purpose of the donor or settlor. We do not accept this. We have listed the four significant facts of this settlement or gift. In our judgment, the fourth of these, granted the others, must speak for itself to define the gift as one made in consideration of marriage. The Crown instanced an employer who selected an employee on the verge of marriage, and who, contingent and effective on that marriage, settled a substantial sum on him absolutely, after making it plain to the employee that he was expected after marriage to transfer the money or property to children of the employer. But if in such case there was nothing in law or equity binding the employee to do this, we do not see why this should not be within the terms of the exemption, any more than in the instant case. We must stress that the property after the marriage was absolutely the property of the grandson. Had he died a week after the marriage, estate duty would have been exigible thereon on his death. It is true that later he settled some £55,000 worth of the funds on descendants of the settlor (other than, for obvious reasons, himself and his wife). But he would only have done this, we have no doubt, after legal advice that in law this would be a voluntary gesture on his part, and that it was against his interest and that of his wife and future children (by the marriage on the occasion of which he received the £80,000) that he should do it. We say all this in order to stress the obvious: that the settlor intended this to be, and it was, in law and equity absolutely the grandson's property, provided that, and when, he married Miss Stockwell; and that is true whatever may have been the hopes of the settlor that, by voluntary action of the grandson, other members of the settlor's family would share in a fund free of estate duty. The settlor no doubt considered, when he made this gift, that the risk was small that his grandson would not act in a gentlemanly fashion; but that is no way to impose a trust. It is not in our view irrelevant to observe that, if the settlement in this case had taken the form of a covenant to transfer the property to trustees on trust for the grandson if and when the marriage took place, it cannot be doubted on authority that the trustees could, and would be required to, enforce the covenant at the instance of the grandson *because* it was a marriage settlement and the beneficiary was within the marriage consideration. In an action in such a case, with the grandson as plaintiff (seeking transfer of the property to himself or to the trustees on trust for him) and the settlor and the trustees (if unwilling to sue) as defendants, the plaintiff grandson would plead that the covenant was a covenant entered into in consideration of his marriage to Miss Stockwell, which marriage took place on etc. The settlor could not deny this allegation, nor (the grandson being within the marriage consideration) resist the claim. Moreover, the allegation would not require to be based on any statement in the settlement that it was made in consideration of marriage; it would be self-evident from the fact that the covenant and trust were for the benefit of the husband of the marriage to take effect if and when the marriage took place. We cannot conceive that in such case it would be open to the settlor to assert that what he had done was not done in consideration of marriage (and that, therefore, the covenant was not specifically enforceable) *because* his main purpose was, in the hope that the grandson would 'play the game', to achieve a distribution of a substantial part of his

a assets among his family (including the grandson) free from a charge to estate duty should he die in the reasonably near future. We should add that at one stage in argument for the Crown the grandson in this case was referred to as a mere conduit pipe. But a mere conduit pipe need take no action and the analogy or metaphor is wholly false.

b In short, therefore, in our judgment all reference in the *Rennell* case⁵ to the purpose or motive of the donor or settlor is wholly irrelevant to a case where the sole absolute beneficiary is a spouse of the marriage in question. In applying to such a case any such consideration Foster J⁶ was, we consider, in error. Consequently, in our judgment, the appeal should be allowed, with an appropriate declaration to the effect that the subject-matter of the settlement was exempt from estate duty on the occasion of the settlor's death.

c *Appeal allowed. Leave to appeal to the House of Lords refused.*

Solicitors: Butt & Bowyer, agents for Latimer, Hinks, Marsham & Little, Darlington (for the defendants); Solicitor of Inland Revenue.

Mary Rose Plummer Barrister.

Hollier v Rambler Motors (AMC) Ltd

COURT OF APPEAL, CIVIL DIVISION

e SALMON AND STAMP LJ AND LATEY J
18th, 19th NOVEMBER 1971

f Contract – Conditions – Incorporation in contract – Course of dealing – Exception clause – Contract of bailment – Oral contract between garage and car owner – Owner requesting garage to repair car – Manager of garage instructing owner to bring car to garage so that defects could be attended to – Garage's normal practice to supply 'invoice' form to be signed by customer – Form including clause stating garage not responsible for damage caused by fire to customer's cars on premises – Car owner having had car repaired at garage on four occasions in previous five years – Car owner having signed 'invoice' on at least two occasions – Whether exception clause incorporated in oral contract by reason of previous course of dealing.

g Contract – Exception clause – Bailment – Bailee's liability for negligence – Exclusion of liability – Need for clear terms – Contract between car owner and garage for repair of car – Clause stating that garage not responsible for damage caused by fire to customers' cars on premises – Garage as bailees only liable for damage caused by negligence – Clause not sufficiently clear to exclude liability for negligence – Clause merely a statement in nature of a warning that garage would not be liable for fire caused otherwise than by their negligence.

h The plaintiff's car having developed an oil leak, he telephoned the manager of the defendants' garage and told him that he wanted some repair work done to it. The manager told the plaintiff that he was unable to do anything immediately but that if the plaintiff had his car towed to the defendants' garage they would attend to the defects in due course. The plaintiff agreed. Those were the only terms of the agreement. Although the plaintiff had frequently bought spare parts for his car from the defendants during the previous five years, when he wanted a car repaired or serviced as a rule he sent it elsewhere. However, on three or four occasions during those five years he had had the repairs or service carried out by the defendants. It was the defendants' practice when doing repairs or servicing a car, but not when merely

5 [1961] 3 All ER 1028, [1962] Ch 329, on appeal [1963] 1 All ER 803, [1964] AC 173

6 [1971] 2 All ER 161, [1971] 1 WLR 710

supplying spare parts, to have a form, described as an 'invoice', signed by the customer. The form contained a description of the work to be carried out and the price for doing it. Underneath the customer's signature was the following clause: 'The Company is not responsible for damage caused by fire to customer's cars on the premises.' The plaintiff had signed this form on at least two previous occasions when the defendants had carried out repairs to his car. While the car was in the garage a fire broke out as a result of the defendants' negligence which caused substantial damage to the plaintiff's car. In an action by the plaintiff claiming damages for negligence, the defendants contended that, although on this occasion the plaintiff had not signed their 'invoice' form, the clause thereon had been incorporated in the oral contract between the parties by a course of dealing and that its effect was to exclude their liability for negligently causing a fire while the plaintiff's car was in their care.

Held – The defendants were liable to the plaintiff for their negligence because—

(i) three or four transactions in the course of five years were not sufficient to establish a course of dealing; the clause on the 'invoice' form could not therefore have been incorporated in the oral contract made between the parties (see p 402 h, p 404 c, p 408 f and p 409 b, post); *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430 applied, *Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd* [1968] 2 All ER 444 distinguished;

(ii) alternatively, on the footing that a course of dealing had been established and the clause consequently incorporated in the contract, the words of the clause were not sufficiently plain to exclude liability for negligence; although as bailees the defendants could only be liable in negligence, if they were seeking to exclude liability for negligence they ought clearly to have conveyed that it was liability for negligence which was being excluded; the words used were susceptible to a construction which would regard them as a mere statement in the nature of a warning that if a fire did occur at the garage which damaged the car and it was not caused by the negligence of the garage then the owner of the garage was not responsible (see p 404 f and g, p 406 g and j, p 407 e, p 408 g to j and p 409 d to f, post); dictum of Denning LJ in *Olley v Marlborough Court Ltd* [1949] 1 All ER at 134 applied; dicta of Scrutton LJ in *Rutter v Palmer* [1922] All ER Rep at 370 and of Lord Greene MR in *Alderslade v Hendon Laundry Ltd* [1945] 1 All ER at 245 explained; *Turner v Civil Service Supply Association Ltd* [1926] 1 KB 50 and *Fagan v Green and Edwards Ltd* [1925] All ER Rep 266 overruled.

Per Salmon LJ. In order to establish that a term has been implied into a contract by a course of dealing, it is not essential to show that the party charged had actual and not merely constructive knowledge of the term and with such actual knowledge had in fact assented to it (see p 403 g and p 404 d, post); dictum of Lord Devlin in *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER at 437 disapproved.

Notes

For conditions in contracts of bailment limiting liability, see 2 Halsbury's Laws (3rd Edn) 114-116, para 225, and for cases on the subject, see 3 Digest (Repl) 76-79, 154-164.

For the incorporation of terms in a contract, see 8 Halsbury's Laws (3rd Edn) 74, para 147.

Cases referred to in judgments

Alderslade v Hendon Laundry Ltd [1945] 1 All ER 244, [1945] KB 189, 114 LJKB 196, 172 LT 153, 3 Digest (Repl) 102, 286.

Fagan v Green and Edwards Ltd [1926] 1 KB 102, [1925] All ER Rep 266, 95 LJKB 363, 134 LT 191, 8 Digest (Repl) 5, 6.

Kendall (Henry) & Sons (a firm) v William Lillico & Sons Ltd [1968] 2 All ER 444, [1969] 2 AC 31, [1968] 3 WLR 110, Digest (Cont Vol C) 853, 781b.

McCutcheon v David MacBrayne Ltd [1964] 1 All ER 430, [1964] 1 WLR 125, Digest (Cont Vol B) 71, 254b.

- a** *Olley v Marlborough Court Ltd* [1949] 1 All ER 127, [1949] 1 KB 532, [1949] LJR 360, 29 Digest (Repl) 16, 186.
Price & Co v Union Lighterage Co [1904] 1 KB 412, [1904-07] All ER Rep 227, 63 LJKB 222, 89 LT 731, 8 Digest (Repl) 46, 277.
Rutter v Palmer [1922] 2 KB 87, [1922] All ER Rep 367, 91 LJKB 657, 127 LT 419, 3 Digest (Repl) 78, 159.
- b** *Turner v Civil Service Supply Association Ltd* [1926] 1 KB 50, 95 LJKB 111, 134 LT 189, 8 Digest (Repl) 5, 5.

Appeal

This was an appeal by the plaintiff, Walter William Frederick Hollier, against a decision of his Honour Judge Sir Shirley Worthington-Evans QC at Brentford County Court on 15th June 1971 in an action brought by the plaintiff against the defendants, Rambler Motors (AMC) Ltd, claiming damages for negligence. The facts are set out in the judgment of Salmon LJ.

R L Johnson for the plaintiff.
S L Tuckey for the defendants.

- d** **SALMON LJ.** The plaintiff bought a secondhand Rambler car early in 1970. I understand that that is a make of car which is manufactured by the American Motor Corp'n. The plaintiff had had Rambler cars for some five years. In the middle of March 1970 he telephoned the defendants, Rambler Motors (AMC) Ltd, spoke to the manager and told him that he wanted some repair work done to the car as it had developed an oil leak. The manager said that the defendants could not do anything about it for the moment, but if the plaintiff would have it towed or sent in on a conveyor the defendants would attend to the defects and put them in order.
- e** The plaintiff agreed. Those were the only terms of the agreement, expressed over the telephone. There would, however, obviously be an implied term that the defendants would carry out the repairs and look after his car with reasonable skill and care; and there would also be an implied term that the plaintiff would pay a fair and reasonable price for the repairs. The plaintiff had his motor car conveyed to the defendants' garage towards the end of March. While it was at the garage a fire broke out as a result of which substantial damage was done to the car.
- f**

- The plaintiff brought an action against the defendants claiming that the fire and the ensuing damage had been caused by the defendants' negligence. At the trial, the chief issue of fact which was fought—and it was fought very hard—was whether
- g** or not the defendants had discharged the onus of proof (which would rest on them as bailees) of having taken reasonable care of the plaintiff's property. The learned county court judge, in the course of a lucid and admirable judgment, said:

- 'I have no hesitation in finding that the defendants failed to show that they had taken reasonable care of the plaintiff's property. I am satisfied that the electric wiring of their premises was faulty in design and was not properly inspected or maintained, and accordingly they are in breach of their duty as
- h** bailees of the plaintiff's property.'

- It is to be observed that not only did he decide that the defendants had not discharged the onus of proof resting on them, but that it had been proved affirmatively that they had been negligent. The defendants do not challenge this finding. They rely,
- j** however, as they did in the court below, on a clause which they contend excludes their liability for negligently causing a fire while the plaintiff's motor car was in their care. The defendants argue that this clause was incorporated into the oral contract by a course of dealing between them and the plaintiff.

The points of law to be decided by the learned county court judge were: Was the clause on which the defendants were relying to be implied into the contract?

And if so, did it have the effect for which the defendants were contending? The learned county court judge was persuaded by counsel for the defendants (in an argument which I am sure was as persuasive and skilful as that which he has addressed to this court), that such a term was to be implied into the contract; and the learned county court judge found that, on the authority of *Turner v Civil Service Supply Association Ltd*¹, he was bound to hold that that clause had the meaning for which the defendants contended. The plaintiff now appeals from the decision of the learned county court judge on those points.

I will deal first of all with the point whether the clause relied on by the defendants can properly be implied into this oral contract by reason of the course of dealing between the parties. The plaintiff had during the five years preceding March 1970 on many occasions bought spare parts from the defendants. As a rule, when he wanted the car to be repaired or serviced, he sent it elsewhere, but three or four times during those five years he had had the repair or service carried out by the defendants. It was the defendants' practice when they were doing repairs or servicing a motor car—but not when they were merely supplying spare parts—to have a form which is described as an 'invoice' signed by the customer. I need not read the form, which is before us, in detail, but it describes the work which is to be carried out and gives the price for carrying out the work. At the bottom of the form appear the words:

'I hereby authorise the above repairs to be executed and agree to pay cash for same upon delivery of car to me. Customer's signature.'

And the customer normally signed the form. Then immediately underneath the signature appear the words:

'The Company is not responsible for damage caused by fire to customer's cars on the premises. Customer's cars are driven by staff at owner's risk.'

It is not clear whether on each of the three or four occasions when the plaintiff had work carried out he signed the form to which I have referred, but he did, at any rate, sign the form on two of those occasions; one was on 15th April 1967, and the other hurriedly in the rain on 3rd February 1970, not quite two months before the date of the telephone conversation at which the oral contract relating to the present case was made. This form that the plaintiff signed has three copies underneath it, with carbons in between. The three copies underneath the form are retained by the defendants. The top copy is handed to the customer after the work has been done and paid for. The plaintiff did not read the forms on any occasion when he signed them, but there was nothing to have prevented him from doing so.

Counsel for the defendants says that there was a course of dealing which constituted the three or four occasions over five years—that is, on an average, not quite one dealing a year—from which it is to be implied that what he called 'the condition' at the bottom of the contract should be imported into the oral agreement made in the middle of March 1970. I am bound to say that, for my part, I do not know of any other case in which it has been decided or even argued that a term could be implied into an oral contract on the strength of a course of dealing (if it can be so called) which consisted at the most of three or four transactions over a period of five years.

We have been referred to *Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd*². That was a case in which some feeding-stuff was sold by some merchants to a farmer. The feeding-stuff was found to be defective. The farmer sued the merchants. The merchants brought in as third party the persons from whom they had purchased the feeding-stuff; they in their turn brought in their suppliers, and there was a long

1 [1926] 1 KB 50

2 [1968] 2 All ER 444, [1969] 2 AC 31

a list of many parties brought in right down the chain. As between two of these suppliers a point arose whether a term that the buyer under the contract took the responsibility for any latent defects was a term which had been imported into the contract in question by reason of the course of dealing between those parties. It is to be observed that in that case there had been three or four dealings each month between the parties during the previous three years. The course of dealing had been that the feeding-stuff was ordered orally by the buyer and the order was accepted orally by the suppliers. Then on the day of the oral contract, or perhaps the next day, the suppliers sent on to the buyer a sold note. One of the terms appearing on the sold note was that the buyer under the contract took the responsibility for any latent defects. Three or four times each month, year in and year out for three years, sold notes had been sent on to the buyer, and the buyer had never raised any protest or said anything which would have led the sellers to assume that the buyer was doing anything other than accepting the terms of the contract which appeared on the sold note. In that case, although this practice had been going on all that time, and the buyer had received well over 100 sold notes containing the condition to which I have referred, he had not actually read the condition and knew nothing about it. It was argued that, therefore, the condition could not be implied into the contract in question, although it had been made in exactly the same way as all the other contracts, namely, orally, with a sold note in the usual form sent on after the contract had been made. The House of Lords decided that the fact that the buyer had not read the condition on the sold notes, having had every opportunity of doing so, did not avail him, because any reasonable seller in circumstances such as those, having had no intimation from the buyer that he took any objection to the condition, would have had good cause to assume that the buyer was agreeing to the condition.

That case is obviously very different from the present case. That seems to be a typical case where a consistent course of dealing between the parties makes it imperative for the court to read into the contract the condition for which the sellers were contending. Everything that the buyer had done, or failed to do, would have convinced any ordinary seller that the buyer was agreeing to the terms in question. The fact that the buyer had not read the term is beside the point. The seller could not be expected to know that the buyer had not troubled to acquaint himself with what was written in the form that had been sent to him so often, year in and year out during the previous three years, in transactions exactly the same as the transaction then in question.

The buyer in that case sought to rely on *McCutcheon v David MacBrayne Ltd*³, which was also a decision of the House of Lords. He relied on that authority chiefly for a passage in the speech of Lord Devlin⁴, which taken literally would mean that no term can be implied into a contract by a course of dealing unless it can be shown that the party charged has actual and not only constructive knowledge of the term, and with such actual knowledge has in fact assented to it. *McCutcheon v David MacBrayne Ltd*³ is an example of a case in which dealings between the parties prior to the contract in question cannot be relied on to import a term into the relevant contract. In that case the appellant had asked his brother-in-law to have a car shipped from the Isle of Islay to the mainland. The appellant had personally consigned goods on four previous occasions. On three of them he was acting on behalf of his employer; on the other occasion he sent his own car; and each time he signed what was called a 'risk note'. The risk note made it plain that the respondents were accepting the goods on their ship on the condition that they would not be responsible for any damage by negligence that the goods might suffer during the course of the voyage. In that case, through negligence, the ship sank and the car was

3 [1964] 1 All ER 430, [1964] 1 WLR 125

4 [1964] 1 All ER at 437, [1964] 1 WLR at 134

lost. The appellant's brother-in-law, who took the car to be shipped on the occasion in question, had himself consigned goods of various kinds on a number of previous occasions. He said that sometimes he had signed a note, and sometimes he had not. On one occasion he sent his own car. He said that on the occasion in question no risk note was put before him. Apparently, unknown to him, the purser, by mistake, had taken the car on board without asking him to sign the risk note. The House of Lords held, as I have already indicated, that there was no previous course of dealing from which the term of exclusion could be implied into the contract which had been made on behalf of the appellant by his brother-in-law.

It seems to me that if it was impossible to rely on a course of dealing in *McCutcheon v David MacBrayne Ltd*⁵, still less would it be possible to do so in this case, when the so-called course of dealing consisted only of three or four transactions in the course of five years. As I read the speeches of Lord Reid, Lord Guest and Lord Pearce, one, but only one amongst many, of the facts to be taken into account in considering whether there had been a course of dealing from which a term was to be implied into the contract was whether the consignor actually knew what were the terms written on the back of the risk note. Lord Devlin said that this was a critical factor. Even on the assumption that Lord Devlin's dictum went further than was necessary for the decision in that case, and was wrong—which I think is the effect of *Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd*⁶—I do not see how that can help the defendants here. The speeches of the other members of the House and the decision itself in *McCutcheon's* case⁵ make it plain that the clause on which the defendants seek to rely cannot in law be imported into the oral contract they made in March 1970.

That really disposes of this appeal, but in case I am wrong on the view that I have formed, without any hesitation I may say, that the course of dealing did not import the so-called exclusion clause, I think I should deal with the point as to whether or not the words on the bottom of the form, had they been incorporated in the contract, would have excluded the defendants' liability to compensate the plaintiff for damage to the plaintiff's car by a fire which had been caused by the defendants' own negligence. It is well settled that a clause excluding liability for negligence should make its meaning plain on its face to any ordinarily literate and sensible person. The easiest way of doing that, of course, is to state expressly that the garage, tradesman or merchant, as the case may be, will not be responsible for any damage caused by his own negligence. No doubt merchants, tradesmen, garage proprietors and the like are a little shy of writing in an exclusion clause quite so bluntly as that. Clearly it would not tend to attract customers, and might even put many off. I am not saying that an exclusion clause cannot be effective to exclude negligence unless it does so expressly, but in order for the clause to be effective the language should be so plain that it clearly bears that meaning. I do not think that defendants should be allowed to shelter behind language which might lull the customer into a false sense of security by letting him think—unless perhaps he happens to be a lawyer—that he would have redress against the person with whom he was dealing for any damage which he, the customer, might suffer by the negligence of that person.

The principles are stated by Scrutton LJ with his usual clarity in *Rutter v Palmer*⁷:

'For the present purposes a rougher test will serve. In construing an exemption clause certain general rules may be applied: First the defendant is not exempted from liability for the negligence of his servants unless adequate words are used; secondly, the liability of the defendant apart from the exempting words must be ascertained; then the particular clause in question must be considered; and if the only liability of the party pleading the exemption is a liability for negligence, the clause will more readily operate to exempt him'.

5 [1964] 1 All ER 430, [1964] 1 WLR 125

6 [1968] 2 All ER 444, [1969] 2 AC 31

7 [1922] 2 KB 87 at 92, [1922] All ER Rep 367 at 370

a Scrutton LJ was far too great a lawyer, and had far too much robust common sense, if I may be permitted to say so, to put it higher than that 'if the only liability of the party pleading the exemption is a liability for negligence, the clause will more readily operate to exempt him'. He does not say that 'if the only liability of the party pleading the exemption is a liability for negligence, the clause will necessarily exempt him'. After all, there are many cases in the books dealing with exemption clauses, and in every case it comes down to a question of construing the alleged exemption clause which is then before the court. It seems to me that in *Rutter v Palmer*⁸, although the word 'negligence' was never used in the exemption clause, the exemption clause would have conveyed to any ordinary, literate and sensible person that the garage in that case was inserting a clause in the contract which excluded their liability for the negligence of their drivers. The clause being considered in that case—and it was without doubt incorporated in the contract—was: 'Customers' cars are driven by your staff at customers' sole risk . . .' Any ordinary man knows that when a car is damaged it is not infrequently damaged because the driver has driven it negligently. He also knows, I suppose, that if he sends it to a garage and a driver in the employ of the garage takes the car on the road for some purpose in connection with the work which the customer has entrusted the garage to do, the garage could not conceivably be liable for the car being damaged in an accident unless the driver was at fault. It follows that no sensible man could have thought that the words in that case had any meaning except that the garage would not be liable for the negligence of their own drivers. That is a typical case where, on the construction of the clause in question, the meaning for which the defendant was there contending was the obvious meaning of the clause.

e The next case to which I wish to refer is the well-known case of *Alderslade v Hendon Laundry Ltd*⁹. In that case articles were sent by the plaintiff to the defendants' laundry to be washed, and they were lost. In an action by the plaintiff against the defendants for damages, the defendants relied on the following condition to limit their liability: 'The maximum amount allowed for lost or damaged articles is 20 times the charge made for laundering.' Again, this was a case where negligence was not expressly excluded. The question was: what do the words mean? f I have no doubt that they would mean to the ordinary housewife who was sending her washing to the laundry that, if the goods were lost or damaged in the course of being washed through the negligence of the laundry, the laundry would not be liable for more than 20 times the charge made for the laundering. I say that for this reason. It is, I think, obvious that when a laundry loses or damages goods it is almost invariably because there has been some neglect or default on the part of the laundry. It is said that thieves break in and steal, and the goods (in that case handkerchiefs) might have been stolen by thieves. That of course is possible, but I should hardly think that a laundry would be a great allurements to burglars. It is a little far-fetched to think of burglars breaking into a laundry to steal the washing when there are banks, jewellers, post offices, factories, offices and homes likely to contain money and articles far more attractive to burglars. I think that the ordinary sensible housewife, or indeed anyone else who sends washing to the laundry, reading that clause must have appreciated that almost always when goods are lost or damaged it is because of the laundry's negligence, and, therefore, this clause could apply only to limit the liability of the laundry, when they were in fault or negligent.

h But counsel for the defendants has drawn our attention to the words used by Lord Greene MR in delivering the leading judgment in this court, and he contends that j Lord Greene MR was in fact making a considerable extension to the law as laid down by Scrutton LJ in *Rutter v Palmer*⁸. For this proposition he relies on the following passage in Lord Greene MR's judgment¹⁰:

8 [1922] 2 KB 87, [1922] All ER Rep 367

9 [1945] 1 All ER 244, [1945] KB 189

10 [1945] 1 All ER at 245, [1945] KB at 192

'The effect of those authorities can I think be stated as follows: where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because if it were not so construed it would lack subject-matter.'

If one takes that work 'must' au pied de la lettre that passage does support counsel for the defendants' contention. However, we are not here construing a statute, but a passage in an unreserved judgment of the Master of the Rolls, who was clearly intending no more than to restate the effect of the authorities as they then stood. It is to be observed that MacKinnon LJ, who gave the other judgment in this court, relied on the rule or principle which he said was very admirably stated by Scrutton LJ in *Rutter v Palmer*¹¹. He said¹²:

'Applying that principle to the facts of this case, I think that this clause does avail to protect the proprietor of the laundry in respect of liability for negligence, which must be assumed to be the cause of these handkerchiefs having disappeared.'

And clearly it did, for the reasons that I have already given. I do not think that Lord Greene MR was intending to extend the law in the sense for which counsel for the defendants contends. If it were so extended, it would make the law entirely artificial by ignoring that rules of construction are merely our guides and not our masters; in the end you are driven back to construing the clause in question to see what it means. Applying the principles laid down by Scrutton LJ, they lead to the result at which the court arrived at in *Alderslade v Hendon Laundry Ltd*¹³. In my judgment these principles lead to a very different result in the present case. The words are: 'The Company is not responsible for damage caused by fire to customer's cars on the premises.' What would that mean to any ordinary literate and sensible car owner? I do not suppose that any such, unless he is a trained lawyer, has an intimate or, indeed, any knowledge of the liability of bailees in law. If you asked the ordinary man or woman: 'Supposing you send your car to the garage to be repaired, and there is a fire, would you suppose that the garage would be liable?', I should be surprised if many of them did not answer, quite wrongly, 'Of course they are liable if there is a fire'. Others might be more cautious and say, 'Well, I had better ask my solicitor', or, 'I do not know. I suppose they may well be liable'. That is the crucial difference, to my mind, between this case and *Alderslade v Hendon Laundry Ltd*¹³ and *Rutter v Palmer*¹¹. In those two cases, any ordinary man or woman reading the conditions would have known that all that was being excluded was the negligence of the laundry, in the one case, and the garage, in the other. But here I think the ordinary man or woman would be equally surprised and horrified to learn that if the garage was so negligent that a fire was caused which damaged their car, they would be without remedy because of the words in the condition. I can quite understand that the ordinary man or woman would consider that, because of these words, the mere fact that there was a fire would not make the garage liable. Fires can occur from a large variety of causes, only one of which is negligence on the part of the occupier of the premises, and that is by no means the most frequent cause. The ordinary man would I think say to himself: 'Well, what they are telling me is that if there is a fire due to any cause other than their own negligence they are not responsible for it'. To my mind, if the defendants were seeking to exclude their responsibility for a fire caused by their own negligence, they ought to have done so in far plainer language than the language here used. In my view, the words of the condition would be understood as being meant to be a warning to the customer that if a fire does occur at the garage which damages the car, and it is not caused by the negligence of the garage owner, then the garage owner is not responsible for damage.

¹¹ [1922] 2 KB 87, [1922] All ER Rep 367

¹³ [1945] 1 All ER 244, [1945] KB 189

¹² [1945] 1 All ER at 247, [1945] KB at 195

a There is another case which I think throws some light on the problem before us, and that is *Olley v Marlborough Court Ltd*¹⁴. In that case there was a notice in the bedroom of a private residential hotel to this effect: 'The proprietors will not hold themselves responsible for articles lost or stolen unless handed to the manageress for safe custody.' Owing to the negligence of the hotel, a thief managed to get into a room, which had been taken by the plaintiff, and stole a quantity of articles. The plaintiff brought an action against the proprietors of the hotel, and succeeded in this court. In that case there was a question whether the notice to which I have referred formed part of the contract between the plaintiff and the hotel proprietors; and there was also some question whether the hotel was an inn, in which case they would have been to some extent insurers of the goods, and another question whether the hotel was only a private hotel. This court considered the case on the basis that the notice did form part of the contract between the parties, and that the hotel was a private hotel, and came to the conclusion, as I have already indicated, that the plaintiff was entitled to recover. Denning LJ said¹⁵:

d 'Ample content can be given to the notice by construing it as a warning that the hotel proprietor is not liable, in the absence of negligence. As such it serves a useful purpose. It is a warning to the guest that he must do his part to take care of his things himself, and, if need be, insure them. It is unnecessary to go further and to construe the notice as a contractual exemption of the defendants from their common law liability for negligence.'

Similarly, I think, in this case the words at the bottom of this form can be given ample content by construing them as a warning in the sense that I have already indicated. It seems plain that if the notice in the bedroom of the hotel had read as follows: 'Proprietors will not hold themselves responsible for articles lost or stolen, nor for the damage or destruction of articles caused by fire', and then there had been a full stop, and the notice went on to say that to avoid articles being lost or stolen they should be handed to the manageress for safe custody, for the reasons which this court gave it would have come to the conclusion that the notice would not have excluded the hotel proprietors from liability for the loss of articles by a fire caused by their own negligence.

f We have been referred to the case on which the learned county court judge relied and by which he was bound, namely, the decision of Sankey J in *Turner v Civil Service Supply Association Ltd*¹⁶. In that case the defendants were furniture removers and warehousemen, and they entered into a contract to remove the plaintiff's furniture from London to Hailsham. The contract was made subject to various conditions. The plaintiff's goods were loaded on to the defendants' motor lorry, and in the course of transfer a fire caused by the negligence of the defendants' servants destroyed the bulk of the goods and damaged the remainder. Sankey J held, as he said with some hesitation and reluctance, that cl 11 in the contract did exempt the defendants from liability. That clause read:

h 'The contractors are not responsible for loss or damage caused by fire, aircraft or bombardment to property in transit, in storage, or in process of being packed . . .'

j Sankey J thought that, since the defendants could not be responsible for damage by fire, save fire caused by negligence, the clause to which I have referred must necessarily be taken to exclude their liability for negligence. I am afraid I cannot agree with that decision. It is fair to say, reading that judgment, that the correct arguments do not appear to have been addressed to the court. I think that in that

14 [1949] 1 All ER 127, [1949] 1 KB 532

15 [1949] 1 All ER at 134, [1949] 1 KB at 550

16 [1926] 1 KB 50

case the defendants were in an even weaker position than the defendants are here. Clause 11 was manifestly dealing with matters which had nothing to do with negligence: 'The contractors are not responsible for loss or damage caused by fire, aircraft or bombardment to property in transit . . .' It is difficult to see how the contractors could have been liable for any damage by aircraft or bombardment. It is hardly to be supposed that they would have negligently manipulated an aircraft over one of their own lorries, or bombarded it. It seems to me manifest that that clause was merely a warning to the customer that the contractors were not responsible for damage by fire, aircraft or bombardment, so that he could insure the goods against those risks. That case does not decide anything except what the learned judge conceived to be the true construction of the clause there in question. In my judgment, his decision was wrong. I consider also, for much the same reasons, that the decision in *Fagan v Green and Edwards Ltd*¹⁷, following *Turner v Civil Service Supply Association Ltd*¹⁸, was wrong.

There have been many cases, to which I do not think it is necessary to refer, in which these exclusion clauses have been construed in relation to the liability of common carriers. I do not think those cases have any application to the present case. Some of them may appear not to be very satisfactory, but they can be reconsidered should the occasion arise. It does not arise in this case.

For these reasons, I have come to the conclusion that, although this was a most careful and in many ways an excellent judgment, the decision was wrong: first, on the point whether or not the term relied on by the defendants was imported into the contract by a course of dealing; and secondly, on the construction of the clause, although on this point the learned county court judge was bound by the decision of Sankey J¹⁸ to reach the conclusion at which he arrived. For these reasons, I would allow the appeal. Before parting with this case, I should like to say how much we are indebted to learned counsel on both sides for their most interesting and able arguments.

STAMP LJ. I agree, for the reasons given by Salmon LJ, that the course of dealings between parties described by Salmon LJ was not such that the terms of earlier contracts can properly be imported into the oral contract here in question.

On the question of construction, I reach the same conclusion as Salmon LJ, but by, I think, a slightly different route. As I understand the law, it is settled that where in a contract such as this you find a provision excluding liability capable of two constructions, one of which will make it applicable where there is no negligence by the defendant, and the other will make it applicable where there is negligence by the defendant, it requires special words or special circumstances to make the clause exclude liability in case of negligence: see, for example, *Price & Co v Union Lighterage Co*¹⁹. Similarly, I would hold that where the words relied on by the defendant are susceptible either to a construction under which they become a statement of fact in the nature of a warning or to a construction which will exempt the defendant from liability for negligence, the former construction is to be preferred. The words here, 'The Company is not responsible for damage caused by fire to customer's cars on the premises', are, in my judgment, certainly susceptible to a construction which would regard them as a mere statement in the nature of a warning, and reinforced by the principle that I have stated, I would hold that that is how they ought to be construed in this case. If this be correct, I do not find it necessary to consider the cases which have been decided on the footing that the clause under consideration was a term of the contract excluding some liability; for on the view that I have formed, the clause on its true construction is not a clause of that nature.

¹⁷ [1926] 1 KB 102, [1925] All ER Rep 266

¹⁸ [1926] 1 KB 50

¹⁹ [1904] 1 KB 412, [1904-07] All ER Rep 227

a For those reasons, I would agree with the conclusion of Salmon LJ. I also agree, for the reasons which he has given, that the decisions in *Turner v Civil Service Supply Association Ltd*²⁰ and *Fagan v Green & Edwards Ltd*¹ cannot be regarded as reliable authorities. I, too, would allow the appeal.

b **LATEY J.** As regards the first ground of appeal, namely, that the learned county court judge was wrong in holding that these printed words were imported as a term into the oral agreement by a course of dealing, I agree that the learned judge, while his findings of primary fact on the evidence were impeccable, did reach a mistaken conclusion. As I so wholly agree with the reasons stated by Salmon and Stamp LJJ, there is no need to repeat them.

c As regards the second ground of appeal, the main stream of the law, the basic principle, as I understand it, is that if A enters into a contract with B and wants to include in it a term exempting himself from liability for his own negligence, to be effective that term must sufficiently clearly convey that it is liability for negligence which is being excluded. It has been argued during this appeal that where A cannot be liable otherwise than in negligence, no such sufficiently clear words are required. *d* In my opinion, that is not the law. In each case one has to look at the words which are claimed to exempt. When in fact A can be liable in negligence only, the law, I believe, is that that fact, to employ Scrutton LJ's words in *Rutter v Palmer*², 'will more readily operate to exempt him'. But the law goes no further than that.

In saying that, I want to add that I wholly and emphatically agree with what Salmon LJ has said in his judgment when dealing with *Rutter v Palmer*³ and *Alderslade v Hendon Laundry Ltd*⁴; when referring to the passage in Lord Greene MR's judgment *e* in the latter case; and with what he has said about *Turner v Civil Service Supply Association Ltd*²⁰ and *Fagan v Green & Edwards Ltd*¹. In the sense I have mentioned and to that limited extent, in this case the defendants are entitled to pray in aid that as bailees they could only be liable in negligence and, therefore, that the court should more readily read these words as sufficient words of exemption. I approach the words *f* in question with that in mind and, doing so, to my mind these words would not convey to many intelligent laymen that the garage is saying: 'If your car is damaged by fire we shall not be liable, and this is so even though it is due to our own fault that the fire happens.' In my opinion, other and plainer words are required. I, therefore, agree that on both grounds this appeal should be allowed.

g *Appeal allowed.*

Solicitors: *Herbert Smith & Co* (for the plaintiff); *Linklaters & Paines* (for the defendants).

Mary Rose Plummer Barrister.

h ²⁰ [1926] 1 KB 50

¹ [1926] 1 KB 102, [1925] All ER Rep 266

² [1922] 2 KB 87 at 92, [1922] All ER Rep 367 at 370

³ [1922] 2 KB 87, [1922] All ER Rep 367

⁴ [1945] 1 All ER 244, [1945] KB 189

Parker v Parker

FAMILY DIVISION

CUMMING-BRUCE J

9th, 10th, 11th NOVEMBER 1971

Divorce – Separation – Five year separation – Decree nisi – Refusal – Grave financial or other hardship – Financial hardship – Offsetting contingent financial loss – Husband serving police officer – Husband seeking decree – Wife thereby losing pension rights under police pension scheme – Loss constituting grave financial hardship to wife – Possibility of offsetting loss by means of insurance policy – Husband capable of paying premiums out of own resources – Husband securing obligation by means of second mortgage on his house – Decree granted – Divorce Reform Act 1969, ss 2 (1) (e), 4.

Divorce – Separation – Five year separation – Decree nisi – Refusal – Grave financial or other hardship – Pleading – Facts relied on in support of plea of grave financial hardship – Facts of confession and avoidance – Facts relied on to be pleaded – Procedure for obtaining further information.

The parties were married in 1949 and had two children born in 1951 and 1958. Since 1951 the husband had been a police officer. In 1962 the husband became friendly with another woman with whom he started to cohabit. In September 1964, after the husband, despite his promises, had failed to return to the wife, she obtained a matrimonial order with a non-cohabitation clause and maintenance for herself and the two children. The wife started work again and was employed as an auxiliary nurse, her take-home pay being £13. The rent for her council house was £4.50. She was entitled to a pension of £2.60 at the age of 60, i.e. in 13 years' time, if she continued in her employment, together with a lump sum tax-free payment of £446. The husband petitioned for divorce under s 2 (1) (e) of the Divorce Reform Act 1969 on the ground that the parties had lived apart for a continuous period of at least five years. The wife opposed the petition under s 4 of the 1969 Act on the ground that the dissolution of the marriage would result in grave financial or other hardship to her and that it would be wrong in all the circumstances to dissolve the marriage. In her answer the wife alleged that she had been a loyal wife and that the husband had incurred further financial responsibility by setting up another home. She alleged that in the event of dissolution she would lose pension rights under the police pension scheme and would have to pay higher contributions and receive a lower rate of pension in respect of her state retirement pension. The loss of entitlement to the police widow's pension was much the most important element of her contingent loss. According to the evidence: (i) if the husband died at his present salary her pension would be £186; (ii) if he left the police force within five years, no widow's pension right would survive; (iii) in five years time she would have a vested right to £319 whether the husband was still in the force or not; (iv) the maximum pension if he served 30 years, would be £425. These figures were liable to increase as a result of increases in the husband's salary and the two-yearly review under the Pensions (Increase) Act 1971 designed to take account of inflation. Apart from leaving his wife the husband had behaved honourably and responsibly and intended to continue in the police force.

Held – (i) The wife would suffer grave financial hardship if the marriage were dissolved; although the loss of the police widow's pension was contingent on her surviving the husband and the contingency was remote in time, her loss of possible future security after the husband's death was a grave hardship when considered in the light of her probable financial stringency after the age of 60 (see p 415 h and j, post).

(ii) Nevertheless this contingent loss and other financial losses flowing from dissolution could be offset out of the husband's financial resources by means of the purchase

a of a deferred annuity or of a policy producing a specified minimum sum on maturity; furthermore it was feasible for the husband to secure his obligation to make the annual premium payments by means of a second mortgage on his house, his ability to give that security being fundamental to the decision that he was capable of compensating for the security afforded by the police widow's pension (see p 416 a to d, post).

b (iii) Since the wife had herself obtained a non-cohabitation order dissolution could not reasonably be regarded as itself a hardship; accordingly, there being no other circumstances of hardship resulting from dissolution it was unnecessary to consider whether it would, in all the circumstances, be wrong to dissolve the marriage and accordingly a decree would be granted (see p 416 e, post).

c Per Cumming-Bruce J. A respondent on whom the onus of proving grave financial hardship lies should, by pleading, set forth the facts relied on. If the petitioner seeks to confess and avoid the financial hardship, he should plead the facts of confession and avoidance by reply. When a party seeks information as to the relevant financial circumstances of the other, the procedure should be to enquire by letter and then, if necessary, to obtain the information by reliance on interrogatories and discovery of documents (see p 413 d and e, post).

d Notes

For divorce on the ground of irretrievable breakdown when the parties are separated, and the refusal of a decree on the ground of hardship, see Supplement to 12 Halsbury's Laws (3rd Edn) para 437A 5, 6.

For the Divorce Reform Act 1969, ss 2 and 4, see Halsbury's Statutes (3rd Edn) 1969 vol, pp 1328, 1331.

e Petition

The husband petitioned for a decree of divorce on the ground that his marriage to the wife had irretrievably broken down and the parties had lived apart for a continuous period of at least five years immediately preceding the presentation of the petition. The facts are set out in the judgment.

f R L Johnson for the husband.
D J Mellor for the wife.

CUMMING-BRUCE J. This is a petition by a husband under s 2 (1) (e) of the Divorce Reform Act 1969, whereby he seeks dissolution on the ground that the parties were married but lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.

g The wife opposes the grant of a decree nisi, pursuant to s 4 (1) of the 1969 Act, on the ground that the dissolution of the marriage will result in grave financial or other hardship to her and that it would be wrong in all the circumstances to dissolve the marriage. By her answer the wife pleads the facts on which she relies. She pleads h that she was a loyal, faithful and good wife to the husband, bore him two children and brought them up in a respectable and decent home until, in 1963 and 1964, the husband formed an association with another lady, committed adultery with her and broke up the home; that since he left her, the husband has incurred further financial responsibility by setting up a home with that lady, begetting a child by her, and generally giving her financial preference over the wife and her children. She alleges j that if dissolution is granted, it is likely that the husband will marry that lady and thus further the financial preference she and her child already enjoy. The wife alleges that if a dissolution is granted, she will lose pension rights under the police pension scheme and will have to pay higher contributions and receive a lower rate of pension in respect of her state retirement pension.

By s 4 (2) of the 1969 Act, in this situation it is my duty to consider all the circumstances, including the conduct of the parties to the marriage and the interests of

those parties and of any children or other persons concerned, and if I am of opinion that the dissolution of the marriage will result in grave financial or other hardship to the respondent and that it would in all the circumstances be wrong to dissolve the marriage, it is my duty to dismiss the petition. The Act enacts that, for the purposes of the section, 'hardship' shall include the loss of the chance of acquiring any benefit which the respondent might acquire if the marriage were not dissolved. As a matter of construction, I take the view that the adjective 'grave' qualifies both 'financial' and 'other hardship'. In a case in which I am satisfied that the only fact mentioned in s 2 (1) on which the petitioner is entitled to rely in support of the petition is that mentioned in para (e), and that if apart from the section the court would grant a decree nisi, then I have to embark on the duty specified in the remaining words of the section. Here there is no issue on the fact of parting and separation for the relevant period, and I am satisfied that the only fact mentioned in s 2 (1) on which the petitioner is entitled to rely in support of his petition is that mentioned in para (e). I am also satisfied that, apart from s 4, this court would grant a decree nisi.

The first matter on which the court has to form an opinion is whether the dissolution of the marriage will result in grave financial or other hardship to the respondent wife. It is only if the court is of such opinion that it is then necessary to proceed to the next stage and to consider whether it would in all the circumstances be wrong to dissolve the marriage.

It is important, in applying s 4, to have in mind the provisions of s 6 of the 1969 Act, which afford protection for a respondent in certain cases by imposing on the court the duty not to make absolute a decree of divorce unless (inter alia) it is satisfied that the financial provision made by the petitioner for the respondent is reasonable and fair or the best that can be made in the circumstances. There is an obvious contrast between the language of s 6 (2) (b) and the language of s 4 (2), for in s 6 (2) (b) the protection is limited by the words (inter alia) that a decree absolute may be made if the court is satisfied that 'the financial provision . . . is . . . the best that can be made in the circumstances', and there may well be situations in which, though the financial provision may be the best that can be made in the circumstances, dissolution of the marriage will nonetheless result in grave financial or other hardship to the respondent.

The machinery for assessment of financial provision is s 5 of the Matrimonial Proceedings and Property Act 1970. By that section, the matters that the court has to regard in relation to assessment of financial provision are set out, and the duty of the court is:

' . . . so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.'

The words of great practical importance in that section are 'so far as it is practicable', because, when the court comes to exercise the powers under s 5 of the 1970 Act, it frequently is not practicable to place the parties in anything like the situation in which they would have been if the marriage had not broken down, and the result of the best financial provision that the court can make frequently is such as to involve a respondent wife in grave financial hardship.

As a matter of construction the court must, on the evidence, irrespective of what is practicable by way of financial provision, determine whether grave financial hardship will be caused to the respondent as a result of dissolution. It is first necessary, on the facts of the case, where s 4 (1) is in point, to determine whether the facts relevant to assessment of financial provision are such that, if the marriage is dissolved, grave financial hardship will result. This involves an enquiry into means carried to the point of appreciating the limits within which the court will have the opportunity

a of arriving at a determination under s 5 of the 1970 Act. The enquiry in proceedings for dissolution will not have to anticipate the actual determination of the orders that the court will subsequently make under s 5 if a decree nisi is pronounced.

The duty is to consider all the circumstances, including the conduct of the parties and the interests of any children or other persons concerned. Here, the wife has alleged matters of conduct of the husband in her answer, and the husband in correspondence has stated that he will rely on certain matters of conduct of the wife. b There are no specific rules of court specifying the matters of which parties should expressly give notice in their pleadings under ss 2 (1) (e) and 4 of the 1969 Act; and I am diffident, after the experience of a single case, to state what such rules might be. It appears to me to be desirable that if either party intends to rely on any matter of misconduct of the other party, or any other particular circumstance which is alleged c to be relevant to the court's consideration, the other party should be given notice thereof in sufficient time to enable the allegation to be investigated and rebutted. How far this should be by pleading, as compared to notice by letter, I prefer to leave to the judgment of practitioners, as I do not wish anything in this judgment to encourage the belief that a prolix pleading of the matrimonial history is necessary or desirable.

d Similar considerations apply to the pleading of facts material to grave financial hardship. A respondent on whom the onus of proving grave financial hardship lies should, by pleading, set forth the facts relied on. If the petitioner seeks to confess and avoid the financial hardship, he should plead the facts of confession and avoidance by reply. Where a party seeks information as to the relevant financial circumstances of the other, the procedure should be to enquire by letter and then, if necessary, to obtain the information by reliance on interrogatories and discovery of documents. e Counsel for the husband in this case made a reasonable complaint that the wife had failed to disclose her capital and income right up to the hearing of the case, although pressed to do so since 25th January 1971. This was a wholly justified complaint, although faced with the wife's silence, no application was made for discovery. If an adjournment had been necessary to discover and check the information, the wife f might have had to pay the costs occasioned thereby. The wife also herself came under suspicion that she, by want of candour, was making it as difficult as possible for the husband and the court to discover relevant truth. But, having heard her evidence, I acquit her of deliberate concealment.

I come to the facts relevant to my consideration of the circumstances. There was a conflict of evidence between the parties on the factors which contributed to the breakdown of the marriage. The view I formed should emerge from my findings g of fact. Both parties were to some degree blind to the difficulties which the other had experienced in the marriage.

The parties were married on 24th June 1949. The husband, then aged 22, was employed as a clerk. The wife was 24. Their daughter was born in 1951. Their son was born in 1958. Since 1951 the husband has been a police officer. Prior to the parting, he had been a detective sergeant and had reason to have been commended h for his part in investigating a case of very great complexity. The parties had to overcome, if they could, some difficulties. The wife felt that she was not sufficiently appreciated and felt that the husband could have spent more time with her and taken more trouble to make her happy. When aggrieved, she was liable to withdraw into silences, sometimes protracted, which lack of communication rebounded on the husband's capacity for affection. Though he was considerate in his physical j demands, his libido was stronger than hers and he resented the restrained degree to which she was able to participate in physical enjoyment. This was a misfortune for which neither should feel any sense of guilt. He was upset by what he recognised as her unfounded suspicions of a harmless social relationship, suspicions which probably had their origin in part in her feeling that there must be an extraneous explanation for the fact that he did not keep her company as much as she had hoped

that he would. Her remarks about that wounded him and damaged their relationship at a moment when the emotional bond between them was fragile. a

In early 1962 he became friendly with the lady with whom he has been cohabiting since September 1964. He began an affair. The wife discovered it. He half-heartedly hoped to continue to maintain the marriage as long as the children were their mutual responsibility and made promises to his wife which he failed to honour. On first discovery of the affair, she was shocked and immensely distressed. Her first reaction was to offer him a divorce; but when he evinced a desire to keep the marriage alive and promised to put the other woman away, she changed her mind. He did not keep his promises, and continued to deceive her. Finally, she became, not surprisingly, very embittered at his clandestine double life, told him that the marriage was finished and told him to leave. I was not satisfied that the husband's view of the degree to which she, during this period, undermined his determination to continue the marriage was a reliable picture of the contemporary situation. They parted. She wrote a complaint about his matrimonial misconduct to his chief constable. Although her primary object was to cause the chief constable to do something to stop him living with his lady friend, she appreciated at the time that there was a risk that the effect might be that her husband would have to leave the force. There was also an element of persecution in the two postcards which she sent to him at his police station. She decided not to divorce him, although she had given up all hope of future cohabitation. She obtained a matrimonial order on 24th September 1964, with a non-cohabitation clause, with a £6 order for maintenance for herself and £2 10s for each of the two children. Later the financial provision was varied, and at present periodical payments run at 5 guineas for herself and £2.50 for the son. The girl is now grown up. At no stage was there such misconduct on the wife's part as would prejudice her right to maintenance or other financial provision. b

The wife began to go out to work, which she had never expected to do again, and has been employed since as an auxiliary nurse. Her present gross wages are £17.60; take-home pay £13. She lives in a council house at a rent of £4.50. I accepted her evidence of outgoings and drawings of savings. There is no element of extravagance in her modest way of life, and she has organised her budget so as to build up a small savings fund as described. I am not satisfied that religious principle played any part in her opposition to divorce. Her anxiety about her loss of pension is now genuine, though in her bitterness in 1964 she was prepared to imperil it. In her present employment she is entitled to a pension presently assessed at £2.60 at the age of 60—that is in 13 years' time, if she continues working for the regional hospital board—together with a lump sum tax-free payment of £446. She pays superannuation deduction and is buying these benefits by her own efforts. c

The financial benefits which she will or may lose on divorce are as follows: loss of widow's state pension after the husband's death; loss of widow's police pension after the husband's death. As a single woman, she must pay 75p a week more on her stamp. If out of work, she is liable to pay 94p on her stamp, which would be recouped by supplementary benefit if she was entitled to such benefit. The loss of entitlement to police widow's pension is much the most important element of contingent loss. Particulars were given by Mr Brooks, who is skilled in local government and police superannuation, on the pension benefits which would be available to her on the death of her husband. (1) If the husband dies in police service, on his present salary today (which I hope will not happen) her pension would be £186. (2) If he leaves the force in the next five years, no widow's pension right survives. (3) In five years time he will have served 25 years' service. On his death then, she has a vested right in the value of £319, whether he is still in the force or not. (4) The maximum pension, if he serves 30 years, would be £425. d

These figures are subject to three possible uplifting factors. (1) The pension is founded on the average of the last three years pay before death, or retirement after 25 years. The salary has been increased by a third over the last three years, and the e

a trend has been for percentage increments to increase. (2) Actual pensions qualify for upwards review at two-yearly intervals under the Pensions (Increase) Act 1971, which is designed to take account of inflation. (3) If he is promoted, there will be a rise in the scale of salary to which the pension is related. His intentions are, of course, relevant. He could leave the force today and defeat altogether her claim to loss of contingent widow's pension; but he is not so irresponsible. On the contrary. Save for the unfortunate fact that he has left the wife to live with another lady, he has throughout behaved honourably and with a high sense of responsibility.

b The facts about his situation are these. He has continued, and intends to continue, in the police force. After the wife made representations to his chief constable, he was moved to a new post and relegated from being a detective sergeant to being a uniformed sergeant, at a financial loss of £4 a week. He has since passed the examination for the rank of inspector, but he has never been promoted. I heard no evidence c from his superiors about his prospects for promotion, and I must be careful about this. He said that the varied experience that he has had in the last few years is probably a long-term advantage to his prospects of promotion. My conclusion, which I hope is not incautious, is: (a) the irregularity of his matrimonial affairs in 1962 to 1964 d caused, or strongly influenced, demotion; (b) probably the continuing irregularity of his domestic life has prejudiced his chances of promotion since. As a matter of probability, if he can marry again, his prospects of promotion will improve and, in view of the ability which won him commendation in the very difficult assignment which he carried out ten years ago, I would expect him to be promoted if he re-married. But the promotion which he may attain is irrelevant to the quantum of her loss of pension rights resulting from dissolution, as it appears that he would be unlikely to be promoted if the irregularity of his present home-life continued indefinitely. e It may be relevant to his capacity to earn enough money to arrange in the future for financial arrangements which might benefit the wife. He is living in a house which he is buying on mortgage, bought in 1962 for £3,400, on a 100 per cent mortgage which he is repaying at the rate of £27.50 per month. With him f lives his lady friend, known locally as 'Mrs Parker', single, ready and eager to marry. They have a child aged three. They have lately taken into their family his granddaughter, as it is not easy for the parent to look after her. They intend to make this child permanently part of their family without financial aid from the parent. This shows an admirable devotion to family responsibility.

His gross pay and allowances are £186.86 per month, including a rent allowance which covers his mortgage outgoings. I do not deal with other details of his finances. I accepted his evidence; and they are set out accurately in his solicitors' letter about g it. He has a car, in which he travels daily to work, which costs him round about £9 a month on expenses. If the awkwardness of his domestic situation is eliminated, those journeys might also be eliminated. I do not know. By house purchase, he is building up a capital asset, from which the lady whom he hopes to marry may eventually benefit; and if they marry, she will gain the contingent security of the police widow's pension which the wife will lose on dissolution.

h On these facts, I am satisfied that the wife will suffer grave financial hardship if the marriage is dissolved. Although the loss of the police widow's pension is contingent on her surviving him, and although the contingency may be regarded, on a scrutiny of actuarial averages, as remote in time, her loss of possible future security after the death of the husband, at a time when she will most need it, is a grave hardship when considered in the light of her probable financial stringency after the age of 60; that i is, in 13 years time. And I take this view in spite of the recognition that, in the bitterness of the breakdown of her family life, she was prepared to intervene with the police authority in a way that carried the risk of destroying her pension prospects at a stroke. I am not surprised that she was tormented at the humiliating prospect of a younger woman reigning in her stead when she had borne two children and loyally seen the family through 12 formative years. The changing manners reflected in

the 1969 Act afford no index to the real pain suffered by some individual women such as this wife. a

But, although there is no pleaded case to this effect, I am satisfied that the contingent loss of benefit from police widow's pension can be offset out of the husband's financial resources. I am satisfied on the evidence that I have heard of financial resources and from statements tendered at the Bar on the cost of endowment policies designed to offset the contingent loss of police widow's pension by purchase of a deferred annuity or of a policy producing a specified minimum sum on maturity at a future date that compensation can be given to the wife for the loss of contingent police pension rights and other losses which she has proved as flowing from dissolution. b

There is, however, a further problem: can the court be confident that the husband will maintain the annual premium payments which must continue unbroken for the period specified in the policy? Without such confidence, there is a risk that the grant of compensating benefits under a policy of insurance will be frustrated. In this case, on the evidence and statements from the Bar which I have heard, I am satisfied that it is feasible for the husband to secure his obligation to make annual premium payments by means of a second mortgage on his house, and his ability to give that security is fundamental to my decision that he is capable of compensating for the security afforded by the police widow's pension by a policy of insurance. c

It is unnecessary at this stage of the proceedings to determine how it should be done, or whether it should be done. Those matters will arise for determination on the proceedings under s 5 of the 1970 Act. It is enough for the purposes of my opinion under s 2 (2) of the 1969 Act that resources are available which enable compensation for the contingent loss to be achieved, so that dissolution of itself will not result in grave financial hardship to the widow. d

There are no other circumstances of hardship, grave or otherwise, resulting from dissolution. Where a wife has herself obtained a non-cohabitation order seven years ago, formal dissolution cannot reasonably be regarded itself as a hardship unless there are factors present which do not exist in this case. It is therefore unnecessary for me to form an opinion whether it would, in all the circumstances, be wrong to dissolve the marriage. Obiter, my opinion is that it is not wrong. e

There will be a decree nisi under s 2 (1) (e) of the 1969 Act. I reserve to myself proceedings under s 5 of the 1970 Act, and adjourn those proceedings to chambers. f

It is for consideration whether the appropriate procedure in a case involving an allegation of grave financial hardship is to cause the notice under s 6 of the 1969 Act to be served and to consolidate the proceedings thereon with the proceedings on the petition for dissolution. Although I decided that that course was unnecessary on the evidence which I heard in this case, it may sometimes be the best practicable way of safeguarding the financial future of the respondent. g

Decree nisi.

Solicitors: *Greene & Greene*, Bury St Edmunds (for the husband); *Ellison & Co*, Colchester (for the wife). h

Alice Bloomfield Barrister.

a Eaglehill Ltd v J Needham Builders Ltd

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, SACHS AND STAMP LJJ

22nd, 25th, 26th OCTOBER, 30th NOVEMBER 1971

- b* Bill of exchange – Notice of dishonour – Validity – Time – Premature notice – Effect – Notice of dishonour given before bill dishonoured – ‘Given’ – Notice sent by post – Notice posted by holder day before bill dishonoured – Notice received by drawer on same day that bill dishonoured – Onus of proving that notice received after presentation and dishonour – Whether notice given when posted or when received – Whether notice which states incorrectly when posted that bill ‘has been dishonoured’ validated if dishonour taking place whilst notice in course of post – Bills of Exchange Act 1882, s 49.

d On 28th August 1970 the defendants drew a bill of exchange, payable four months after date, on F Ltd which owed them money. The bill was accepted by F Ltd payable at Lloyds Bank Ltd, Desborough Road, High Wycombe. The defendants, having indorsed the bill in blank, took it to the plaintiffs who discounted it, thereby becoming holders of the bill for value. Within a few weeks F Ltd went into liquidation. Both the plaintiffs and the defendants knew of the liquidation, and knew that in consequence the bill, when presented to the bank, would be dishonoured. The bill was duly despatched by the plaintiffs and received by Lloyds Bank at High Wycombe on the due date, 31st December. During the course of business on that day the bank marked the bill ‘Refer to Acceptor, Company in Liquidation’, and returned it to the plaintiffs. The plaintiffs, knowing that the bill would be dishonoured, had previously drawn up a letter addressed to the defendants stating: ‘Please take notice that the [bill of exchange] has been dishonoured by non-payment, and we request immediate settlement from you.’ The letter was dated 1st January 1971 but, through inadvertence, the plaintiffs posted it on 30th December 1970. It was received by the defendants in the first post on the morning of 31st December. No other notice of dishonour was given by the plaintiffs. In an action by the plaintiffs on the bill the defendants contended that, by virtue of s 48^a of the Bills of Exchange Act 1882, they were not liable since the notice of dishonour, having been given before the bill had in fact been dishonoured, was not a valid and effectual notice within s 49^b of the 1882 Act.

Held (Lord Denning MR dissenting) – The plaintiffs’ action should be dismissed for the following reasons—

- g* (i) in no circumstances could an action be brought on a bill of exchange unless notice of dishonour had been given; knowledge on the part of the defendant that

a Section 48, so far as material, provides: ‘Subject to the provisions of this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged . . .’

- h* *b* Section 49, so far as material provides: ‘Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules:— . . . (5) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment . . . (12) The notice may be given as soon as the bill is dishonoured and must be given within a reasonable time thereafter. In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless—(a) where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill. (b) where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no post on that day then by the next post thereafter . . .’

the bill had been dishonoured without notification thereof was of no effect; furthermore notice of dishonour could not be given until the bill had in fact been dishonoured; the onus lay on the plaintiff to prove that notice had been given in due time and before the action was brought (see p 424 f to h, p 425 b and c, and p 427 d and e, post); statement in Byles on Bills, 22nd Edn, pp 147, 148, approved;

(ii) there were no grounds for the contention that a notice of dishonour was not 'given' until it had been received and that, therefore, the notice given by the plaintiffs was not given until 31st December; where the notice was sent through the post the bill must already have been dishonoured at the time when the notice was despatched (see p 425 e and h and p 428 b, post); *Fielding & Co v Corry* [1898] 1 QB 268 distinguished;

(iii) in any event, even if a notice was not 'given' until it had been received, the onus was on the plaintiffs affirmatively to prove that the time when the bill was presented to and dishonoured by the bank on 31st December preceded the moment when the notice of dishonour was received through the post by the defendants on that day; there was no irrebuttable presumption that, where two events had taken place on the same day, they had occurred in proper sequence; nor was there any rule relating to the reckoning of parts of a day applicable to the present case; on the evidence the plaintiffs had failed to discharge the onus of proving that the notice of dishonour had been received by the defendants after the bill had been dishonoured (see p 426 b f and g and p 429 f, post); *Castrique v Bernabo* (1844) 6 QB 498 applied; *Aikman v Conway* (1837) 3 M & W 71 distinguished;

(iv) furthermore, a statement in a notice posted on 30th December which on its true construction meant that a bill had been dishonoured on or before that day did not acquire a different meaning because as a matter of law the notice containing the statement was not 'given' until the following day; being an incorrect statement that something had happened on or before 30th December it could not be regarded as a correct statement of something that happened on the following day; since the purported notice did not have the necessary characteristic of a notice of dishonour, that it should correctly state, not that the bill would be dishonoured, but that it had been dishonoured, it followed that no notice of dishonour had been given (see p 426 j to p 427 a and p 428 c to e, post).

Notes

For notice of dishonour by non-payment of a bill of exchange, see 3 Halsbury's Laws (3rd Edn) 207-212, paras 362-373, and for cases on the subject, see 6 Digest (Repl) 237-240, 1670-1706, 244, 1741-1746.

For the Bills of Exchange Act 1882, ss 48, 49, see 3 Halsbury's Statutes (3rd Edn) 214.

Cases referred to in judgments

Aikman v Conway (1837) 3 M & W 71, 7 LJEx 12, 150 ER 1061, 45 Digest (Repl) 271, 400.
Bailey v Bodenham (1864) 16 CBNS 288, 33 LJCP 252, 10 LT 422, 143 ER 1139, 6 Digest (Repl) 248, 1781

Bickerdike v Bollman (1786) 1 Term Rep 405, 99 ER 1165, 6 Digest (Repl) 269, 1962.

Carew v Duckworth (1869) LR 4 Exch 313, 38 LJEx 149, 20 LT 882, 6 Digest (Repl) 271, 1982.

Castrique v Bernabo (1844) 6 QB 498, 14 LJQB 3, 115 ER 186, 6 Digest (Repl) 237, 1667.

Caunt v Thompson (1849) 7 CB 400, 18 LJCP 125, 12 LTOS 531, 137 ER 159, 6 Digest (Repl) 260, 1889.

Claridge v Dalton (1815) 4 M & S 226, 105 ER 818, 6 Digest (Repl) 271, 1979.

Fielding & Co v Corry [1898] 1 QB 268, 67 LJQB 7, 77 LT 453, 6 Digest (Repl) 247, 1778.

Hartley v Case (1825) 1 C & P 676, 3 LJOSKB 262, 107 ER 1085, 6 Digest (Repl) 255, 1832.

Kennedy v Thomas [1894] 2 QB 759, 63 LJQB 761, 71 LT 144, 6 Digest (Repl) 244, 1743.

Lawson v Sherwood (1816) 1 Stark 314, 6 Digest (Repl) 245, 1750.

May v Chidley [1894] 1 QB 451, 63 LJQB 355, 6 Digest (Repl) 443, 3110.

- a* *R v Appeal Committee of County of London Quarter Sessions, ex parte Rossi* [1956] 1 All ER 670, [1956] 1 QB 682 [1956] 2 WLR 808, 16 Digest (Repl) 474, 2929.
Stocken v Collin (1841) 7 M & W 515, 10 LJEx 227, 151 ER 870, 6 Digest (Repl) 254, 1829.
Yeoman Credit Ltd v Gregory [1963] 1 All ER 245, [1963] 1 WLR 343, Digest (Cont Vol A) 67, 13974.

Case also cited

- b* *Tindal v Brown* (1786) 1 Term Rep 167, 99 ER 1033, *affd* (1787) 2 Term Rep 186, 6 Digest (Repl) 245, 1747.

Appeal

This was an appeal by the defendants, J Needham Builders Ltd, against the judgment of Donaldson J given on the trial of the action on 28th May 1971 whereby it was adjudged that the plaintiffs, Eaglehill Ltd, were entitled to £7,660 against the defendants as drawers of a bill of exchange for such sum which was dishonoured by non-payment on 31st December 1970 (being the last day of grace), and that a notice of dishonour given to the defendants by a letter received by the defendants on 31st December 1970 constituted a valid notice of dishonour although given on the same day as the dishonour of the bill. The facts are set out in the judgment of Lord Denning MR.

- d* *Norman C Tapp QC* and *M F Gattleson* for the defendants.
R M Yorke QC and *A D R Abdela* for the plaintiffs.

Cur adv vult

30th November. The following judgments were read.

LORD DENNING MR.

e 1. *Introductory*

- In this case the plaintiffs have all the merits. They are the holders for value of a bill of exchange for over £7,000. The defendants are the drawers of the bill. The bill was dishonoured. The plaintiffs gave the defendants notice of dishonour, but they sent it off *a day too soon*; and, as it happened, the post office took only one day to deliver it instead of two days. Owing to this *expeditious* delivery by the post office, the defendants say that they are exempt from all liability on the bill. They need not pay the £7,000 which they ought in justice to pay. There are no merits in this defence. But we have to consider whether it is good in law.

2. *The facts*

- g* The defendants, J Needham Builders Ltd, are a large company of builders carrying on business in Leigh Street, High Wycombe, Buckinghamshire. In August 1970 they were owed a lot of money by a company of furniture-makers called Fir View Furniture Co Ltd of Beech Road, Wycombe Marsh, High Wycombe, Buckinghamshire. In order to get payment, on 28th August 1970 J Needham Builders Ltd drew a bill of exchange on Fir View Furniture Co Ltd for £7,660, payable four months after date. I set it out:

- h* 'Bill for £7,660 os od. 28th August 1970
 Four months after date pay to us or our Order the sum of Seven thousand six hundred and sixty pounds only for Value received.
 To Fir View Furniture Co. Limited. For and on behalf of
 Beech Road, Wycombe Marsh, J. Needham Builders Ltd.
 High Wycombe, Bucks. A. D. Russell.
 Director.'

- j* Fir View Furniture Co Ltd accepted the bill stamping on it:

'ACCEPTED payable at Lloyds Bank Ltd. Desborough Road High Wycombe.
 p.p. Fir View Furniture Co. Ltd.
 Director: J Wheatley
 Secretary: J M Buckley.'

The director indorsed the bill in blank on the back by writing simply:

‘For and on behalf of J. Needham Builders Ltd.
A. D. Russell.
Director.’

By this indorsement in blank, the bill became payable to bearer. The drawers—J Needham Builders Ltd—took it along to a discount house, Eaglehill Ltd, the plaintiffs, who carry on business in Cannon Street in the City. They discounted the bill, that is to say, Eaglehill Ltd paid J Needham Builders Ltd the amount of the bill, less a discount, and became themselves the holders of the bill for value.

In the next few weeks the Fir View Furniture Co Ltd went into liquidation. Thenceforward they were unable to meet their obligations. If the bill was presented, it would inevitably be dishonoured. Both the holders and drawers knew this. But it was still necessary for the holders to present the bill for payment on the due date and to give notice of dishonour. I will take these two requirements in order.

3. *Presentment for payment*

The bill was payable four months after date, that is, after 28th August 1970. Allowing for the three days of grace, that meant that *the bill was due and payable on 31st December 1970*, which was a Thursday. It was absolutely necessary for the bill to be presented for payment on that day at Lloyds Bank, Desborough Road, High Wycombe. If it was not so presented, the drawers—J Needham Builders Ltd—would be discharged: see s 45 of the 1882 Act. Everyone knew beforehand that Fir View Furniture Co Ltd were in liquidation and that the bill would, on presentment, be dishonoured. But that did not dispense with the necessity for presentment: see s 46 (2) (a) of the 1882 Act.

The holders, or their bankers, sent the bill by post to Lloyds Bank Ltd, Desborough Road, High Wycombe. *It arrived there by the first post on the due date—31st December 1970.* The bank manager gave this description of what they did with it:

‘The Bill in question was received by us at the commencement of business. We were aware that Fir View Furniture Company Ltd, upon whom the Bill was drawn were in liquidation and during the course of the day the Bill was marked, “Refer to Acceptor, Company in Liquidation”. We cannot be specific as to the actual time that the Bill was marked during the course of the day’s business but would not have awaited the close of business before so doing in view of the liquidation of Fir View. Had an enquiry been made during the course of the day’s business by another Bank, the enquirer would have been told that the Bill had been dishonoured.’

It is plain, therefore, that the bill was duly presented for payment on the due date and was dishonoured on that day. But at what time was it dishonoured? If the bill had arrived at the bank on 29th or 30th December, the bank would receive it as agent for presentation to itself: see *Bailey v Bodenham*¹. It would be its duty to hold it until the due date, 31st December, and present it to itself at the commencement of business on that day. But, seeing that it arrived on the morning of the due date, 31st December, the bank did not receive it as agent for presentation to itself. The bill was duly presented to the bank, through the post, at the commencement of business on that day. The bill was not then paid. It was then and there dishonoured. The time of dishonour was the commencement of business on that day—I presume 9.30 a.m. Later on that day the bill was marked ‘Refer to Acceptor, Company in liquidation’. But that was only a way of noting the dishonour. The bill had already been dishonoured at the commencement of business at 9.30 a.m.

a 4. *The need to give notice of dishonour*

Although the drawer, J Needham Builders Ltd, knew perfectly well that Fir View Furniture Co Ltd were in liquidation and that the bill would be dishonoured on presentation, nevertheless it is settled law that the holder was bound to give the drawer notice of dishonour. Many judges have regretted this rule. In *Claridge v Dalton*² Bayley J said³: 'a party who cannot be prejudiced by want of notice, shall not be entitled to require it.' In *Carew v Duckworth*⁴, Bramwell B said⁵:

'The true rule should be, that no notice of dishonour is required where it would convey no information, that is, when the party sued knew beforehand that the bill would not be paid . . .'

But, in spite of all these regrets, the judges have felt bound to hold that 'knowledge of the probability, however strong, that a bill of exchange will be dishonoured, cannot operate a notice of dishonour or dispense with it', see *Caunt v Thompson*⁶. The editors of Smith's Leading Cases said this about it⁷:

'... it is difficult to see how the drawer could be prejudiced by want of notice, when the drawee had become bankrupt or notoriously insolvent. Yet in both these cases he was unquestionably entitled to it':

d see the notes to *Bickerdike v Bollman*⁸. The rule is now contained in s 48 of the 1882 Act which provides:

'... when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour *must* be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged . . .'

e 5. *The time for giving the notice of dishonour*

The time for giving notice of dishonour *starts* at the very moment when the bill is dishonoured. In this case 9.30 a.m. on 31st December 1970. The holder can then at once give notice to the drawer. But he cannot bring an action against the drawer until the next day: see *Kennedy v Thomas*⁹. The time for giving notice *ends* within a reasonable time after the bill is dishonoured. When the parties live in the same place, a reasonable time includes the whole day after the dishonour, but no longer. When they live at different places, it includes the second day after the dishonour, but generally no longer. It may be given by messenger, by post, by telephone, by telegram or by telex. In this case the holders, Eaglehill Ltd, and the drawers, J Needham Builders Ltd, resided in different places. The holders in London. The drawers in High Wycombe. If sent by post, the *latest* time for giving notice of dishonour was by sending it off by post on the day after the dishonour of the bill, that is, on 1st January 1971 (see s 49 (12) (b) of the 1882 Act), so that it would, in the ordinary way, arrive next day, but the *earliest* time for giving notice was as soon as the bill was dishonoured, that is, at 9.30 a.m. on 31st December 1970.

6. *The notice of dishonour here*

The holders in London, knowing of the liquidation of the acceptor, made preparation to give notice of dishonour within the prescribed time. They drew up this letter:

'110 Cannon Street,
London, E.C.4.
1st January, 1971

J. Needham Builders Ltd.,
Leigh Street,
High Wycombe,
BUCKS.

2 (1815) 4 M & S 226

3 (1815) 4 M & S at 231

4 (1869) LR 4 Exch 313

5 (1869) LR 4 Exch at 316

6 (1849) 7 CB 400

7 11th Edn, vol 2, p 111

8 (1786) 1 Term Rep 405

9 [1894] 2 QB 759

Dear Sirs,

Please take notice that the undernoted Bill(s) of Exchange has been dishonoured by non-payment, and we request immediate settlement from you.

On receipt of your remittance, we will return the Bill(s) of Exchange to you.

Drawer	Acceptor	Amount	Due Date
J. Needham Builders Ltd.	Fir View Furniture Co. Ltd.	£7,660.0.0.	31/12/70

Yours faithfully,
p.p. EAGLEHILL LIMITED
John E. Morris
Director'

If that letter had been posted on the date it bore, 1st January 1971, it would undoubtedly have been a good notice of dishonour: see s 49 (12) (b). If it had been posted on 31st December 1970 and received next day on 1st January 1971, it would also have been beyond doubt a good notice of dishonour. But the lady in the office was anxious to clear her desk and posted it one day early, that is, on 30th December 1970. She posted it about 5.00 pm on that day. If it had taken two days to get there, so that it arrived on 1st January 1971, it would have been a good notice of dishonour. But it took only one day. It arrived at the office of J Needham Builders Ltd at High Wycombe by the first post on the morning of 31st December 1970; and they stamped on it their receipt stamp: 'J. Needham Group 31st Dec 1970 Received'. Does that make it a bad notice of dishonour? That is the question.

7. What is meant by 'giving' notice of dishonour?

Sections 48 and 49 of the 1882 Act require that notice of dishonour must be 'given' to the drawer and each indorser, within a reasonable time. It seems to me that, according to the ordinary use of language, a notice is not 'given' to a man until he receives it. In this branch of the law, as in others, 'it is of the very essence of such notice that it should be communicated to or should reach the party concerned'; cf *Regina v Appeal Committee of County of London Quarter Sessions, ex parte Rossi*¹⁰ per Morris LJ. Before the statute, it was held that when notice of dishonour is sent by post it is 'given' at the time when the letter is received by the person concerned, not at the time when it is sent off: see *Castrique v Bernabo*¹¹. Since the statute, it has been held that if the holder sends his letter to the wrong address but then sends a telegram to the right address which is received by the drawer at the time when a letter rightly addressed would have been delivered, it is a good notice: see *Fielding & Co v Corry*¹².

These cases accurately represent the law merchant. They show that a notice of dishonour is given by the holder to the drawer at the time when the drawer receives it; subject, however, to this exception: that, if the holder 'sends' it by post, so that in due course of delivery it would arrive in time, he is 'deemed' to have given due notice of discharge, notwithstanding that it is lost or delayed in the post; see *Stocken v Collin*¹³; s 49 (15) of the Act.

In this case we have a letter dated in advance '1st January, 1971' but posted on 30th December 1970. It might well have taken two days in transit, especially at that season of the year. If it had taken two days, and had reached the drawer on the morning of 1st January 1971, it would have been a perfectly good notice of dishonour. As it happened, however, the post office was on this occasion unusually expeditious. It delivered the letter on the morning of the due date, 31st December 1970. Does this expedition make the notice bad? I think not. It is clear law that a holder is not to

¹⁰ [1956] 1 All ER 670 at 678, [1956] 1 QB 682 at 696

¹¹ (1844) 6 QB 498

¹² [1898] 1 QB 268

¹³ (1841) 7 M & W 515

a suffer owing to the delays of the post office. So also he should not suffer by its expedition.

8. *Parts of a day*

b The bill was received at Lloyds Bank, High Wycombe, by the first post on 31st December 1970. It was presented for payment at the commencement of business on that day—I presume 9.30 a.m.—and was at once dishonoured. The letter giving notice of dishonour was delivered to the premises of the drawers—J Needham Builders Ltd—at High Wycombe by the first post on 31st December 1970. We do not know when the letter was opened. When was the notice ‘received’? I should think at the commencement of business on that day, that is, when the post was opened and the letter put before a person in authority. I would expect it to be about 9.30 a.m. also. Which took place first, the dishonour or the notice of dishonour?

c It is suggested that we ought to look at the parts of a day, so as to ask this question: if the bill was dishonoured at the bank at 9.30 a.m. and the notice of dishonour received by the drawer at 9.31 a.m., the notice is good. But, if the notice of dishonour was received by the drawer at 9.29 a.m., it is bad.

d I decline to look into the times so narrowly. It is an absurd exercise. The law has long recognised the difficulty of getting evidence as to the exact time of day when any particular event takes place. For that reason it has laid down the general rule that the law does not have regard to parts of a day. When it is a question which of the two acts on one day was done first, it presumes that everything was done regularly. As Alderson B said in *Aikman v Conway*¹⁴:

e ‘It is a good rule, that when two things are done on the same day, that shall be presumed to have been done first which ought to be so.’

Seeing that the dishonour ought to take place before the notice of dishonour, we should presume that it did so. This rule was applied to bills of exchange by Megaw J in *Yeoman Credit v Gregory*¹⁵, when he expressed the view that a notice of dishonour was valid if given on the same day as the dishonour.

f Applying this principle, I am of opinion that we should presume that the bill was dishonoured at Lloyds Bank Ltd before the time when notice of dishonour was given to the drawers—J Needham Builders Ltd. So the notice of dishonour was good. This was the view of Donaldson J, and I entirely agree with it.

9. *The contrary arguments*

g As against these reasons, stress is laid on the words of s 48, which says that, when a bill *has been* dishonoured, notice of dishonour must be given to the drawer: and of s 49 (12), which says that the notice may be given *as soon as* the bill is dishonoured. It is said that the holder must not send off his notice of dishonour until after the bill has been dishonoured. I do not agree. The word ‘given’ in those sections does not mean ‘send off’. It means ‘received’. Notice is given to the drawer at the time when he *receives* the notice. It is permissible, therefore, to prepare the notice in advance, and to send it off beforehand. It is good so long as the drawer receives it after the bill is dishonoured.

h Scorn is levelled too at the lack of logic in the law which says (so it is supposed): if on the day before the due date a holder says *truly* to the drawer: ‘This bill will be dishonoured on presentation tomorrow’, it is a bad notice. But, if he says *untruly*: ‘This bill has been dishonoured’, and sends it off, it is a good notice. But this is answered again by remembering that it is not the sending off of the notice that matters. It is the *receipt* of it by the drawer. If the notice is true at the time when the drawer receives it, then it is a perfectly good notice. In the present case it was known to all that the bill would certainly be dishonoured on the due date. I see

¹⁴ (1837) 3 M & W 71 at 72

¹⁵ [1963] 1 All ER 245, [1963] 1 WLR 343

nothing untrue in preparing a notice in advance and posting it beforehand—so long as it is timed to arrive on the due date. By the time it arrives it is true. a

Finally, it is said that the law must be clear and certain; and that, for this reason, it must hold this notice to be bad. But the law, as I consider it to be, is clear and certain. It says that a notice of dishonour is good if it is *received* on the same day as the dishonour. That is surely certain enough for anyone.

Conclusion b

Beyond any question, justice requires that the defendants should pay this bill of £7,660. They drew it and, by their indorsement, warranted that it would be met on presentation. Long before it was presented, they knew that the acceptor was insolvent. They knew it would not be met on presentation. It was not met on the due date. It was dishonoured. And on that very day the defendants received a letter telling them it had been dishonoured. But they now say to the holders: 'You posted your letter a day too soon. So we are discharged.' I have never met a more technical or unmeritorious defence. The commercial judge, who knows much about these matters, rejected it. So would I. I would dismiss this appeal. c

SACHS LJ. Despite the lack of merits on the side of the defendants, I am unable to agree that their appeal should be dismissed. d

The first point to be considered is counsel for the plaintiffs' contention that to establish the plaintiffs' cause of action it is not necessary to prove that the defendants were given due notice of dishonour; it was suggested that in law an action could be commenced in certain circumstances before such notice had been given. This submission, as he rightly conceded, runs quite contrary to the general view of the profession, to the writings in all textbooks both new and old, and to well-established decisions such as *May v Cridley*¹⁶. It is sufficient to refer to Byles on Bills¹⁷ where the law is stated in precisely the same terms as it was in the 10th edition (1870) of that authoritative work. The relevant paragraph states: e

'It lies on the plaintiff to show that notice was given in due time and before action brought.' f

One of the cases cited is *Lawson v Sherwood*¹⁸ where Lord Ellenborough said:

'The *onus probandi* lies upon the plaintiff, and since he had not proved due notice he must be called.' g

That is a correct statement of the law as it is and has been for over a century; the contrary submission fails.

The constituents of the due notice which the plaintiffs must prove have since 1882 been laid down by the Bills of Exchange Act of that year. It is clear that the notice must follow after the dishonour. Section 55 (1) (a) enacts, so far as is relevant, that the drawer of the bill by drawing it: h

'Engages that on due presentment it shall be . . . paid . . . and that if it be dishonoured he will compensate the holder . . . *provided that the requisite proceedings on dishonour be duly taken*'.

Unless the procedure laid down in s 49 is followed, the liability does not arise—the contingent liability does not crystallise. j

When considering the effect of the relevant provisions of the Act it is at all stages necessary to bear in mind that, as stated in Byles¹⁹:

16 [1894] 1 QB 451

17 22nd Edn, p 157

18 (1816) 1 Stark 314 at 315

19 Byles on Bills, 22nd Edn, pp 147, 148

- a 'Notice does not mean mere knowledge but actual notification, for a man who can be clearly shown to have known beforehand that the bill would be dishonoured is nevertheless entitled to notice.'

That has been the law at any rate since 1849 (cf *Caunt v Thompson*²⁰). Notice before dishonour has no effect. In this behalf it is to be noted that s 48 says in the plainest terms:

- b '... when a bill *has been* dishonoured by ... non-payment, notice of dishonour *must* be given to the drawer ... and any drawer ... to whom *such* notice is not given is discharged ...'

The words in italics are reinforced by the provisions, inter alia, of s 49 (see, for instance, r (12)).

- c It being thus clear that the notice must be subsequent to the dishonour, it is in my judgment impossible to say that a notice despatched before the due date and received before the presentation for payment can constitute due notice. I reject the submission (made primarily in connection with counsel for the plaintiffs' first contention) that a notice proved both to have been sent before and also received before the dishonour took place could be regarded as due notice.

- d In thus stating my opinion on the law I have so far refrained from canvassing whether as regards notice being 'given' the moment of time to be considered is that when the notice is sent or that when it is received, or both; that point is immaterial on the conclusions as to the facts under consideration which I am about to relate. Having, however, had the advantage of reading the judgment about to be delivered by Stamp LJ it is as well to state that I am disposed to agree with what he has said on that matter. *Fielding & Co v Corry*²¹, on which the defendants relied, does not appear to me to be an authority to the contrary—indeed it deals with very special facts. There a notice despatched after dishonour had been addressed to the wrong branch of a bank, but was followed by a telegram to the correct branch of the same bank; the majority of the court held that there had been good notice. A L Smith LJ was of the opinion¹ that an address mistake could be rectified. Rigby LJ stated²:

- f '... it is not material that the notice has been wrongly addressed, provided that this has not prevented it getting to the proper person within the proper time';

whilst Collins LJ, when dissenting, said³:

- g 'The point on which I differ is the question whether different branches of a bank are to be treated as one and the same person for the purpose of giving and receiving notice of dishonour.'

On balance it seems that this decision tends against the proposition that all that matters is the time of receipt of the notice. On the footing that the Act requires any notice to be both despatched and received after dishonour, the plaintiffs' claim would, of course, clearly fail.

- h Turning now to the facts of the instant case, it is convenient first to examine what would be the position if (contrary to my view) the onus lies on the defendants to show that notice was *received after the presentation*. The two relevant buildings—the offices of the defendants in Leigh Street and the premises of Lloyds Bank in Desborough Road—were only about 100 yards apart. On the facts as set out in the agreed statement it is definitely on balance of probabilities more likely that the notice of dishonour reached the defendants before the bill of exchange got to the stage of being dishonoured rather than after that moment; so the defendants could

20 (1849) 7 CB 400

21 [1898] 1 QB 268

1 [1898] 1 QB at 271

2 [1898] 1 QB at 272

3 [1898] 1 QB at 273

properly claim to have discharged the assumed onus. The earliest reasonable time for presentation must either be 9.30 a.m. (the commencement of normal banking hours) or some time between 9.00 a.m. and 9.30 a.m., leaving sufficient time for the mail to be opened and reach whatever member of the staff has to take action on it; even in 1970 postal deliveries at business premises in the centre of a town (e.g. the defendants' premises) normally take place before 9.00 a.m., i.e. *before* the time of presentation. a

As, however, the onus in my judgment lies on the plaintiffs affirmatively to prove that the notice relied on was after presentation, then, of course, they are in even greater difficulties—for clearly they cannot be said to have discharged such a burden. b

It follows that the plaintiffs must fail unless they can substantiate one or more of their other contentions. Of these the most strongly pressed was the submission that when two events take place on the same day there was an irrebuttable presumption that they occur in proper sequence and that accordingly the notice of dishonour must in that case be presumed to have arrived at the plaintiffs' premises after the time of dishonour. For this proposition the plaintiffs relied solely on *Aikman v Conway*⁴. There it was laid down that the practice in the office of the Court of Queen's Bench in effect produced such a presumption in regard to the rules of pleading. The court had sent to enquire the practice and Parke B said⁵: c

'Master Le Blanc certifies to us, that if both acts are done on the same day, there is no irregularity. . .'

d

Alderson B then gave his judgment in the terms cited by Lord Denning MR. Basing himself on that authority, counsel for the plaintiffs went so far as to submit that even if it were conclusively proved that a notice of dishonour reached a drawer's office at 8.00 a.m. and that the relevant bill was presented at 3.00 p.m., the notice must be presumed to have been given after the presentation. To my mind *Aikman v Conway*⁴ simply is not in point in relation to the mercantile law relating to bills of exchange; that indeed was decided as long ago as *Castrique v Bernabo*⁶, when the submission now made by counsel for the plaintiffs was rejected in the days when letters posted in the city of London before 3.00 p.m. were delivered in Oxford Street before 6.00 p.m. I firmly decline to hold that this court is bound to come to any conclusions contrary to the truth. There may well come a case where a presumption arises that events relating to a bill of exchange have occurred in due sequence, but it could not apply to the instant facts nor could it be irrebuttable. e

Similarly, with all respect to those who may be disposed to a contrary view, as was Megaw J speaking obiter in *Yeoman Credit Ltd v Gregory*⁷, I find myself unable to see that there exists any rule relating to the reckoning of parts of a day that applies in the instant case. Indeed, with all respect to what has been said as to 'parts of a day not counting', I cannot accept that this concept can be prayed in aid by the plaintiffs, nor the suggestion that whereas an anticipatory notice given three days in advance of dishonour is bad, yet when given three hours in advance it is good. f

Finally should be mentioned counsel for the plaintiffs' gloomy prognostications of mercantile difficulties in these days of timed telex notices of dishonour if the plaintiffs' contentions were not accepted. These failed to impress me, for in at least 99.99 per cent of cases the mere fact that a telex notice states that dishonour *has* occurred enables it to be said by the sender—as would be accepted by a court—'of course I only gave the notice when I knew it had occurred'. Quite contrary to that submission on behalf of the plaintiffs I would deprecate the confusion which would be introduced into the law by finding in their favour. In that event it would be necessary to hold that a notice which stated facts that to the knowledge of the recipient must have been untrue when it was sent, and which in essence was at best g

⁴ (1837) 3 M & W 71

⁵ (1837) 3 M & W at 72

⁶ (1844) 6 QB 698

⁷ [1963] 1 All ER 245, [1963] 1 WLR 343 h

a saying 'The bill will be dishonoured in our opinion' can by some alchemy of the courts be transformed into a notice that complied with the provisions of the 1882 Act despite the rule in *Caunt v Thompson*⁸. Here again I would record my respectful agreement with the judgment about to be delivered by Stamp LJ. Such a holding would breed confusion. The Act has many provisions that can result in hard cases owing to mistake in an office; but it has the outstanding merit of providing clear and certain law on which a busy mercantile community can know exactly where it stands.

b It is now a very long time since Lord Mansfield stressed the importance of certainty in the law merchant. For well over a century there has been certainty that to establish due notice of dishonour it must be shown that it was notice after presentment and dishonour. In this technical sphere of the law merchant it would be no good service to introduce complexity and uncertainty by grafting artificial exceptions on to a well-known rule—exceptions moreover which run contrary to the plain meaning of the words of the 1882 Act and which would make an inroad on its provisions.

c I would accordingly allow the appeal.

STAMP LJ. In my judgment no effective notice of dishonour of the bill here in question was ever given.

d However informal a notice of dishonour may be, and I accept that it may be given in the most informal way and in the most informal terms; it must at least be couched in such terms that the recipient knows that the bill has been dishonoured. Nothing less than that will do: see *Hartley v Case*⁹ and r (5) of s 49 of the Bills of Exchange Act 1882. It is common ground that a statement that the bill will be dishonoured will not do however certain the happening of that event may be.

e The notice relied on by the plaintiffs as notice that the bill had been dishonoured said 'Please take notice that the undernoted Bill(s) of Exchange has been dishonoured by non-payment'. The notice, received as it was by the defendants by the first post on 31st December 1970, could only have been sent not later than the previous day and according to the ordinary meaning of the English language the statement in it that the bill *had been* dishonoured meant, and could only mean, that this had happened

f not later than the previous day. The bill had not in fact been dishonoured on the previous day and if the matter rested there, the statement in the notice that the bill had been dishonoured being an erroneous statement, could not be a notice of dishonour. An incorrect intimation that the bill has been dishonoured by non-payment cannot satisfy the requirements of r (5) of s 49. The parties being both aware that the bill did not become payable until 31st December and that it would then be dishonoured, the defendants might no doubt have regarded the notice as a notice that the bill would be dishonoured on presentation; but, as I have said, such a notice is not a good notice of dishonour.

g What is submitted on behalf of the plaintiffs is that a notice of dishonour is not 'given' until it is received, and because by the time this notice was received the bill must, so it is said, be taken to have been dishonoured, the statement in it that the bill had been dishonoured had become a true statement so that the notice was a notice of dishonour.

h The authorities most relied on in support of the proposition that notice is not given until it is received were *Castrique v Bernabo*¹⁰ and *Fielding & Co v Corry*¹¹. The former case is in my judgment authority for no more than that where a writ is issued before receipt of the notice of dishonour, the cause of action is not complete. In the latter case a letter containing a notice of dishonour was sent off in due time to the wrong branch of the bank. It was followed by a telegram sent off too late to the correct branch of the bank correcting the error. It was held by A L Smith LJ¹² that it would

8 (1849) 7 CB 400

11 [1898] 1 QB 268

9 (1825) 1 C & P 676

12 [1898] 1 QB at 271

10 (1844) 6 QB 498

be frittering away the provisions of the Act if a mistake in the address could not be rectified, if the effect of the rectification is that the person to whom notice is sent in point of fact gets notice in due course and in due time. Rigby LJ¹³ held that it was not material that the notice had been wrongly addressed provided this did not prevent it getting there. I find nothing in either of the cases relied on to support the submission that a notice 'sent off'—I quote the words of paragraphs (a) and (b) of r (12) of s 49—on one day is not given until the day it is received. Assuming, however, that for some purpose a notice of dishonour does fall to be treated as given at the time it is received, it does not follow that for all purposes it falls to be so treated or as not coming into existence until it is received; and, at the risk of appearing to be playing with words, I would remark that you cannot 'send off' a notice of dishonour which does not exist. In my judgment it cannot in any event be so treated for the purpose of ascertaining its meaning and effect.

A statement in a notice posted on 30th December which on its true construction means that a bill has been dishonoured on or before that day does not in my judgment acquire a different meaning because as a matter of law the notice containing the statement is not 'given' until the following day. Being an incorrect statement that something happened on or before 30th December, it cannot be regarded as a correct statement of something that happened the following day. Putting it in another way, no notice of dishonour was in my judgment ever 'given' because no notice containing a true statement that the bill had been dishonoured was ever delivered or sent. The notice here never had the necessary characteristic of a notice of dishonour that it should correctly state, not that the bill would be dishonoured, but that it has been dishonoured, and so qua notice of dishonour was never given.

A consideration of the terms of r (12) of s 49 of the Act leads me to the same conclusion. Paragraphs (a) and (b) of that rule speak of the notice—I stress the definite article—being given or sent off. What is contemplated is a notice having the necessary characteristic of a notice of dishonour—namely, containing a statement that the bill has been dishonoured—being sent off, and not a notice which not having that characteristic, may or may not acquire that characteristic while in transit. Moreover a plain reading of r (5) of s 49 shows, as I think common sense requires, that the notice of dishonour must state that the bill has been dishonoured, and since you cannot state that something has happened until it has happened, it follows, in my judgment, as the night follows the day, that a notice given before dishonour is not and never can be a notice of dishonour.

Any other view of the matter would in my judgment lead to great confusion. If while denying validity as a notice of dishonour to a notice posted on the second day of grace stating truthfully that the bill would be dishonoured on presentation, the law upheld the validity of one posted at the same moment stating untruthfully that the bill had been dishonoured, it would be at least anomalous. If it did so by attributing to the language of the notice an ambulatory effect operating on the state of affairs existing at the date the notice was received, it would introduce legal subtlety where all ought to be clear and would put a gloss on rules which codified the law as long ago as 1882 and have become well known to those dealing with bills of exchange. In general the meaning and effect of a document does not change while it is in the hands of the postman. If by applying to the construction and effect of a notice of dishonour the doctrine that the notice is not given until it is received and so treating it as having an ambulatory effect speaking not from the time the writer spoke but by reference to a changed state of affairs subsisting at the date of its receipt there would be introduced into this particular branch of the law a peculiarity not, so far as I can recollect, to be found in any other of its branches.

In the present case the defendants are without merit because they knew the bill would not be met; but the confusion which would result from upholding the plaintiffs' submission may be illustrated by supposing that the defendants had not had

a that knowledge. They would have known when they opened the first post on the morning of 31st December that it could not be true, as represented in the notice, that the bill had been dishonoured prior to that day; but if the submission of the plaintiffs that technically the notice speaks from the time of its receipt is well founded, the defendants would, until they made some enquiry, be in ignorance of whether the bill had been dishonoured on 31st December. Nothing could be more unsatisfactory than a situation in which the recipient of a notice of dishonour is left in uncertainty b whether the bill has or has not been dishonoured and must make enquiry to ascertain the fact; a situation in which, contrary to principle, it would be impossible to say of the notice that it was couched in such terms that the recipient knew that the bill had been dishonoured. The difference of substance between such a case and the present case I think derives from the fact that here the recipient was certain that the bill would be dishonoured. But just as the knowledge of the recipient does not c excuse the sending of a notice of dishonour so that knowledge cannot in my judgment convert into a notice of dishonour complying with s 49 one which was otherwise not such a notice and did not so comply.

d It was submitted on behalf of the plaintiffs that any defect in the notice here in question does not matter because the defendants were not deceived; but this appears to me dangerously like an argument that because a party has notice of the true facts, a notice of dishonour can be altogether dispensed with. I accept counsel for the defendants' submission that the plaintiffs are inviting the court to introduce a new dispensation from the necessity of giving a proper notice of dishonour.

e The point was also made that since the notice bore the date 1st January the defendants must have known that it was intended to come into operation on that day. So regarded the notice, so it appears to me, is no more than a notice that the bill will have been dishonoured by 1st January and does not contain the necessary statement that the bill has been dishonoured.

f If I am wrong in the view I have expressed that a notice sent off before dishonour is not a valid notice of dishonour although received after dishonour, I share the view of Sachs LJ that this notice ought, for the reasons which he gives, to be taken to have been received before the bill was in fact dishonoured.

I too would allow the appeal.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Edgley & Co*, agents for *Reynolds, Parry-Jones & Crawford*, High Wycombe (for the defendants); *Antony Leader & Co* (for the plaintiffs).

L J Kovats Esq Barrister.

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Lane v Willis
Lane v Beach (Executor of estate of George
William Willis (deceased))

COURT OF APPEAL, CIVIL DIVISION
DAVIES, SACHS AND ROSKILL LJJ
30th NOVEMBER 1971

b

Practice – Stay of proceedings – Jurisdiction – Medical examination of plaintiff – Plaintiff's refusal to submit to psychiatric examination – Amendment of statement of claim substantially enlarging gravity of neurosis aspect of case as originally pleaded – Delay – Plaintiff's refusal unreasonable.

c

In May 1968 the plaintiff was injured in a motor accident allegedly caused by the defendant's negligent driving. In September 1968 the plaintiff's solicitor sent to the defendant's solicitor a medical report which, although dealing in the main with orthopaedic matters, made it quite plain that a considerable neurosis element was subsisting. There followed, in December, a letter which made it plain to the defendant's solicitors that the neurosis element was serious. Following negotiations the writ was issued in January 1969. In April the plaintiff was examined by a neurologist on behalf of the defendant. In June the statement of claim was served in which the particulars of the injuries were stated shortly as: 'Bruising of chest. Contusion of left knee. Nervous shock, depressive anxiety state.' The defence was not served until May 1970 due to a series of negotiations with a view to a settlement. In February 1971 an order was made to carry on the action, the original defendant having died, and there was also an order to amend the pleadings. The amended statement of claim which was served in February 1971 considerably expanded the allegations contained in the original statement of claim, and enlarged the gravity of the neurosis aspect of the case. The defendant's solicitors had for some 12 months been pressing the neurologist who had examined the plaintiff in April 1969 to make a further examination of the plaintiff but they heard nothing until, following two further examinations, they received reports in May and July 1971. Neither the plaintiff nor the court had seen these reports. On 22nd July 1971 the defendant's solicitors wrote to the plaintiff's solicitors asking that the plaintiff should submit to a further medical examination by a well-known consultant psychiatrist. This was refused, the plaintiff objecting not to the personality of the psychiatrist but on principle to a further examination by anyone. The defendant therefore applied to the master to have the action stayed unless the plaintiff submitted himself to a medical examination by the psychiatrist. The master refused the application. The defendant appealed to the judge who also refused to stay the proceedings. On appeal,

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Held – An order for a medical examination of any party to an action was an invasion of personal liberty and should only be granted when it was reasonable in the interests of justice so to order; when the refusal of an examination was alleged to be unreasonable the onus lay on the party who said that it was unreasonable and who had applied for the order to show that he was unable properly to prepare his claim (or defence) without the examination. Although there had been considerable delay in the present case the action should be stayed unless the plaintiff submitted himself to a psychiatric examination because, in view of the substantial difference between the injuries as originally pleaded and the injuries pleaded in the amended statement of claim it was reasonable for the defendant to ask for the psychiatric examination in addition to the neurological examination which had originally been obtained; accordingly, and in view of the undertaking by the defendant to send the plaintiff's solicitors copies of the psychiatrist's report as soon as it was available as well as copies of the reports

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- a already made by the neurologist, the appeal would be allowed (see p 433 d, p 434 d, p 435 h, p 436 a, p 437 d and f and p 438 b and c, post).
Edmeades v Thames Board Mills Ltd [1969] 2 All ER 127 applied.
Pickett v Bristol Aeroplane Co Ltd (16th March 1961) unreported, distinguished.
 Dictum of Lawson J in *Baugh v Delta Water Fittings Ltd* [1971] 3 All ER at 262, 263, disapproved.
- b Per Davies and Roskill LJJ. It is difficult to see why it should be wrong in principle to stay an action under the Fatal Accidents Acts 1846-1959 where the plaintiff refuses to undergo a medical examination. If there is evidence before the court obtained by a defendant to show that a widow's expectation of life is likely to be seriously diminished there may well be a case for staying the action unless she submits to a medical examination (see p 435 a and b and p 438 g and h, post).
- c Dictum of Lawson J in *Baugh v Delta Water Fittings Ltd* [1971] 3 All ER at 261 doubted.

Notes

For the circumstances in which an action may be stayed, see 30 Halsbury's Laws (3rd Edn) 407-409, para 768, and for cases on the subject, see 51 Digest (Repl) 1003-1008, 5374-5404.

- d **Cases referred to in judgments**
Baugh v Delta Water Fittings Ltd [1971] 3 All ER 258, [1971] 1 WLR 1295.
Edmeades v Thames Board Mills Ltd [1969] 2 All ER 127, [1969] 2 QB 67, [1969] 2 WLR 668, Digest (Cont Vol C) 1102, 5371a.
Pickett v Bristol Aeroplane Co Ltd (16th March 1961) unreported.
- e *S v S, W v Official Solicitor*, [1970] 3 All ER 107, [1970] 3 WLR 366, Digest (Cont Vol C) 441, 2673h.

Interlocutory appeal

- f This was an appeal by the defendant, John Metson Beach, executor of the estate of George William Willis, deceased, the original defendant, against an order of Talbot J made on 6th October 1971 in chambers dismissing his appeal against the decision of Master Lubbock made on 3rd September 1971 whereby the master refused to order that all proceedings in the action be stayed unless the plaintiff, Norman Alexander Lane, submitted himself to medical examination by Dr Denis Leigh, a consultant psychiatrist. In his action the plaintiff claimed damages for personal injuries and consequential loss to his motor car caused by the alleged negligent driving of the original defendant on 16th May 1968. The facts are set out in the judgment of
- g Davies LJ.

M J Turner for the defendant.

Henry Brooke for the plaintiff.

- h **DAVIES LJ.** This is an appeal, by leave of the judge, from an order of Talbot J made on 6th October 1971. He had before him an appeal by the defendant from an order of Master Lubbock made on 3rd September 1971. The master had had before him an application by the defendant for a stay of proceedings in default of the plaintiff submitting himself to medical examination by Dr Leigh, an extremely well-known psychiatrist. The master refused to make the order, and that refusal
- i was upheld by the learned judge. From that refusal, as I have said, the defendant appeals.

The history of the matter is as follows. On 16th May 1968 the plaintiff, who was a man aged 55, suffered injuries in an accident. On 13th September 1968 the plaintiff's solicitors sent to the defendant's solicitors a medical report by a surgeon, Mr Moynihan, dated 12th August 1968. Apparently for a time negotiations took place.

On 3rd January 1969 the writ was issued, and on 16th June 1969 the statement of claim was served. The defence was served in May 1970. Apparently that delay was explained by a series of negotiations with a view to settlement. Nothing further happened until, in February 1971, there was an order to carry on the action, the original defendant having died; and there was an order for leave to amend the pleadings. With regard to medical evidence, the order of the master provided for a medical report to be agreed if possible; if not, that the medical evidence be limited to three witnesses for each party.

The amended statement of claim was served on 8th February 1971. I think it is right that at this stage I should turn to the particulars of injuries both in the original and in the amended statement of claim. The injuries set out in the original statement of claim were stated very shortly. Paragraph 2 reads as follows:

‘By reason of the matters aforesaid, the Plaintiff suffered pain, injury, loss and damage which are continuing. Particulars of injuries: Bruising of chest. Contusion of left knee. Nervous shock, depressive anxiety state.’

That is the lot. By amendment, it reads (and I will read it incorporating the original):

‘Bruising of chest. Contusion of left knee, stirring up pre-existing minor degenerative changes in left knee joint and causing swelling and pain. Nervous shock, depressive anxiety state. The Plaintiff, who was aged 55 years at the date of the accident, was detained overnight in hospital for observation, and subsequently attended Holloway Sanatorium for 1 week in December 1968 for E.C.T. treatment for severe depression. He has suffered sleeplessness, nightmares, frequent bouts of depression lasting 1-2 hours, lost weight through losing his appetite. He previously enjoyed driving, which is essential for his work. As a result of the accident he is tense, irritable, and on edge when driving and feels exhausted after short drives. He may well have to retire prematurely from his employment instead of continuing until the age of 65, which would cause him substantial loss of earnings and of pensions payments. He has further sustained a recurrence of backache caused by a pre-existing prolapsed intervertebral disc dormant for some years which was exacerbated by the accident.’

So it can be seen that, although some of those extra matters are undoubtedly referred to in Mr Moynihan’s report of August 1968, nevertheless the allegations contained in the statement of claim are very considerably expanded by the amendment. The defence was amended on 1st March 1971.

I now turn to the question of the medical examination. On 19th April 1969 Dr Carroll, a neurologist, examined the plaintiff on behalf of the defendant. In February 1970, though nothing much turns on this, a Mr Shires, who is an orthopaedic surgeon, examined him with regard to his knee injuries. Then after the amendment made in 1971 the same Dr Carroll had two examinations of the plaintiff, on 14th May and 9th July. Apparently the defendant’s solicitors had been pressing Dr Carroll for some 12 months to make a further examination but, for some reason we do not know, they did not receive any reports from Dr Carroll until, as I have said, May and July 1971. On 22nd July 1971 the defendant’s solicitors (or the defendant’s insurance company, it does not matter which) asked the plaintiff’s solicitors that the plaintiff should submit to medical examination by the well-known psychiatrist, Dr Leigh, to whom I have already referred. That was refused on 5th August; hence this application.

We have a short note of the judgment of Talbot J, and I refer only to two passages in it. He mentions certain authorities, to which I shall have to turn shortly, and he goes on:

‘I think the Court should approach with considerable care, bearing in mind

a that it is being asked as stated by Donovan LJ in *Pickett v Bristol Aeroplane Co Ltd*¹ "although this Court has inherent jurisdiction to do what is here asked, I am clear that the power should not be exercised in this case. Indeed, for myself I would go the whole length of saying that it would be wrong in this class of action to make an order which in effect shuts out the Plaintiff from the seat of justice, even if he refused all medical examination on behalf of the Defendants, and still less if, as in this case, he merely objects to the particular doctor they choose. The sanction, if any, lies elsewhere".

b I would interpolate there that for myself I find it difficult, as did Widgery LJ in the subsequent case of *Edmeades v Thames Board Mills Ltd*², to see what other sanction could be available. To continue with the judgment of Talbot J, his final conclusion is in these terms:

c 'In those circumstances was the refusal of the request unreasonable? If the examination does not take place, is the proper issue going to be prevented from being determined?'

And the judge answers that question 'No'.

d The whole question, as I think, in the present case is: in the circumstances, was the defendant's request for a further psychiatric examination reasonable? or was the plaintiff's refusal to submit himself to it reasonable?

e I am bound to say that, although I think the defendant has been guilty of some dilatoriness and although, as has been emphasised in the course of the argument by Sachs LJ, there was not put before the master or the judge, or this court, any expert or medical evidence to show that such an examination is desirable, and indeed necessary, for the defendant properly to conduct his defence to this claim, I think that on all the history of this case it is a reasonable request and ought to be granted.

f We have been referred to a number of authorities in this case, and it is necessary that I should deal with them to some extent. The first case to which I would refer is an unreported case, *Pickett v Bristol Aeroplane Co Ltd*¹, in which Donovan LJ delivered the judgment from which the learned judge quoted. That case was decided in 1961, and it was a decision of this court composed of Willmer and Donovan LJ. I do not propose to quote any more than did the learned judge in the note of his judgment which I have just read. But I would point out two things which are inherent in what Donovan LJ said: one, that the court expressed no doubt at all that there was jurisdiction to make such an order, and secondly, that the real ground on which the court acted there was that the defendants were insisting on an examination by one particular doctor to whom the plaintiff objected. That was the basis of their refusal to make the order. It is perfectly true that in the instant case it is only one particular doctor, i.e. Dr Leigh, that the defendant is suggesting should examine the plaintiff. But counsel for the plaintiff in this court has said in terms that it is not the personality of the doctor, Dr Leigh, to which objection is taken: objection is taken on principle that there should be no further medical examination by anyone. So much for *Pickett v Bristol Aeroplane Co Ltd*¹.

g I turn now to the decision of this court in *Edmeades v Thames Board Mills Ltd*². It is a well-known case. The court on that occasion was composed of Lord Denning MR, Widgery LJ and myself. I think I need cite from that case one passage only. I should just preface my quotation from it by saying that in that case the defendants were wanting a further examination by any one of six doctors and the plaintiff rejected them all. In the original pleading the plaintiff's injuries were stated to be³:

'Abrasions of the left shin; swelling of the left foot, ankle and thigh; and partial rupture of the quadriceps muscle; and it was claimed that the injuries had caused him to give up gardening, which had put him to further expense.'

1 (16th March 1961) unreported

3 [1969] 2 QB at 68

2 [1969] 2 All ER 127, [1969] 2 QB 67

But subsequently it became clear from an examination of him by a doctor on his own behalf that he was suffering from⁴ 'a small marginal fracture of the left patella'—mentioned for the first time—and the doctor 'added that if that were so there had been "a substantial aggravation of the long-standing osteo-arthritis"'. So that there was there a considerable difference between the injuries as originally alleged and the injuries for the inclusion of which it would appear an amendment would be asked when the case got to court. A similar application was made there by the defendants for a stay of the action in default of the plaintiff submitting himself to examination.

I now turn to the judgment of Lord Denning MR. He prefaced the observation I am about to read with a reference to the committee⁵ presided over by Winn LJ, who, with regard to this sort of situation, had said:

'In case of need, we consider that the Court must have a power if necessary by legislation to stay the action pending the plaintiff submitting to such an examination.'

Lord Denning MR continued⁶:

'I do not think legislation is necessary. This court has ample jurisdiction to grant a stay whenever it is just and reasonable so to do. It can, therefore, order a stay if the conduct of the plaintiff in refusing a reasonable request is such as to prevent the just determination of the cause. The question in this case is simply whether the request was reasonable or not.'

I think that is the test, and it is a test that has been applied once or twice since the case was decided. But there has been a subsequent decision of Lawson J in *Baugh v Delta Water Fittings Ltd*⁷. I ought to say at once that I find the facts of that case quite different from the present case and the other cases to which I have referred. For that was an action under the Fatal Accidents Acts 1846-1959 and the defendants had asked for a similar order for a stay of the action in default of the plaintiff widow submitting herself to medical examination. There was a complete absence of evidence that there was anything wrong with the widow, anything to enquire into; and I should have thought that that might have been a very proper ground for the learned judge refusing to make the order applied for. But he went a great deal further and said (I will make a quotation in a moment) that in principle such an order ought not to be made. His observations as I read them were not confined to an action under the Fatal Accidents Acts but were directed to all actions for damages for personal injuries. He said this⁸, under the heading 'The question of principle':

'In my judgment it is wrong in principle to stay an action under the Fatal Accidents Acts unless and until a widow or other dependant in respect of whom a claim for loss of dependency is included submits to a medical examination. In reaching this conclusion I start with the proposition that a requirement under compulsion to submit to a medical examination or medical tests is an invasion of personal liberty which can only be justified where Parliament has imposed or authorised the imposition of such a requirement and, as a rule, has provided an appropriate sanction for non-compliance.'

Then he referred to *S v S, W v Official Solicitor*⁹. The learned judge omits to mention that in that case, which was a case in the House of Lords, Lord MacDermott, who was sitting as a member of the House, expressly referred to the case of *Edmeades*¹⁰ and

4 [1969] 2 QB at 68

5 Committee on Personal Injuries Litigation (1968 Cmd 3691), para 312

6 [1969] 2 All ER at 129, [1969] 2 QB at 71

7 [1971] 3 All ER 258, [1971] 1 WLR 1295

8 [1971] 3 All ER at 261, [1971] 1 WLR at 1298

9 [1970] 3 All ER 107, [1970] 3 WLR 366

10 [1969] 2 All ER 127, [1969] 2 QB 67

a made no suggestion that it was otherwise than rightly decided. Whether Lawson J was right in saying that it would be wrong in any case to order a widow to be examined, I doubt. If there was before the court some evidence obtained by the defendants to show that her expectation of life, owing to some disease or other cause, was likely to be seriously diminished, then I should have thought that that might well be a case for ordering her to submit to medical examination, or rather to stay the action unless she did so submit. But we need not concern ourselves with that, as that is not this case.

b Now I turn to read a passage in Lawson J's judgment where he dealt with the case of *Edmeades*¹¹. Having dealt with the case of *Pickett*¹², which I have already attempted to explain, he went on in this way¹³:

c 'The position as indicated by that decision of the Court of Appeal in 1961 [i.e. *Pickett*¹²] seems, however, to have been radically affected so far as injured plaintiffs are concerned by a later decision of the Court of Appeal in *Edmeades v Thames Board Mills Ltd*¹¹.'

Then he summarised the judgment of Lord Denning MR in that case and continued in these terms¹⁴:

d 'With the greatest possible respect I do not find palatable the use of the court's jurisdiction to stay proceedings and thus achieve a result indirectly, which could not be achieved by a direct order. I question whether the employment of the inherent jurisdiction of the court in this way conduces to respect for the administration of justice. Nevertheless I am bound by the decision in *Edmeades* case¹¹, although I am compelled to say, again with the greatest respect, that I believe it to have been wrongly decided.'

e With the greatest respect to the learned judge, I think that those observations were out of place. It is unusual and, I am bound to say, undesirable, in my opinion, for a judge sitting at first instance—indeed, in that case in chambers—to express the opinion, although accepting that he is bound by it, that a decision, and a fairly recent decision, of this court was wrong. I for myself adhere firmly to the opinion which this court expressed in *Edmeades's* case¹¹, namely, that, in an appropriate case, given the right circumstances, this court has the jurisdiction to make that order.

f There remains very little for me to say. There has obviously been a considerable delay on the part of the defendant in this case. Whether it was due to his insurance company, or to the solicitors, or to the doctor, I do not know. Possibly it would have been better if, instead of, as people are apt to do in these actions, keeping their cards close to their chest, as the saying is, they had exchanged their reports with a view to seeing whether they could be agreed. That is true. But it does seem to me, in view of the substantial difference between the injuries as originally pleaded and the injuries as pleaded in February 1971, that it is reasonable for the defendant to ask for a psychiatric examination as well as the neurological examination which had originally been had by them.

h I for myself would allow the appeal.

SACHS LJ. The principles on which a court should, in aid of obtaining a medical examination of one of the parties to an action, act when deciding whether or not to take the somewhat strong course of staying the action if a medical examination is not afforded, are by now clear. An order for a medical examination of any party to an action has been well said to be an 'invasion of personal liberty'. Accordingly, it should

i 11 [1969] 2 All ER 127, [1969] 2 QB 67

12 (16th March 1961) unreported

13 [1971] 3 All ER at 262, [1971] 1 WLR at 1300

14 [1971] 3 All ER at 263, [1971] 1 WLR at 1300

only be granted when it is reasonable in the interests of justice so to order. When the refusal of a medical examination is alleged to be unreasonable, the onus lies on the party who says that it is unreasonable and who applies for the order to show, on the particular facts of the case, that he is unable properly to prepare his claim (or defence) without that examination. The onus lies firmly on the applicant, as counsel for the defendant very rightly conceded. Let me say at once as regards the judgment of Lawson J¹⁵, to which Davies LJ has referred in terms with which I am in full agreement, that if there is anything in it which suggests these orders should not be made even when the onus has been discharged, it should, of course, not be followed.

Turning now to the facts of the instant case, it is one in which the statement of claim was amended pursuant to an order of 2nd February 1971. Much was made, in the course of argument by counsel for the defendant, of this amendment, which undoubtedly on the face of it enlarges the gravity of the neurosis aspect of the case. It should, however, be recorded that as early as 13th September 1968, the plaintiff's solicitors sent to the defendant's solicitors a report which, albeit dealing in the main with the orthopaedic matters, yet made it quite plain that a considerable neurosis element was subsisting. Moreover, on 17th December 1968 there followed a letter in which again it was made plain that the neurosis element not merely subsisted but was serious. It is to be observed that the letter of 17th December adds:

'We are informing you of this as, with respect, it may be more appropriate for your examination to be by a specialist in matters involving nervous shock. At the present time, [the plaintiff], is undergoing a course of treatment for this nervous shock and the consequent symptoms.'

In many ways the amendment of 2nd February 1971 had been foreshadowed by material which was in the hands of the defendant's solicitors.

It is as well to state here and now that throughout the course of these proceedings the conduct of the plaintiff's solicitors has been impeccable in providing such information as it was proper to give the defendant and in helping the defendant to obtain such medical examinations as were appropriate to the case.

This is a serious neurosis case and it is right to emphasise that in such a case each successive examination of the unfortunate plaintiff must be apt to disturb him and to aggravate the very thing for which he is claiming compensation. To that extent a plaintiff in his position requires the aid—as was indeed given to him by his solicitors—of every effort to protect him against *unnecessary* examinations. Until the end of July 1971 there was really no suggestion made on behalf of the defendant that an examination by someone other than Dr Carroll was necessary. Since the 2nd February 1971 order for the amendment of the statement of claim, there have already been two examinations by Dr Carroll, but we have seen nothing of that doctor's reports; nor has the plaintiff. In those circumstances I confess that it was with some reluctance that I have been led to the view that the plaintiff should be compelled to have yet another examination. That reluctance is increased by the way the matter has been handled on behalf of the defendant—and in saying that I wish to make it plain that no blame attaches in that behalf to counsel for the defendant.

The defendant's solicitors were by the first week in February aware of the amendment of the statement of claim and in the same month they had had advice from counsel to consider whether there should, having regard to that amendment, be a further examination by Dr Carroll or whether there should be an examination by a psychiatrist if Dr Carroll so advised. In fact the plaintiff was examined by Dr Carroll not once but twice—in May and in July; and so ineffective, apparently, were the steps taken on behalf of the defendant in relation to medical examinations that it was not until 22nd July that his solicitors wrote a letter, in the baldest possible terms. This letter in effect read, we have been told, as follows: 'We would be grateful if you would afford facilities for an examination by Dr. Leigh.' Not a word as to why

15 I.e. in *Baugh v Delta Water Fittings Ltd* [1971] 3 All ER 258, [1971] 1 WLR 1295

- a it was regarded as necessary at this stage or as to why this plaintiff should be further disturbed.

When the matter came before the master and the judge in chambers, it is manifest that in those circumstances the onus lay heavily on the defendant to show that such a further examination was needed. But he produced nothing in the way of medical evidence to show why another doctor or expert was required. He did nothing but produce correspondence.

- b For my part, I am by no means prepared to say that either the master or the learned judge was wrong on the material laid before them. Now, however, we have had further discussion of the case, the fact that some medical evidence should have been put before the master or the judge—and preferably, to my mind, the reports of Dr Carroll—has been ventilated, and it has become plain that in future cases of this particular type (if these should ever recur) such medical evidence should be produced; no room should be left for a plaintiff to wonder whether the application is really due to the reports of a defendant's medical expert being favourable to the plaintiff. On the other hand, this particular case is the first occasion that there has been fully discussed what should be done and how the strong onus that lies on a person who seeks an extra medical examination in these particular circumstances should be discharged. I am thus prepared, as this is the first case of this particular type, to accept counsel for the defendant's statement at the Bar that this is a case in which, in the interests of justice, a psychiatrist should be available to the defence and that the preparation of the case for the defence requires an examination by that psychiatrist in advance of trial. Accordingly, for those reasons I am prepared to accept—albeit, as already stated, with reluctance—that an appropriate order to that end should be made.

- e There is only one further observation that needs to be made, and that is in support of what has been said by Davies LJ as regards the exchange of medical reports. There is far too much reluctance in this matter of exchanging—far too much manoeuvring behind the scenes—far too much (especially on the part of defendants) trying to hold back a report until the moment of trial. The object of making orders in the form in which they are made on a summons for directions is to ensure that reports be exchanged, unless there is some really good reason to the contrary. In this case I am glad that counsel for the defendant has felt himself able to give a firm undertaking to the court that the moment Dr Leigh's report is received he will send to the plaintiff's solicitors both that report and all the reports of Dr Carroll—receiving, of course, in exchange any outstanding reports which were made as a result of medical examinations on behalf of the plaintiff.

- g **ROSKILL LJ.** I agree that this appeal should be allowed. I add a few words for two reasons only: first because we are differing from Talbot J, and secondly, because I desire to express my concurrence with everything which has fallen from Davies LJ, with reference to the decision of Lawson J in *Baugh v Delta Water Fittings Ltd*¹⁶.

- h So far as Talbot J's decision in the present case is concerned, the learned judge at the end of his judgment (of which we have a very complete note taken by counsel) rightly posed the question thus:

'In those circumstances was the refusal of the request unreasonable? If the examination does not take place, is the proper issue going to be prevented from being determined?'

- j The learned judge answered that question in the negative, as had the master from whom the appeal was brought to Talbot J.

I confess that if I had been sitting as judge in chambers and had had to deal with this issue on the same material as did Talbot J, I should have reached the same conclusion as he did. But the matter has pursued a somewhat different course in this court. Before Talbot J the defendant, on whom the onus entirely rested, did not

vouchsafe any evidence in support of the application that the plaintiff's action should be stayed unless he submitted to an examination by Dr Denis Leigh, the well-known consultant psychiatrist. There was no medical evidence placed before the learned judge; there was no affidavit from the defendant's solicitors saying that they had been advised that such evidence was essential to the proper conduct of the defendant's case. The learned judge was, therefore, left to deal with the matter almost, as it were, in vacuo. But, as Sachs LJ pointed out, in this court counsel for the defendant has—in my judgment very properly—undertaken that if this court makes the order which he seeks, at any rate in some form, the defendant's solicitors will, as soon as they get Dr Leigh's report, send to the plaintiff's solicitors a copy not only of that report but of the various reports which Dr Carroll has already made as a result of his several examinations of the plaintiff. If the defendant does not wish to call Dr Carroll at the trial, it would then be open to the plaintiff to call him if he so desired. It is for those reasons that I reach a different conclusion from Talbot J and the learned master and think that the order sought should be made.

So far as the decision of Lawson J in *Baugh v Delta Water Fittings Ltd*¹⁷ is concerned, I would respectfully emphasise what Davies LJ has said, that the decision in *Edmeades v Thames Board Mills Ltd*¹⁸ was expressly approved by Lord MacDermott in *S v S, W v Official Solicitor*¹⁹. Lord MacDermott said¹⁹:

'The rule book naturally tends to lag behind new methods of proof and ascertainment, and the essential purpose of this ancillary jurisdiction means that it cannot be tied to what is old or outmoded. For example, the increasing number of claims which put in issue the bodily condition of a party have in recent years produced what is now a very common demand by defendants, namely that the claimant shall submit to a medical examination. There is nothing about this in the rules of court; but the jurisdiction of the High Court to order such an examination cannot, in my view, be questioned in this day and age. See, for a recent example, *Edmeades v Thames Board Mills Ltd*¹⁸, where the Court of Appeal ordered a stay until the plaintiff, seeking damages for personal injuries, submitted himself to a medical examination.'

Lord MacDermott then quotes the crucial passage from the judgment of Lord Denning MR in *Edmeades's* case²⁰. Lawson J referred to *S v S*¹ in his judgment, but he appears to have overlooked that passage in Lord MacDermott's speech. I am afraid I am quite unable to accept the learned judge's view that *Edmeades's* case¹⁸ was wrongly decided. Nor indeed was it a matter for him whether it was rightly decided or not. The present case is not a case of a claim under the Fatal Accidents Acts 1846-1959. But I respectfully agree with what has fallen from Davies LJ that it is difficult to see why it is wrong in principle to stay an action under the Fatal Accidents Acts in the appropriate case if there is power—as in my judgment there clearly is—to stay an action where the injured party has survived, if he unreasonably refuses to submit to a medical examination. Obviously the power to stay would be used less frequently in the case of a claim under the Fatal Accidents Acts; but that it exists and can be employed in a suitable case admits, in my judgment, of no doubt.

For those reasons I agree that this appeal succeeds.

Appeal allowed.

Solicitors: *Lawrence, Graham & Co* (for the defendant); *Baker & MacKenzie* (for the plaintiff).

Mary Rose Plummer Barrister.

¹⁷ [1971] 3 All ER 258, [1971] 1 WLR 1295

¹⁸ [1969] 2 All ER 127, [1969] 2 QB 67

¹⁹ [1970] 3 All ER 107 at 114, [1970] 3 WLR 366 at 377

²⁰ [1969] 2 All ER at 129, [1969] 2 QB at 71

¹ [1970] 3 All ER 107, [1970] 3 WLR 366

a Thorne Rural District Council v Bunting

CHANCERY DIVISION

MEGARRY J

6th, 7th OCTOBER 1971

- b** Declaration – Jurisdiction – Locus standi of applicant – Sufficiency of interest to support claim – Commons registration – Registration of claims in respect of properties within area of rural district – Application by rural district council for declarations that claimant had no such rights – Council having no proprietary rights in properties concerned – Indirect financial interest by reason of effect on rateable values – Existence of rights affecting council's powers under planning legislation – Whether council having locus standi as plaintiff.
- c** The defendant, who owned a house in a rural district in Yorkshire, had registered extensive claims under the Commons Registration Act 1965 in respect of properties within the area of the rural district. The rural district council, who owned only one of the properties concerned, a road, brought an action asking for declarations that the defendant had no such rights. The main complaint of the council was that the defendant's claims had discouraged prospective developers from developing land in the rural district. On the question whether the council had any locus standi as a plaintiff before the court, except as to the road, the council contended that it had sufficient interest to support its claim to the declarations sought in that (i) it was concerned financially insofar as the rateable value of properties in its area might well be affected by the existence of the rights of common claimed, (ii) it was affected in relation to its powers under the planning legislation, and (iii) under the 1965
- d** Act no limitation was placed on the persons who might lodge objections to any claim to rights of common.

Held – Even if the council was indirectly concerned with the existence or otherwise of the rights of common and the matter was one of consequential interest to the council, this indirect concern did not amount to such a substantial interest as to justify the council in making a claim for a declaration relating to land in which it had no proprietary interest; what the council was seeking was not in any real sense of the word 'relief', i.e. something that would relieve the council from any real liability or disadvantage or difficulty; accordingly the council had no locus standi to sue for the declarations sought, save in respect of the road (see p 443 f and g, post).

- e** Dicta of Pickford and Bankes LJ in *Guaranty Trust Co of New York v Hannay & Co* [1914-15] All ER Rep at 35, 39 applied.

Notes

For declaratory judgments, see 22 Halsbury's Laws (3rd Edn) 746-751, paras 1610, 1611, and for cases on the subject, see 30 Digest (Repl) 165-182, 174-295.

Cases referred to in judgment

- h** *Anisimic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208, [1969] 2 AC 147, [1969] 2 WLR 163, Digest (Cont Vol C) 591, 280ac.
- Booker v James* (1968) 19 P & CR 525, 112 Sol Jo 421, Digest (Cont Vol C) 129, 1099.
- Dyson v A-G* [1911] 1 KB 410, 80 LJKB 531, 103 LT 707, 30 Digest (Repl) 168, 193. See also [1912] 1 Ch 158, 81 LJKB 217, 105 LT 753, 30 Digest (Repl) 168, 194.
- i** *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536, [1914-15] All ER Rep 24, 84 LJKB 1465, 113 LT 98, 30 Digest (Repl) 174, 239.
- Trafford v Ashby* (1969) 21 P & CR 293, Digest (Cont Vol C) 130, 1100.

Preliminary point of law

This was a preliminary point of law for determination by the court whether the Thorne Rural District Council had any locus standi as a plaintiff in an action it had

brought against William Bunting, the defendant, asking for declarations that the defendant had no right to claims he had registered under the Commons Registration Act 1965. The facts are set out in the judgment. a

Jeremiah Harman QC and Ian McCulloch for the plaintiff council.
A J Balcombe QC and J R MacDonald for the defendant.

MEGARRY J. I have before me an action and a motion by the plaintiff council. In the action, a preliminary point of law has arisen. The plaintiff council is a rural district council in Yorkshire. The defendant is a resident in the rural district in which he owns a house which has an area of somewhat less than 200 square yards. Originally there were three defendants, but the other two have now disappeared from the proceedings. The area of the rural district, I may say, substantially coincides with the ancient manor of Hatfield. b

The defendant has registered various claims under the Commons Registration Act 1965 in respect of the whole area of the rural district. The claims are for a variety of rights of piscary, venary and aucupary, and a variety of profits in the soil, together with a profit of pasture for 1,000 cattle. The plaintiff council claims four declarations that the defendant has no such rights, and four injunctions, one of them restraining the defendant from exercising such rights, and three of them for mandatory orders requiring the defendant to remove or amend or procure the removal or amendment of various registrations that he has effected under the Act. By the motion the plaintiff council seeks the four injunctions. I may say that the claim to the rights apparently depends on such matters as an agreement between Charles I and one Cornelius Vermuyden in 1626, a contract of 1628, a decree and award of the Court of Exchequer in 1630, an Enclosure Act of 1811, and an Enclosure Award of 1825, as well as immemorial user. Doubtless there is much interesting historical matter to be explored. Many objections have been made to the registration of these various common rights, amounting, I understand, to nearly 900, and I have been told that considerable local feeling has been aroused. A main complaint of the plaintiff council is that the defendant's claims have discouraged prospective developers from developing any land in the rural district. c

The genesis of the preliminary point now before me is as follows. At the end of last week, with the motion facing him, the defendant requested the county council to cancel the registration for roughly half of the land in question. I understand that his applications for cancellation are not all complete, but that those remaining are in the course of being made. Under s 5 (5) of the Act, the county council as the registration authority under the Act has a discretionary power on such an application to cancel or modify the registration. I shall refer to the area in respect of which, on the assumption that all the applications for cancellation are granted, there remains any live application for registration by the defendant as the 'blue land', from the hatching on a plan with which I have been supplied. The blue land excludes nearly all the land in the rural district which is owned by the plaintiff council, and nearly all the land in the rural district in respect of which there are present prospects of development. The blue land also excludes a large number of small islands of land on which stand residences owned by others. The blue land still includes, however, a road owned by the plaintiff council called Broadbent Gate Moor Road, which I shall refer to simply as 'the road'. d

With these qualifications, the plaintiff council has now achieved the major part of its objective, in that, subject to the county council cancelling the registrations, the discouraging effect of registration has been removed from nearly all the land with prospects of development, as well as from nearly all the plaintiff council's own land. Furthermore, the reduction of the defendant's area of claim to the blue land will meet the objections in all the 900 or so cases, save some 19; and of these 19 objections, I understand that five are by the registration authority, the county council. e

a In view of this substantial change, the question that arises is what course this action should now take.

Yesterday, at the opening of the case, there was some argument on the relationship of these proceedings to the 1965 Act. This Act provides special machinery for the working out of claims to commons by commons commissioners who are to be appointed, with an appeal on points of law to the High Court by way of case stated.

b The bulk of the Act came into force at the beginning of 1967, and the provisions as to the commons commissioners and appeals to the High Court on 1st January 1970. Unfortunately, even though a year and three-quarters has elapsed since these provisions came into force, no commons commissioners have yet been appointed, and the Act is accordingly still not in full operation. In *Booker v James*¹ Pennycuik J had to deal with the position before 1970, and, by a narrow margin, in *Trafford v Ashby*² I had to do the same. In each case it was held that the court still retained its jurisdiction during the interim period. In *Booker v James*³ Pennycuik J said:

d 'On the face of the Act the jurisdiction to determine the issue whether or not a particular piece of land is a common is entrusted to Commons Commissioners. It is plainly the intention of the Act to exclude the jurisdiction of the court, at any rate, in any ordinary case. The question may arise in future whether the court possesses some residual jurisdiction; for instance, to deal with cases where the registration, on the face of it, represents an abuse of the right of registration conferred by the Act.'

To that statement I ventured to lodge a caveat, saying in *Trafford v Ashby*⁴:

e '...it seems quite plain that the Act of 1965 has provided appropriate machinery for settling disputes. It may well be that this is intended to be the normal procedure. The remedy by making a declaration is, like that of an injunction, a discretionary remedy, and so the courts may often reach the conclusion that a matter would be more appropriately dealt with under the special machinery of the Act than by the general remedy of making a declaration and granting an injunction. Be that as it may, I cannot, for my part, at present see what there is in the Act of 1965 which so plainly excludes the jurisdiction of the courts that the remedy by way of declaration and injunction is taken away. The matter, in other words, seems to me to be one not of jurisdiction but of discretion. However, the matter has not been fully argued out in contested proceedings, and I wish to make it plain that I am doing no more than I professed to do at the outset, namely, lodge a caveat.'

g Whichever of these views is right, there seem to be obvious advantages in leaving all ordinary cases of dispute to the special procedure under the Act, with the courts exercising jurisdiction only in cases where there would otherwise be some failure of justice. However, having regard to the fact that no commons commissioners have yet been appointed, I feel no doubt that even if (contrary to my provisional view) h the matter is one of jurisdiction and not merely of discretion, the court retains sufficient jurisdiction to deal with the point that I have to decide. For today, counsel on both sides turned to a preliminary point of law which, by common consent, they wished to have argued and decided first; and in the event I did not think it right to refuse their request.

j The point of law, as stated under RSC Ord 33, r 3, is in substance whether or not, in the events which have happened, the plaintiff council has any locus standi as a plaintiff before this court, save and except as to the road. On this, I have heard

1 (1968) 19 P & CR 525

2 (1969) 21 P & CR 293

3 (1968) 19 P & CR at 530

4 (1969) 21 P & CR at 297

considerable argument, and I have had cited to me *Dyson v A-G*⁵, *Guaranty Trust Co of New York v Hannay & Co*⁶, *Anisminic Ltd v Foreign Compensation Commission*⁷, and a number of passages from a textbook and the notes in the Supreme Court Practice to RSC Ord 15, r 16. In addition, during the argument yesterday, counsel for the defendant cited certain authorities to show that on the facts of this case the plaintiff council had no cause of action. Today, however, on the authorities that I have mentioned he accepted the contention that in proceedings for a declaration it is not necessary to show that there is a cause of action in the ordinary sense of the word. He contended, however, that this did not mean that anybody could sue for a declaration, however, little real connection he might have with the subject-matter of dispute; the plaintiff, he said, must have a substantial interest recognised by the law. In the *Dyson* case⁵, of course, the bone of contention was a form which had to be completed under threat of a penalty, while in the *Anisminic* case⁷ it was the disallowance of a claim to compensation.

Now in this case, counsel for the plaintiff council has pointed out the various matters which, he says, constitute a sufficient interest for the plaintiff council to support its claim to the declarations sought. First, he said that the plaintiff council was concerned in a financial way, in that the rateable value of properties in its area might well be affected by the existence or non-existence of the various claims to rights of common. Second, he pointed to the plaintiff council's delegated powers under the planning legislation, and said that the council was affected in that sense in a very real way. Third, he pointed to the 1965 Act, and said (as was accepted by counsel for the defendant) that there was no limitation placed by the Act on the persons who might lodge objections to any claim to rights of common. He subsumed these three claims under the general head of an interest in the rural district and in its good government, a head which is plainly capable of comprising other matters than the three specific heads that he put forward, though no doubt those were the most important.

It seems to me that these are somewhat shadowy interests to support the claim made for the declarations; and it was not suggested that the claims for injunctions could be in any better case. What is here in question is a series of declarations relating to the existence of rights of common over land owned by others. I leave on one side, of course, the road, which is owned by the plaintiff council. In the whole of the rest of the blue land it is accepted that the plaintiff council has no proprietary interest, and can rely only on those interests put forward on its behalf by counsel.

I accept that the remedy by way of declaration is wide and flexible, and that in recent years the tendency of the courts towards width and flexibility has, if anything, been accentuated; the remedy is indeed a valuable servant. But there must be some limit. For myself, I am at a loss to see why a local authority should be entitled to litigate a claim by A to rights of common over B's land by suing A for a declaration when B, who is the person most closely affected, is not even a party to the proceedings. If the local authority loses, why should B have his land incumbered by the consequent strengthening or apparent strengthening of an adverse claim over it which he might well have been able to defeat had he taken part in the proceedings? If the local authority wins, why should B have any consequent improvement of the value of his land effected at the ratepayers' expense? Why should A be vexed by litigation over his claim if B, the landowner, has no intention of resisting it, just because the local authority decides that it wishes to litigate the point? Further, even if the local authority is indirectly concerned with the existence or otherwise of the rights of common, and the matter is one of consequent financial interest to that authority, I

5 [1911] 1 KB 410. See also [1912] 1 Ch 158

6 [1915] 2 KB 536, [1914-15] All ER Rep 24

7 [1969] 1 All ER 208, [1969] 2 AC 147

a do not see that this indirect concern amounts to such a substantial interest as to justify the authority in making a claim for a declaration.

In *Guaranty Trust Co of New York v Hannay & Co*⁸, Pickford LJ discussed what is now RSC Ord 15, r 16, and said:

b 'I think therefore that the effect of the rule is to give a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject-matter of the declaration. It does not extend to enable any stranger to the transaction to go and ask the Court to express its opinion in order to help him in other transactions.'

Banks LJ said⁹, again speaking of the rule:

c 'It is essential, however, that a person who seeks to take advantage of the rule must be claiming relief. What is meant by this word relief? When once it is established, as I think it is established, that relief is not confined to relief in respect of a cause of action it seems to follow that the word itself must be given its fullest meaning. There is, however, one limitation which must always be attached to it, that is to say, the relief claimed must be something which it would not be unlawful or unconstitutional or inequitable for the Court to grant or contrary to the accepted principles upon which the Court exercises its jurisdiction. Subject to this limitation I see nothing to fetter the discretion of the Court in exercising a jurisdiction under the rule to grant relief, and having regard to general business convenience and the importance of adapting the machinery of the Courts to the needs of suitors I think the rule should receive
d as liberal a construction as possible.'

Construing the rule as liberally as one may, it seems to me that what the plaintiff council is seeking in this case is not in any real sense of the word 'relief', that is, something which will relieve the council from any real liability or disadvantage or difficulty which affects the council. In my judgment, the council's complaint is too
f indirect and insubstantial to justify proceedings for a declaration relating to land in which they have no proprietary interest. I also bear in mind that the making of the declaration is a discretionary remedy; there may be other cases where on other facts there is a more substantial reason for a local authority to claim a declaration in respect of land in their area not owned by the authority. But accepting to the full for the purposes of this argument the points that have been put forward by counsel
g for the plaintiff council, it seems to me there are no sufficient grounds to support the claim for a declaration save in relation to the road. Accordingly, I answer the point of law that has been submitted for decision by holding that in the events which have occurred the plaintiff council has no locus standi to sue for the declarations sought save in respect of the road.

I should add this. Yesterday there was some considerable argument about the
h ambit of s 276 of the Local Government Act 1933. I do not think I need go into that, except to say that on the facts of this case it does not seem to me to assist the plaintiff council.

Order accordingly.

j Solicitors: *Holloway, Blount & Duke*, agents for *Kenyon, Son & Craddock*, Doncaster (for the plaintiff council); *Stileman Neale & Topping*, agents for *J J Pearlman*, Leeds (for the defendant).

R W Farrin Esq Barrister.

8 [1915] 2 KB at 562, [1914-15] All ER Rep at 35

9 [1915] 2 KB at 572, [1914-15] All ER Rep at 39

Re Edmondson's Will Trusts Baron Sandford of Banbury and another v Edmondson and others

COURT OF APPEAL, CIVIL DIVISION

RUSSELL, BUCKLEY AND ORR LJ

8th, 9th, 10th, 11th, 22nd NOVEMBER 1971

Settlement – Class gift – Distribution date – Rule in Andrews v Partington – Time of ascertainment of class – Trust ‘for such of the children of the two sons of the Appointer . . . whenever born as . . . shall attain the age of twenty one’ etc – Eldest grandchild having reached age of 21 – Two sons still living – Whether words ‘whenever born’ excluding operation of rule.

Settlement – Class gift – Distribution date – Rule in Andrews v Partington – Settlement of land – Trust for sale – Power of trustees to postpone sale – Trust for children of settlor’s two sons ‘who shall attain the age of twenty one years’ etc – Eldest grandchild attaining age of 21 – Sons still living – Grandchild having no power to compel sale of land on attaining vested interest – Whether fact that at the time of the settlement the property settled was solely land excluding the operation of the rule.

The testator by his will gave his son, S, a power of appointment over one-quarter of his residuary estate. The power of appointment was limited to ‘all or such one or more exclusively of the . . . children or remoter issue . . . in such shares and in such manner in all respects as [S] shall by deed . . . appoint . . .’ In 1948 S executed a deed of appointment in pursuance of the power and, by cl 1 thereof, he directed the trustees to stand possessed of the appointed share ‘upon trust for such of the children of the two sons of [S] . . . whenever born as being a son or sons shall attain the age of twenty one or being a daughter or daughters shall attain that age or marry as a single class and if more than one in equal shares’. By cl 3 it was provided that the powers of maintenance and advancement implied by the Trustee Act 1925 or any statute amending or replacing the same should apply to the appointed share. In 1949 S conveyed certain freehold and leasehold properties to trustees on trust to retain or sell, which by the Law of Property Act 1925 operated as an immediate binding trust for sale with power in the discretion of the trustees to postpone that sale. By a contemporaneous settlement the proceeds of sale were to be held on trust ‘for such of the children of the two sons of [S] . . . as being a son or sons shall attain the age of twenty one years or being a daughter shall attain that age or marry as a single class and if more than one in equal shares’. In 1948, when S made the appointment, one of his sons had a daughter less than a year old while the other son had only recently married. At the time when the proceedings were brought each of the sons had four children, S therefore having a total of eight grandchildren, of whom three had attained the age of 21. One of S’s sons had married a second time, his wife being 30 years old. The question arose whether the rule in *Andrews v Partington*^a applied to the deed of appointment and to the settlement so that, the eldest grandchild having reached the age of 21, any further grandchildren born were excluded from the class of beneficiaries in each case. It was contended that the deed of appointment by its terms disclosed an intention to exclude the rule; further that the rule was also excluded in relation to the settlement on the grounds (i) that a beneficiary with a vested interest in the case of land settled on trust for sale had no right to demand sale and transfer of his share, (ii) that the function of the

^a (1971) 3 Bro CC 401

a rule was to enable a member of a class to claim as of right payment or transfer of his share on attaining a vested interest, and (iii) that therefore where at the time of the settlement the property consisted solely of land the rule had no operation.

Held – (i) The phrase ‘whenever born’ in cl 1 of the deed of appointment was a specific and emphatic phrase which in terms pointed to all time in the future. It was equivalent to ‘at whatever time they may be born’ and was limited only by the course of nature to the lifetime of the parents. Whereas the phrase ‘born or hereafter to be born’ was a general reference to the future without express limit in time and, therefore, consistent with a limit imposed by the direction for vesting and the rule, the phrase ‘whenever born’ was a particular reference to the future expressly unlimited in time and, therefore, readily to be distinguished as inconsistent with a time limitation such as that imposed by the rule. Accordingly, the rule was excluded by the deed of appointment and the class of beneficiaries embraced all children of the sons whether born before or after the attainment by the first of a vested interest (see p 449 f and g and p 450 b, post).

d (ii) The rule, however, applied to the settlement. The function of the rule was to enable trustees to distribute by removing uncertainty or, if it were to enable a beneficiary who had attained a vested interest to claim his minimum share, it was to enable the claim to be made but subject to the due and proper exercise by the trustees of the administrative powers and directions to which the whole trust and every share therein was subject. The proposition that the rule was not applicable where the only property settled was land was untenable. Accordingly there being no grounds for excluding the rule, the class of beneficiaries under the settlement had closed when the eldest grandchild of the settlor attained the age of 21 (see p 450 f and g, post); *Re Canney's Trusts* (1910) 101 LT 905 applied.

e Per Curiam. The provision in cl 3 of the deed of appointment that the powers of maintenance and advancement implied by the Trustee Act 1925 should apply to the appointed funds was not inconsistent with the applicability of the rule in *Andrews v Partington*^b (see p 448 h and j, post); *Re Henderson's Trusts* [1969] 3 All ER 769 distinguished.

f Decision of Goulding J [1971] 3 All ER 1121 reversed in part, affirmed in part.

Notes

For the rule in *Andrews v Partington*^b, see 34 Halsbury's Laws (3rd Edn) 610, para 1067, and 39 *ibid* 1037-1040, paras 1558, 1559, and for cases on the subject, see 49 Digest (Repl) 669-677, 6321-6379.

Cases referred to in judgment

Andrews v Partington (1791) 3 Bro CC 401, [1775-1802] All ER Rep 209, 29 ER 610, 49 Digest (Repl) 669, 6321.

Blackman v Fysh [1892] 3 Ch 209, 67 LT 802, 49 Digest (Repl) 984, 9228.

Bleckly (decd), *Re, Bleckly v Bleckly* [1951] 1 All ER 1064, [1951] Ch 740, 49 Digest (Repl) 671, 6342.

Canney's Trusts, *Re, Mayers v Strover* (1910) 101 LT 905, 49 Digest (Repl) 676, 6376.

Henderson's Trusts, *Re, Schreiber v Baring* [1969] 3 All ER 769, [1969] 1 WLR 651, Digest (Cont Vol C) 873, 1169a.

Kebley-Fletcher's Will Trusts, *Re* [1967] 3 All ER 1076, [1969] 1 Ch 339, [1968] 2 WLR 34, Digest (Cont Vol C) 1067, 6379a.

Scott v Earl of Scarborough (1838) 1 Beav 154, 8 LJCh 65, 48 ER 898, 49 Digest (Repl) 688, 6489.

Wernher's Settlement Trusts, *Re, Lloyds Bank Ltd v Mountbatten (Earl)* [1961] 1 All ER 184, [1961] 1 WLR 136, Digest (Cont Vol A) 1321, 1166a.

b (1791) 3 Bro CC 401

Cases also cited

Defflis v Goldschmidt (1816), 1 Mer 417.

Horsnaill, Re, Wommersley v Horsnaill [1909] 1 Ch 631.

Mainwaring v Beevor (1849) 8 Hare 44.

Marshall, Re, Marshall v Marshall [1914] 1 Ch 192, [1911-13] All ER Rep 671.

Appeal

This was an appeal by the plaintiffs, the Reverend the Rt Hon John Cyril second Baron Sandford of Banbury and the Hon Anthony James Kinghorn Edmondson, against decisions of Goulding J dated 11th and 12th March 1971 and reported [1971] 3 All ER 1121. The facts were as follows.

The testator, James Edmondson, made his will on 7th March 1931 and died on 7th June 1931. By cl 10 of the will he directed his trustees to hold one-fourth of his residuary estate on trust to pay the income thereof to his son, later to become the first Lord Sandford, during his life and after his death to hold the share on trust—

‘for all or such one or more exclusively of the others or other of the children or remoter issue of my said son if more than one in such shares and in such manner in all respects as my said son shall by deed revocable or irrevocable or by Will or Codicil appoint . . .’

By a deed dated 25th July 1948 Lord Sandford exercised his power of appointment in pursuance of the power given to him by the testator. The deed recited that it was supplemental to the testator's will and continued:

‘THE Appointor is desirous of making such exercise of the power of appointment conferred on him by the Will of the Testator in favour of his two sons [the first and second plaintiffs] hereinafter mentioned (both of whom were born in the lifetime of the Testator) and of their children hereinafter set forth and of making such release as is hereinafter contained.’

The operative part of the deed was in the following terms:

‘1. IN pursuance of the power conferred on him in that behalf and of all if any the powers him thereto enabling THE Appointor DOTH HEREBY IRREVOCABLY APPOINT that the Trustees shall from the date hereof stand possessed of the one quarter or other the share of the Testator's residuary estate to the income of which the Appointor is or may become entitled during his life (hereinafter called “the Appointed Share”) upon trust for such of the children of the two sons of the Appointor namely the [first plaintiff] and the [second plaintiff] whenever born as being a son or sons shall attain the age of twenty one or being a daughter or daughters shall attain that age or marry as a single class and if more than one in equal shares.

‘2. DURING such period as no child of either of the said sons is in existence the income of the Appointed Share shall be held in trust for the said two sons in equal shares.

‘3. SUBJECT as is mentioned in the next following clause the powers of maintenance and advancement implied by the Trustee Act 1925 or any statute amending or replacing the same shall apply to the Appointed Share.

‘4. IF and to the extent that any of the trusts aforesaid shall fail whether by reason that no child of either of the said sons shall attain a vested interest or that any implied directions for the accumulation of income shall be in excess of that permitted by law or for any other reason the capital and income of the Appointed Share or so much of such capital and income as that the trusts whereof shall fail to have effect shall be held in trust for and belong to the said two sons in equal shares absolutely.

‘5. THE Appointor DOTH HEREBY RELEASE unto the Trustees all that the life

a or other the interest of the Appointor in the Appointed Share and the income thereof to the intent that such life or other interest shall be wholly extinguished and that the Appointed Share and all income received by the Trustees hereafter shall without apportionment of such income be held upon the trusts of these presents.'

b At the time when the appointment was made the first plaintiff had one child only, Margaret Catharine Edmondson, who was born on 7th November 1947, and was therefore less than a year old at the date of appointment. The second plaintiff had no child at that time. Subsequently the first plaintiff had three more children, i.e. four children in all, and the second plaintiff had, since the date of the appointment, also had four children. There was therefore a class of eight individuals in existence and prospectively or actually interested under the appointment. The oldest of the eight was 23 years old, the youngest was 13 years old. Of the eight, three had attained the age of 21, and five were still under that age. In addition the second plaintiff had recently married for the second time, his wife being only 30 years of age.

c On 2nd April 1949 the first Lord Sandford conveyed certain freehold and leasehold properties to trustees directing that they might either retain the properties for so long as they might think fit or might at any time or times sell the properties or any of them or any part or parts thereof. After payment of the costs of sale the trustees were to hold the net moneys arising from the sale and the net rents and profits until sale on the trusts declared by a deed of settlement of the same date. By virtue of s 25 (4) of the Law of Property Act 1925 the provisions in the conveyance giving the trustees the power to retain or sell operated as a trust to sell with an indefinite power to postpone sale at their discretion. The settlement of the same date, having referred to the proceeds of the sale of the properties as 'the Trust Fund', provided by cl 2:

d 'THE Trustees shall hold the Trust Fund Upon trust for such of the children of the two sons of the Settlor namely . . . [the first plaintiff] and [the second plaintiff] as being a son or sons shall attain the age of twenty one years or being a daughter shall attain that age or marry as a single class and if more than one e in equal shares.'

By an originating summons dated 11th January 1971 the plaintiffs as trustees of the testator's will, of the deed of appointment of 25th July 1948, and of the settlement of 2nd April 1949, sought the determination of the court on the following questions: (1) whether, on the true construction of the deed of appointment of 25th July 1948 and in the events which had happened, the appointed share mentioned in that deed was held: (i) in trust for such of the children of the plaintiffs as had been born before 7th November 1968 (the date when the eldest of such children attained the age of 21) and had attained or should attain 21 or (being female) should marry under that age in equal shares per capita, or (ii) in trust for such of the children of the plaintiffs whenever born (whether before or after 7th November 1968) as had attained or should attain 21 or (being female) should marry under that age in equal shares per capita, or (iii) on some other and what trusts; (2) whether, on the true construction of the settlement of 2nd April 1949 and in the events which had happened, the trust fund mentioned in that settlement was held: (i) in trust for such of the children of the plaintiffs as had been born before 7th November 1968 (the date when the eldest of such children attained the age of 21) and had attained or should attain 21 or (being female) should marry under that age in equal shares per capita, or (ii) in trust for such of the children of the plaintiffs whenever born (whether before or after 7th November 1968) as had attained or should attain 21 or (being female) should marry under that age in equal shares per capita, or (iii) on some other and what trusts. There were joined as defendants the eight children of the plaintiffs, namely, the Hon Margaret Catharine Edmondson, the Hon James John Mowbray Edmondson,

Charles Anthony Edmondson, Elizabeth Ann Edmondson, the Hon Frances Mary Edmondson, the Hon Nicholas Mark Edmondson, Simon Andrew Edmondson and Anthony James Edmondson. a

By his judgment Goulding J declared that, in answer to question (1), on the true construction of the deed of appointment and in the events which had happened the appointed share was held in trust for such of the defendants as were born before 7th November 1968, the date when the eldest of them attained the age of 21, and had attained or should attain 21, or being female should marry under that age, in equal shares per capita; and that question (2) should be answered in the same sense as question (1). b

V G H Hallett for the plaintiffs.

D A Lowe for the defendants.

Cur adv vult c

22nd November. **RUSSELL LJ** delivered the following judgment of the court. This appeal concerns the applicability of the rule known as the rule in *Andrews v Partington*¹ to the trusts of two instruments. The two questions were joined in one originating summons because the trustees and beneficiaries and possible future beneficiaries are in each case the same; but otherwise the two questions are quite distinct. The decision of Goulding J in each case was that the rule applied. Since the decisions are reported², we need not set out the circumstances in great detail. d

The first question concerns the appointment by the first Lord Sandford by deed dated 25th July 1948 of a fund in which he had a life interest and a special power of appointment among his issue. He appointed in equal shares to a class consisting of the children of his two named sons at 21 or if female earlier marriage. At the same time he released his life interest. At that date there was only one such child, of tender years. Before any grandchild attained a vested interest the appointor died; accordingly, if the rule applies, the class of grandchildren to take closed when the first grandchild attained the age of 21 on 7th November 1968. The appointor's second son has married for a second time and may well have further children. The plaintiffs on behalf of any such future children argue that they will be included in the class, the rule not applying. The defendants, consisting of children of the two sons born before 7th November 1968, contend the contrary. e

We say at once that it appears to us that the question turns solely on the significance to be attached to the words 'whenever born' in the phrase in cl 1 of the deed of appointment: f

'. . . upon trust for such of the children of [the plaintiffs] whenever born as being a son or sons shall attain the age of twenty one or being a daughter or daughters shall attain that age or marry as a single class and if more than one in equal shares.'

g

Neither side in our judgment could derive any support for its arguments from cl 2, 4 or 5 of the appointment. For the plaintiffs it was argued that the provision in cl 3 that 'the powers of maintenance and advancement implied by the Trustee Act 1925 . . . shall apply to' the appointed funds, was inconsistent with the applicability of the rule, or at least gave some indication in that regard. We do not accept that. That clause is consistent equally with the class closing when the first member attained a vested interest (or, had it occurred later, the death of the life tenant appointor), and with the class remaining open until the death of the survivor of the appointor's two sons. In this regard *Re Henderson's Trusts*, *Schreiber v Baring*³, was quite different; there the language of the document itself in terms envisaged the possible existence of a *vested presumptive* share under the trusts declared, that is to say that a beneficiary h

¹ (1791) 3 Bro CC 401, [1775-1802] All ER Rep 209

² [1971] 3 All ER 1121, [1971] 1 WLR 1652

³ [1969] 3 All ER 769, [1969] 1 WLR 651 i

a having attained 21 was nevertheless liable to have the fraction of that share reduced by later additions to the class.

There are many reported cases on the applicability of this rule and the reasons for it. We do not think it necessary to recapitulate them. We believe that the question in this and other cases may be briefly thus stated: 'Is it clear from the language of the instrument in the circumstances in which that language is used that the rule is not applicable?' In the present case without the words 'whenever born' b in cl 1 there is no doubt that the rule would apply. In the reported cases there are instances in which phrases descriptive of the class in apparently unlimited and general terms have been held not to exclude the rule, on the ground that they were capable of referring only to the period before the application of the rule would close the class. Among such phrases we find 'all the children... whether now born or c hereafter to be born'; 'all and every the children of X'; 'the children of X as many as there might be'; 'all or any the children or child of X'. Goulding J⁴ considered that it would be too great a refinement to draw a distinction between such phrases (and in particular the phrase 'whether now living or hereafter to be born') and the words 'whenever born'. He described as tempting, and we think that in the end he succumbed to the temptation, to say that both phrases covered the future without d any express limit and, therefore, why should the latter phrase disclose an intention to hold up the possibility of distribution of the shares of those with a vested interest?

We do not find this proposition thus tempting. In our view there is an important distinction between the two phrases. The former is a general phrase pointing towards the future and, therefore, to some time in the future. The phrase 'whenever born' is in our view a specific and emphatic phrase which in terms points to all time e in the future. It is equivalent to 'at whatever time they may be born', and is limited only by the course of nature to the lifetime of the parents. If the phrase had been 'whenever in the lifetime of their respective parents born' there could be surely no doubt that the class was clearly defined as remaining open to membership by all grandchildren: just as was the case in *Scott v Earl of Scarborough*⁵ where the phrase was 'hereafter be born, during the lifetime of their respective parents'. (It is true that f there was in that case apparently another phrase also which showed that the rule was inapplicable: although oddly enough this was not the phrase relied on.) If the phrase used was 'now born or hereafter at whatever time to be born' surely the rule would be excluded; and 'whenever born' is to our minds the precise equivalent. In summary the phrase 'born or hereafter to be born' is a general reference to the future without g express limit in time and, therefore, consistent with a limit in time imposed by the direction for vesting and the rule. But 'whenever born' is a particular reference to the future expressly unlimited in time and, therefore, readily to be distinguished as inconsistent with a time limitation such as is imposed by the rule.

We were referred to a number of occasions in judgments and textbooks where the words 'whenever born' seem to have come naturally to the lips or pen when the speaker or writer wished to refer to a situation in which the rule was not applied. h It may well be that these instances do not establish the proposition for which the plaintiffs have contended; but they can certainly do nothing to weaken their argument. Instances of this were *Jarman on Wills*⁶; *Hawkins on Wills*⁷; *Re Bleckly (decd)*⁸; *Re Wernher's Settlement Trusts*⁹; *Re Ketby-Fletcher's Will Trusts*¹⁰; *Theobald on Wills*¹¹. We would refer to the fact that in their work on Real Property¹² by Megarry

4 [1971] 3 All ER at 1128, [1971] 1 WLR at 1660

5 (1838) 1 Beav 154

6 8th Edn, 1951, vol 3, p 1673

7 3rd Edn, 1925, p 99

8 [1951] 1 All ER 1064, [1951] Ch 740

9 [1961] 1 All ER 184, [1961] 1 WLR 136

10 [1967] 3 All ER 1076, [1969] 1 Ch 339

11 13th Edn, 1971, para 933

12 3rd Edn, 1966, pp 239, 509

and Wade the authors suggest that the words 'whenever born' do not exclude the rule; but for this view they rely on a reference to *Scott v Earl of Scarborough*¹³ which does not support it.

Accordingly in our judgment the rule in *Andrews v Partington*¹⁴ is excluded in the case of the appointment by the words 'whenever born' and the class will embrace all children of the sons whether born before or after the attainment by the first of a vested interest on 7th November 1968. On this aspect of the case the appeal will be allowed and an appropriate declaration substituted.

We turn now to the second part of the case. The settlor (also the first Lord Sandford) on 2nd April 1949 conveyed certain freehold and leasehold properties to trustees on trust to retain or sell, a trust which by the Law of Property Act 1925 was the equivalent of an immediate binding trust for sale with power in the discretion of the trustees to postpone that sale. By a contemporaneous settlement of the proceeds of sale the trust fund was to be held on trust in equal shares for the sons of the same two sons of the settlor at 21 and daughters at 21 or earlier marriage. The words 'whenever born' were absent. *Prima facie*, therefore, the rule applies and the class closed on 7th November 1968.

Counsel for the plaintiffs, however, mounted an elaborate argument based on the following contentions. First, that authority showed that a beneficiary with a vested interest in the case of land settled on trust for sale had no right on attaining a vested interest to demand sale and transfer of his share or presumptive share of the proceeds. Secondly, that the function of the rule was to enable a member of a class to claim as of right payment or transfer of his minimum share on attaining a vested interest. And thirdly, that consequently where at the time of the settlement the property settled was *solely* land the rule had no operation. Goulding J¹⁵ in part rejected this contention on the ground that the land was to be treated as converted into personalty. We did not call on counsel for the defendants on this point. We think that the answer to the plaintiffs' contention is a short one. The function of the rule is to enable trustees to distribute by removing uncertainty; or if it be to enable a beneficiary who has attained a vested interest to claim his minimum share, it is to enable the claim to be made but subject to the due and proper exercise by the trustees of the administrative powers and directions to which the whole trust and every share therein is subject. We do not regard *Blackman v Fysh*¹⁶ as at all a satisfactory authority for the proposition that the rule is not applicable when the only property settled was land; we share on this the view of Eve J in *Re Canney's Trusts*¹⁷. It would in our view introduce an absurdity if in a given case the rule would be applicable if at the time of the settlement the settled property were £100,000 in value of land and £100 in value of personalty, but not applicable if the personalty were lacking, even though at the time for decision of the point the whole trust property consisted of marketable securities.

Consequently the appeal on this second point fails.

Appeal on the first point allowed. Appeal on the second point dismissed. Leave to appeal to the House of Lords refused.

Solicitors: George & George (for the plaintiffs and the defendants).

Mary Rose Plummer Barrister.

¹³ (1838) 1 Beav 154

¹⁴ (1791) 3 Bro CC 401, [1775-1802] All ER Rep 209

¹⁵ [1971] 3 All ER 1121, [1971] 1 WLR 1652

¹⁶ [1892] 3 Ch 209

¹⁷ (1910) 101 LT 905

Coast Lines Ltd v Hudig & Veder Chartering NV

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, MEGAW AND STEPHENSON LJJ

16th, 17th NOVEMBER, 7th DECEMBER 1971

Conflict of laws – Contract – Proper law of contract – Charterparty – Law with which transaction has closest and most real connection – Charterparty between English owners and Dutch charterers – Factors pointing to English or Dutch law equally balanced – Subject-matter of charterparty English ship – Relevance of law of flag – Claim by owners based on exemption clause – Clause invalid under Dutch law – English law proper law.

Practice – Service – Service out of jurisdiction – Charterparty between English owners and Dutch charterers – Charterparty governed by English law – Charterers' residence and principal place of business in Holland – Charterers having no place of business or assets in England – Claim by owners based on exemption clause – Dutch law compelling Dutch courts to disregard exemption clause even though charterparty governed by English law – Leave to serve notice of writ out of jurisdiction – RSC Ord 11, r 1 (f).

The plaintiff shipowners, an English company, chartered their ship to the defendant charterers, whose residence and principal place of business was in Rotterdam and who had no place of business or assets in England. The charterparty was signed in Rotterdam following negotiations by telephone and telex between the charterers in Rotterdam and the shipowners' agents in Cardiff. The charterparty, which was in English in the Gencon form, provided for the carriage of cargo from Rotterdam to Ireland. It contained a clause exempting the shipowners from damage to goods caused by unseaworthiness of the vessel unless the unseaworthiness was attributable to want of due diligence on the part of the shipowners or their manager personally. It contained no express provision as to the law governing the contract. The bill of lading was issued in Rotterdam signed by agents on behalf of the master. It contained a clause binding the shipowners to exercise due diligence to make the ship seaworthy and making them liable for want of due diligence, thereby subjecting them to a greater liability than that provided by the charterparty. On the voyage the cargo was damaged as a result of the unseaworthy condition of the vessel. The shipowners admitted liability to the cargo owners under the terms of the bill of lading and, on the basis of their restricted liability for unseaworthiness under the charterparty, claimed an indemnity against the charterers. Under the Netherlands Commercial Code in force at the material time, a clause in a charterparty, such as that in the Gencon form, restricting the shipowners' liability for damage due to unseaworthiness was rendered null and void; furthermore the relevant provisions of the code applied to all cases of carriage of goods by sea from Netherlands ports even though the parties had expressly chosen some law other than Netherlands law as the proper law of the contract. The shipowners applied for leave to serve notice of the writ on the charterers out of the jurisdiction under RSC Ord 11, r 1 (f), on the basis that the charterparty was governed by English law.

Held – (i) (Stephenson LJ dubitante) Although the factors pointing to English law or Netherlands law as that with which the contract had its closest and most real connection were evenly balanced, the proper law of the charterparty was English law for the following reasons—

(a) (per Lord Denning MR) in a contract of charterparty, other things being equal, the law of the flag, in this case English law, should govern it (see p 455 h and j, post);

(b) (per Megaw LJ) the connection which had to be sought was that between the transaction and the system of law, which meant that, where the parties had not expressed their intention, more importance was to be attached to what was to be done under the contract—its substance—than considerations of form and formalities; in the present case the subject-matter of the charterparty was an English ship and the whole of the transaction contemplated by the contract concerned the activities of that English ship (see p 457 g to p 458 a and g, post);

(c) (per Lord Denning MR) the contract contained an exemption clause which was valid under English law but invalid under Netherlands law and applying the principle that a contract should be so construed as to make it valid rather than invalid, this was a pointer to English law as the proper law (see p 456 a and b, post); *P & O Steam Navigation Co v Shand* (1865) 3 Moo PC 272 and dictum of Lord Halsbury LC in *Re Missouri Steamship Co* (1889) 42 Ch D at 337 applied.

(ii) The proper law being English law, leave should be given to serve the writ out of the jurisdiction; as the charterers were a Netherlands company, owing no allegiance in England and having no place of business there, it would not be appropriate to grant leave if the Netherlands courts were free to apply English law as the proper law; however, since the Netherlands courts were not free to do so, being compelled to apply a special law of the Netherlands which was not the proper law of the contract and which was out of line with the maritime law of all other countries, the shipowners should not be compelled to pursue their claim in the Netherlands courts (see p 456 f, p 460 e and f and p 462 b, post).

Notes

For the proper law of a contract, see 7 Halsbury's Laws (3rd Edn) 72, 73, para 137, and for cases on the subject, see 11 Digest (Repl) 420-429, 715-750.

For leave to serve a writ outside the jurisdiction, see 30 Halsbury's Laws (3rd Edn) 323-326, paras 588, 589, and for cases on the subject, see 50 Digest (Repl) 335-338, 646-663.

Cases referred to in judgments

Assunzione, The [1954] 1 All ER 278, [1954] P 150, [1954] 2 WLR 234, Digest (Cont Vol A) 229, 784a.

Bonython v Commonwealth of Australia [1951] AC 201, 35 Digest (Repl) 189, 33.

Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA [1970] 3 All ER 71, [1971] AC 572, [1970] 3 WLR 389, *rvsg* sub nom *Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA* [1969] 3 All ER 589, [1969] 1 WLR 1338, Digest (Cont Vol C) 140, 721b.

Hagen, The [1908] P 189, [1908-10] All ER Rep 21, 77 LJP 124, 98 LT 891, 50 Digest (Repl) 337, 657.

Kruger & Co Ltd v Moel Tryvan Ship Co Ltd [1907] AC 272, 76 LJKB 985, 97 LT 143, sub nom *Moel Tryvan Ship Co Ltd v Kruger & Co Ltd* [1907] 1 KB 809, 41 Digest (Repl) 278, 956.

Lloyd v Guibert (1865) LR 1 QB 115, 35 LJQB 74, 13 LT 602, 41 Digest (Repl) 404, 1896.

Miller (James) and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] 1 All ER 796, [1970] AC 583, [1970] 2 WLR 728, *rvsg* sub nom *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd* [1969] 2 All ER 210, [1969] 1 WLR 377, Digest (Cont Vol C) 141, 734d.

Missouri Steamship Co, Re (1889) 42 Ch D 321, 58 LJCh 721, sub nom *Re Missouri SS Co, Monroe's Claim*, 61 LT 316, 6 Asp MLC 423, 11 Digest (Repl) 424, 728.

P & O Steam Navigation Co v Shand (1865) 3 Moo PC 272, 6 New Rep 381, 12 LT 808, 11 Digest (Repl) 431, 771.

United Railways of the Havana and Regla Warehouses Ltd, Re [1960] 2 All ER 332, [1961] AC 1007, [1960] 2 WLR 969, Digest (Cont Vol A) 231, 862a.

Interlocutory appeal

- a** This was an appeal against an order of Roskill J made on 28th July 1971 refusing the application of the charterers, Hudig & Veder Chartering NV, for an order that the order of Master Hyamson, dated 20th May 1970, giving leave to the shipowners, Coast Lines Ltd, on an ex parte application, to issue a writ of summons against the charterers and to serve notice thereof on them at Rotterdam, Holland, be set aside.
- b** The facts are set out in the judgment of Lord Denning MR.

A E J Diamond for the charterers.

R J H Collinson and *S A G L Gault* for the shipowners.

Cur adv vult

- c** 7th December. The following judgments were read.

- LORD DENNING MR.** In December 1967 an English company, Coast Lines Ltd who are the owners of the mv Grangefield, let her on a voyage charter to a Dutch company—Hudig & Veder Chartering NV. Under the charter, the vessel was to proceed to Rotterdam and there load a cargo and carry it to Drogheda, a port in the Republic of Ireland. The cargo was loaded at Rotterdam, but the vessel ran into very bad weather conditions. When she arrived at Drogheda it was found that some 65 tons of water had been taken inboard. The cargo was badly damaged. The water had got in by a broken bilge sounding pipe. The pipe was found to be extremely rusty, corroded and wasted. The vessel cannot have been in a seaworthy condition when she started on the voyage. The cargo owners claimed damages from the shipowners. The shipowners admitted liability to the cargo owners, but then the shipowners claimed to be indemnified by the charterers.
- d**
- e**

On 28th May 1970 the shipowners, Coast Lines Ltd, issued a writ against the charterers, Hudig & Veder Chartering NV, indorsed as follows:

- f** 'THE PLAINTIFFS CLAIM is for an indemnity under and/or damages for breach of a contract by Charter Party dated the 13th December 1967 whereby the Defendants hired the plaintiffs' motor vessel "GRANGEFIELD" in respect of the Plaintiffs' liability under Bill of Lading signed in accordance therewith at the request of the Defendants.'

- g** The shipowners applied ex parte to the master for leave to serve the writ on the proposed defendants, the charterers, out of the jurisdiction. The master gave leave. The charterers entered a conditional appearance and applied to set aside the service. Roskill J refused to set it aside. The charterers appeal to this court.

1. The charterparty

- h** The charterparty is dated 'Rotterdam 13th December, 1967'. It was for carriage of cargo from Rotterdam in the Netherlands to Drogheda in Ireland. The negotiations leading to the fixture of the Grangefield were conducted over the telephone and on the telex between the charterers in Rotterdam and J F Thomas & Co Ltd (brokers for the shipowners) in Cardiff. It is customary in the Netherlands for the charterers' brokers to draw up and sign the charterparty. This charterparty was drawn up in Rotterdam and signed there on behalf of both parties by the charterers. Copies were subsequently sent to J F Thomas & Co Ltd. The charterparty was made in the Gencon form. This is the form of charterparty which is the most widely used by all those in Rotterdam who are engaged in the European shipping trade. The Gencon form is used, irrespective of whether or not the charterparty has any connection with England or whether or not either party is English.
- j**

The charterparty contained an exemption for the shipowners in the terms usual in the Gencon form:

'Owners are to be responsible for loss of or damage to the goods or for delay in delivery of the goods only in case the loss, damage or delay has been caused by the improper or negligent stowage of the goods (unless stowage performed by shippers or their stevedores or servants) or by personal want of due diligence on the part of the Owners or their Manager to make the vessel in all respects seaworthy and to secure that she is properly manned, equipped and supplied or by the personal act or default of the Owners or their Manager.

'And the Owners are responsible for no loss or damage or delay arising from any other cause whatsoever, even from the neglect or default of the Captain or crew of some other person employed by the Owners on board or ashore for whose acts they would, but for this clause, be responsible, or for unseaworthiness of the vessel on loading or commencement of the voyage or at any time whatsoever . . .

'The Captain to sign Bills of Lading at such rate of freight as presented without prejudice to this Charterparty . . .'

It is apparent from that clause that the shipowners were relieved—so far as the charterers were concerned—of any liability for the damage done to these goods; for, although the damage was due to the vessel being unseaworthy, nevertheless this was no fault of the owners or manager *personally*. It was quite permissible in English law for the shipowners to stipulate in the charterparty for that exemption, because the Carriage of Goods by Sea Act 1924 does not apply to charterparties.

2. *The bill of lading*

The bill of lading was issued in Rotterdam. It was for the carriage of 4,000 paper bags of bleaching earth (made in Germany) from Rotterdam to Drogheda. It was signed by agents on behalf of the master. It was in English and contained on the back a clause paramount which incorporated the Hague Rules. It bound the shipowner to exercise due diligence to make the ship seaworthy and made him liable for want of due diligence. It made the shipowner liable, therefore, in this case to the cargo owner.

It is apparent that, under that bill of lading, the shipowners were subject to a greater liability than that provided by the charterparty. The charterers must take responsibility for the presentation of that bill of lading. By that conduct the charterers imposed on the shipowners a greater liability than was stipulated for in the charterparty. On this account it has been held that the charterers were under a duty to indemnify the shipowners: see *Kruger & Co Ltd v Moel Tryvan Ship Co Ltd*¹. This duty may be said to arise from the request of the charterers to the master to sign the bills of lading. But I would prefer to put it on an implied term in the charterparty to the effect that, in case the charterers should present—or cause to be presented—bills of lading imposing a greater liability on the shipowners than that contained in the charterparty, the charterers would indemnify the shipowners in respect of that greater liability.

3. *English law and Netherlands law*

If the charterparty is governed by English law, the shipowners will be able to rely on the indemnity of which I have just spoken. They will be entitled to call on the charterers to indemnify them against the liability to the cargo owners. The Hague Rules will not apply. But, if the charterparty is governed by Netherlands law, the position will be quite different. The Netherlands Commercial Code (as it existed at the time of this shipment—it has been altered since) contained an art 517d which applied the Hague Rules to the carriage of goods by sea from Netherlands ports; and this has been held by the courts of the Netherlands to apply, not only to bills of lading, but also to charterparties; and to override any stipulation, express or

a implied, to the contrary. Even if a charterparty expressly says that it is to be governed by some other law, e.g. English law, nevertheless art 517d is regarded as mandatory to the Netherlands courts. They must apply the Netherlands Commercial Code to every shipment from a Netherlands port. If the shipowners should, therefore, sue the charterers in the Netherlands courts—or the charterers sue the shipowners—those courts must ignore English law altogether—they must ignore the exemption clause in the charterparty and the implications from it—they must hold that the shipowners are liable to the full extent set out in the Hague Rules, and cannot claim indemnity from the charterers.

b In making this mandatory provision binding on their courts, the Netherlands are out on a limb by themselves. In an ideal world it would be different. If a contract is properly held to be governed by English law, then the courts of every country should apply English law to it. The Netherlands Commercial Code goes against this ideal. It says that every cargo of goods from a Netherlands port is to be governed by Netherlands law, no matter that the contract has nothing else to do with the Netherlands. We are told that since 1969 the Netherlands have withdrawn this mandatory provision. They have come into line with the other maritime countries. So the point may not in future arise. But we have to deal with the position as it was in 1967.

c In view of this difference, we have to consider these points: 1. What is the proper law of the contract? If it is Netherlands law, then the Netherlands Commercial Code will apply. The shipowners will not be entitled to an indemnity. If it is English law, and the case is allowed to proceed in the English courts, then the English courts will apply English law, and will give the shipowners an indemnity. But, if the shipowners are forced to sue in the Netherlands courts, those courts will (despite the contract being governed by English law) apply the Netherlands Commercial Code to it, and will refuse an indemnity. 2. If the proper law is English law, ought these courts to allow service out of the jurisdiction so that the case can proceed in the English courts, or should they refuse and force the shipowners to go to the Netherlands courts?

f 4. *The proper law of the contract*

In order to determine the proper law of the contract, the courts at one time used to have a number of presumptions to help them. Now we have to ask ourselves: what is the system of law with which the transaction has the closest and most real connection? This is not dependent on the intentions of the parties. They never thought about it. They had no intentions on it. We have to study every circumstance connected with the contract and come to a conclusion. This new test is all very well. It is often easy to apply. But, there are sometimes cases where it is quite indecisive. The circumstances do not point to one country only. They point equally to two countries, or even to three. What then is a legal adviser to do? What is an arbitrator or a judge to do? Is he to toss up a coin and see which way it comes down? Surely not. The law ought to give some help. It ought to provide a pointer to a solution, if only as a last resort. One such pointer is that, in a contract of charterparty, other things being equal, the law of the ship should govern: see *Lloyd v Guibert*² and *The Assunzione*³ per Hodson LJ in a passage quoted by Roskill J.

h Apply the test here. One important circumstance is that the contract was made in Rotterdam by Dutch charterers for shipment at Rotterdam. That points to Netherlands law. Another important circumstance is that the contract was for carriage in an English ship owned by English owners for carriage on the high seas. That points to English law. Put those two into the scales, one on one side, the other on the other. You find they are equal. Other circumstances point one way, then another. There is nothing to choose. So, as a last resort, you take the law of the flag, which is English law.

2 (1865) LR 1 QB 115

3 [1954] 1 All ER 278 at 300, [1954] P 150 at 194

But then there is a further consideration. The contract contained an exemption clause which was valid under English law, but invalid under Netherlands law. That, I think, is important. In the maritime law of this country—and I believe of all other maritime countries—it is an accepted principle that a contract is, if possible, to be construed so as to make it valid rather than invalid. The Latin maxim is well known. A stipulation must be construed *ut res magis valeat quam pereat*. Applying it here, the exemption clause in the charterparty is valid by English law, but invalid by Netherlands law. That is a pointer to English law as the proper law of the contract. For this simple reason it cannot be assumed that the Dutch charterers put their signatures to a contract which they did not intend to honour. This is supported by opinion of the Privy Council in *P & O Steam Navigation Co v Shand*⁴; and by the judgment of Lord Halsbury LC in *Re Missouri Steamship Co*⁵.

I would add another consideration also. The commercial judge (Roskill J) has held that the proper law is English law. We should be slow to differ from him on such a point. As Lord Wilberforce said recently, 'decision by the commercial judge should end the matter': see *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA*⁶.

I am of opinion, therefore, that the proper law of this contract is English law, and not Netherlands law.

5. *The exercise of their discretion*

Once it is held that the charterparty is by implication governed by English law, the next question is whether leave should be given to serve the writ out of the jurisdiction? This is a very serious question. The charterers are a Netherlands company. They owe no allegiance here. They have no place of business here. They have, as yet, no assets here. It is a strong thing to force them to come to England to contest a case against them. So we must be exceedingly careful before doing so. That was pointed out long ago: *The Hagen*⁷. If the Netherlands courts were free to apply the proper law of the contract (i.e. English law), I would not be disposed to grant leave to serve out of the jurisdiction. But the Netherlands courts are not free. They are compelled by the Netherlands law to apply a special law of the Netherlands (i.e. art 517d), which is not the proper law of the contract and which is out of line with the maritime law of all other countries. The Netherlands courts are compelled to apply a law which is contrary to the general understanding of commercial men. In these circumstances, I do not think we should send the English shipowners to the Netherlands courts. We should retain the case in these courts where we can and will apply English law, which is the proper law of the contract.

I know that the charterers can avoid our English law by refusing to submit to the jurisdiction of the English courts. In that case any judgment of the English courts will not be enforceable in the Netherlands under the arrangements for the reciprocal enforcement of judgment; see the Reciprocal Enforcement of Foreign Judgments (The Netherlands) Order 1969, art III (2) (a) and IV (1)⁸. The English shipowners would then be forced to sue in the Netherlands, and the courts there would, no doubt, apply the Netherlands Commercial Code. So, in a sense, the matter rests with the charterers. But, so far as these courts are concerned, I think that leave should be given to serve out of the jurisdiction.

I agree with the judgment of Roskill J and I would dismiss the appeal.

MEGAW LJ. The facts as to the making of this charterparty and as to the transaction which it covered have been stated by Lord Denning MR.

4 (1865) 3 Moo PC 272

5 (1889) 42 Ch D 321 at 337

6 [1970] 3 All ER 71 at 89, [1971] AC 572 at 600

7 [1908] P 189, [1908-10] All ER Rep 21

8 SI 1969 No 1063

a The shipowners, Coast Lines Ltd, claim that they ought to be allowed to serve notice of their writ out of the jurisdiction on the charterers, Hudig & Veder Chartering NV, in the Netherlands. The charterers contend that leave ought to have been refused. For the shipowners' submission that this is a proper case for the English courts to assert jurisdiction against a defendant who has not been served with the writ in this country, the shipowners rely, and rely solely, on para (f) (iii) of RSC Ord 11, r 1: that is, that the contract in respect of which they seek relief is 'by implication governed by English law. The charterers contend that the contract is governed by the law of the Netherlands. That, therefore, is the first issue. It has to be decided on the basis of the principles of private international law as applied by the English courts. If that issue be answered in favour of English law as being the proper law of the contract, a second issue arises: since the granting of an order under RSC Ord 11, r 1, is always discretionary, should that discretion be exercised in favour of the shipowners in this case?

c Counsel for the charterers has submitted that if the case falls to be decided by the Netherlands courts the shipowners' claim must fail. On the uncontradicted evidence of an expert in Netherlands law, that would certainly seem to be so. On the other hand, he suggests that if English law is applied as the proper law of the contract, the shipowners would be, at least, very likely to succeed. That may be; although for myself I should prefer at this stage not to express any concluded opinion on that matter. It may fall to be argued hereafter.

d What is the proper law of the contract? In this charterparty the parties did not express their actual intention as to the proper law. No inference can be drawn from any one or more of the express terms of the contract as to the actual common intention of the parties. Hence the question to be answered is: what is the system of law with which the transaction has its closest and most real connection?

e This test has its origin with Professor Westlake (see Cheshire's Private International Law⁹). It was first adopted by Lord Simonds in delivering the judgment of the Privy Council in *Bonython v Commonwealth of Australia*¹⁰. A decade later it was accepted explicitly for purposes of English private international law by the House of Lords in *Re United Railways of the Havana and Regla Warehouses Ltd*¹¹: see Lord Denning's speech¹² and that of Lord Morris of Borth-y-Gest¹³. It has recently been reaffirmed in *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA*¹⁴, in which Lord Reid¹⁵, Lord Morris of Borth-y-Gest¹⁶ and Lord Diplock¹⁷, accepted and applied the *Bonython* test¹⁸ of the closest and most real connection with the transaction.

g I think it is not without significance to note that the connection which has to be sought is expressed to be connection between the *transaction*, i.e. the transaction contemplated by the contract, and the system of law. That, I believe, indicates that, where the *actual* intention of the parties as to the proper law is not expressed in, and cannot be inferred from, the terms of the contract (so that it is impossible to apply the earlier part of the *Bonython* formula¹⁸, the system of law 'by reference to which the contract was made'¹⁹), more importance is to be attached to what is to be done under the contract—its substance—than to considerations of the form and formalities of

9 8th Edn, pp 199, 200 and 202

10 [1951] AC 201 at 219

11 [1960] 2 All ER 332, [1961] AC 1007

12 [1960] 2 All ER at 356, [1961] AC at 1068

j 13 [1960] 2 All ER at 364, [1961] AC at 1081

14 [1970] 3 All ER 71, [1971] AC 572

15 [1970] 3 All ER at 74, [1971] AC at 583

16 [1970] 3 All ER at 77, [1971] AC at 587

17 [1970] 3 All ER at 91, [1971] AC at 603

18 See *Bonython v Commonwealth of Australia* [1951] AC 201

19 [1951] AC at 219

the contract or considerations of what may, without disrespect, be described as lawyers' points as to inferences to be drawn from the terms of the contract. a

With which system of law did this transaction—the business transaction of the provision of a ship which would carry goods from Rotterdam to Drogheda—have its closest and most real connection? The shipowners were English, the charterers were Dutch. The charterparty, having been negotiated across the seas, was dated 'Rotterdam, 13th December 1967'. It was only in that somewhat technical sense that the contract was 'made' there. It was in the English language. In the light of the uncontradicted evidence, that is not a matter of great weight in this case in favour of the English legal system. The fact that the freight and demurrage were expressed in sterling deserves slightly greater weight, although, again, it is not a strong factor in the light of the evidence. The loading of the vessel was to take place in Rotterdam and bills of lading were to be issued there. To that extent performance of the obligations of the contract was connected with the Netherlands. So far as the bills of lading were concerned, it might well be that the fact that they were issued in Rotterdam in respect of goods loaded there would be a conclusive, or at least a powerful, indication that the proper law of the contracts to which they might give rise would be the law of the Netherlands. But different considerations apply to the two types of contract—charterparty contracts and bill of lading contracts, as is indeed evidenced by the Hague Rules, based on international convention, to which I shall have to refer further on the second issue. b

Against this connection with the Netherlands system of law, arising out of the fact that an important part of the transaction was to be carried out in Netherlands territory, it is necessary to set the fact that the principle subject-matter of the charterparty, on a sensible business view of the transaction, was the ship. A voyage charterparty, while normally containing detailed provision for dealing with the goods to be carried, not only at the port or ports of loading but also during the voyage and at the port or ports of discharge, is primarily and in essence a contract for the provision of services of—the use of—a specified, named, ship. This may be contrasted with a bill of lading contract where it could sensibly be said that the principal subject-matter of the contract is the goods covered by the bill of lading. The ship here chartered was, to put it shortly, English. The flag was British, with English registration and English ownership. It would not be right to place too much stress on the rule of public international law (see Oppenheim's *International Law*²⁰) that 'vessels, and the things and persons thereon, remain during the time they are on the open sea under the jurisdiction of the State under whose flag they sail', and that they are in many respects to be treated as 'floating portions of the flag State'. But to my mind the fact that the subject-matter of the charterparty was an English ship and that the whole of the transaction contemplated by the contract concerned the activities of that English ship, in loading, carrying and discharging the cargo, produces the result that the transaction, viewed as a whole and weighing all the relevant factors, has a closer and more real connection with English law than with the law of the Netherlands. c

It may be suggested that this is to bring back into English private international law a presumption—the presumption of the law of the flag—as *prima facie* determinant of the proper law. Presumptions, once fashionable during the earlier development of English private international law, are now, whether for good or for ill, out of fashion and rejected. That, indeed, is a necessary result of the adoption of the 'closest and most real connection' test. No single factor is to be treated as, *prima facie*, providing the answer. I would go so far as to say that in a charterparty case the flag of the vessel is likely normally to be important. But it must be considered along with all the other relevant factors. Weighing it, as best I can, with and against the other relevant aspects of this transaction, I think that the result is as I have indicated. Therefore English law is the proper law of the charterparty contract. d

a Let me suppose that I am wrong (as may well be the case) in suggesting that a significant distinction was intended between the words 'contract' and 'transaction' in the *Bonython*¹ formula. It would follow that one would then be entitled, in a case such as this, to give substantial weight to considerations arising out of the legal effect of the contractual terms, according as one system of law or the other might be held to be applicable; and this, even though there may be no reason to suppose that the parties had any such consideration in mind. (This would, I think, reflect Dicey's 'inferred intention'², approved, with a reservation, by Lord Wilberforce in *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA*³). On that supposition, the case in favour of English law would in my view be overwhelming. For an important term which the parties agreed to incorporate into this contract would be valid under English law, but would be a nullity under the law of the Netherlands. It was such a point as this, on the 'inferred intention' theory of the law, which was a determinant factor, in Lord Halsbury LC's judgment, in *Re Missouri Steamship Co*⁴. For myself, however, I am inclined to think that this consideration is effective only to negative any argument that the terms of the contract show an actual intention of the parties that Netherlands law should govern.

d It is necessary now to consider the second issue: should the discretion which exists under RSC Ord 11, r 1, be exercised so as to found jurisdiction in England against the Netherlands charterers. The principal argument of counsel for the charterers is that in all the circumstances it would be contrary to comity to permit the writ to be served out of the jurisdiction. There is, however, one factor here, to be found in the uncontradicted evidence of an expert in Netherlands law, which has led me to the conclusion that that argument ought not to prevail.

e The Hague Rules, accepted as a result of international agreement, were expressly and deliberately restricted to bill of lading contracts. Charterparties were not included, for it was the general consensus that freedom of contract should remain in respect of them. The Netherlands Commercial Code, as it stood at the time which is relevant for this case, restricted freedom of contract by applying the Hague Rules restrictions in respect of all contracts for the carriage of goods by sea from Netherlands ports, irrespective whether the relevant contract was, or was evidenced by, a charterparty or a bill of lading. That was the combined effect of arts 517d, 466 and 468 to 480 of the Code. We are told that charterparties have now been excluded by amendment of the Code. But we must, of course, deal with this case, as presumably the Netherlands courts would have to deal with it if it came before them, on the basis of the law as it was in December 1967.

g The result of those provisions of the Code was, first, that in Netherlands municipal law the express provisions of the Gencon charterparty, limiting the owner's liability so that it falls below the level permitted by that law, would be null and void. But there was a further consequence, affecting the operation of private international law as applied by the Netherlands courts. This is stated by Dr Boeles, an expert in Netherlands law, in his affidavit on behalf of the charterers, as follows:

h '10. It is, however, not permissible for the parties to a contract, where Article 517 (d) applies, to choose as the proper law of the relevant contract a law other than Netherlands law. Article 517 (d) is a mandatory provision. It applies Articles 468 to 480 to all cases of the carriage of goods by sea from Netherlands ports: (i) even though the parties to the contract of carriage expressly choose some law other than Netherlands law as the proper law of the contract; (ii) even though the contract of carriage has the closest connection with some system of law other than Netherlands law; (iii) even though the parties provide that the Courts of

1 [1951] AC at 219

2 Dicey and Morris on Conflict of Laws, 7th Edn (1958) r 148, sub-r 2

3 [1970] 3 All ER at 84, [1971] AC at 595

4 (1889) 42 Ch D 321 at 337

some country, other than the Netherlands, shall have sole jurisdiction over all disputes; and (iv) even though the contract contains an arbitration clause whereunder all disputes are to be referred to arbitration in some country other than the Netherlands.

'11. The above principles are illustrated by a number of decisions of the Netherlands Courts . . .'

If this requirement (a requirement founded, no doubt, on what was at the time regarded as a matter of public policy in the Netherlands, which involved the ignoring or overriding of that which would otherwise have been the proper law of the contract) had related to ensuring the enforcement of the spirit or the letter of an accepted international convention (for example, the Hague Rules in relation solely to bills of lading) or had related to the prevention of an avoidance of such generally accepted rules by the device of making the contract subject to the law of another state, I should have been disposed to say that the English courts should, in their discretion, have refused leave to serve out of the jurisdiction. That would have been a proper instance of giving effect to the requirements of comity. But that is not the case here. Netherlands law at the relevant time was based on a refusal to allow freedom of contract in respect of a charterparty, provided that there was involved any carriage of goods from any Netherlands port, whether or not it was the first port of loading under the relevant charterparty and whether or not there was any other element connecting the transaction with the Netherlands. On the other hand, the relevant international convention had, at least by implication, indicated that this was not a sphere in which the consensus of opinion, internationally, favoured such a restriction. If English law is the proper law of the contract, and the contract does not offend against the public policy of this country or what may be called the general public policy of maritime nations, to be implied from the terms of the international convention, comity, in my view, does not demand that a party who desires to have his dispute decided in accordance with the proper law of the contract should be precluded from having it so decided. That, on the evidence, would be the consequence of a refusal of leave to serve notice of the writ out of the jurisdiction in this case.

Accordingly, in agreement with Roskill J and, I believe, for substantially the same reasons, I would hold that this is a proper case in which the discretion should be exercised under RSC Ord 11, r 1. I would dismiss the appeal.

STEPHENSON LJ. I have found difficulty in answering both the questions raised by this appeal.

What is the proper law of this contract, English or Dutch? This question cannot be answered by ascertaining the actual intention of the parties. If they had applied their minds to it the English shipowners would probably have answered 'English' and the Dutch charterers 'Dutch'. If they had been asked to agree on the application of the other's law to the charterparty each would probably have refused and there would have been no contract; but there is a contract: cf *The Assunzione*⁵ per Singleton LJ. The parties have not expressed their actual choice of the proper law to govern this contract. So the court has to infer the intention, which they have not expressed and one of them would probably disclaim, from the terms and the nature of the contract and from the relevant contemporary circumstances; or, if that is impossible, to ascertain the country and system of law with which the contract and transaction have the closest and most real connection: *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd*⁶ and *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA*⁷. I think that the insertions of 'the country' and 'the transaction' in this formulation of Professor Cheshire's so-called 'localization' test

5 [1954] 1 All ER 278 at 290, [1954] P 150 at 176

6 [1970] 1 All ER 796, [1970] AC 583

7 [1970] 3 All ER 71, [1971] AC 572

a have the significance respectively attributed to them by Lord Reid in the former case⁸ and by Megaw LJ in the instant case.

Which country and system of law is that? This question has now to be answered without the help of any presumptions and simply by weighing all the elements and circumstances of the contract and its contemplated performance and deciding on which side the scale tips. I find the scales evenly balanced, but the court cannot leave
b them in everlasting equipoise because there would then be no proper law of the contract. But there is a proper law and that the court must impose on the contract, or extract from it, even if the operation is more like an adjustment than a reading of the scales.

Into the English scale the judge put the English nationality of the ship and of the shipowners, the place of business in Cardiff of their agents who negotiated the charterparty by telephone and telex, the provision for payment of freight and for calculating
c demurrage and dispatch in sterling and the English form and language of the charterparty. But he rightly gave little weight to the last two and disregarded the bill of lading.

Into the Dutch scale he put the place where the charterparty was signed, the nationality of the charterers, and the place of shipment. He rightly disregarded the
d earlier charterparty and its Dutch ship for which this charterparty was substituted, but apparently treated the fact that everything after shipment up to port of discharge was to take place outside the Netherlands as more significant than the fact that it was to take place outside England also.

Into the English scale Lord Denning MR has put the consideration that the parties would not have put their signatures—or rather allowed one of them to put a signature on behalf of both of them—to a contract which was partly invalid. In *Re Missouri*
e *Steamship Co*⁹ Fry LJ asked:

'If you find in a contract, one of the parties to which is English, a stipulation which is valid according to the law of *England*, but not according to the law of the country where it is made, is not that evidence that the parties intended to
f contract according to English law?'

Counsel conceded that it was some evidence and in their judgments Lord Halsbury LC and Fry LJ indicated that they thought it respectively 'irresistible' and 'cogent' evidence.

I appreciate that this is a consideration which only has weight if intention, however artificially, comes into the ascertainment of the proper law. But if it does, there must
g go into the Dutch scale a counterbalancing consideration that the Dutch charterers are not lightly to have imputed to them, abetted by the other party, an intention to transgress the commercial code of their country, which their country's law forbids them to do by choosing the law of another country.

Bearing in mind all these matters, I confess that if I had to read the balance without assistance I should have been inclined to decide, by perhaps underestimating the power
h of the flag of the ship which it still has, that it tipped, if at all, in favour of Dutch law. But I am not willing to differ on such a nice and difficult point from the contrary view of Roskill J reached without the help from commercial arbitrators which the judge had in the *Compagnie d'Armement Tunisienne SA* case¹⁰ but endorsed by the other members of this court, particularly in a branch of the law where their experience so far exceeds my own.

j If the proper law of this contract is English and this court therefore has jurisdiction under RSC Ord 11, r 1 (1) (f) (iii) to make the order under appeal, why should it not be made? It is tempting to ask the question in that form when the contract by its terms

8 [1970] 1 All ER at 798, [1970] AC at 604

9 (1889) 42 Ch D 321 at 331

10 [1970] 3 All ER 71, [1971] AC 572

makes English law its proper law but to reverse the approach where the contract does so by implication only and to ask: why *should* the order be made? Again it is tempting to say, as Farwell LJ indicated in *The Hagen*¹¹, that the court's discretion ought to be exercised only in plain cases to which the rule clearly applies but not in doubtful or borderline cases like the present.

However, I am satisfied that these temptations ought to be resisted; that the discretion given by the rule is unfettered except by comity, convenience and the justice of the case; and that the arguments elaborated by counsel for the charterers for reversing the judge's exercise of his discretion in favour of the shipowners must be rejected for the reasons given by the judge and by Lord Denning MR and Megaw LJ.

I agree therefore that this appeal fails.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Holman, Fenwick & Willan* (for the charterers); *Alsop, Stevens, Batesons & Co* (for the shipowners).

L J Kovats Esq Barrister.

Dutton v Bognor Regis United Building Co Ltd and another

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, SACHS AND STAMP LJJ

26th, 27th, 28th, 29th OCTOBER, 1ST, 2ND, 3RD, 4TH NOVEMBER, 17TH DECEMBER 1971

Negligence – Duty to take care – Exercise of statutory powers – Local authority – Building operations – Legislation giving authority control over building operations – Byelaws requiring approval of foundations of building by authority's building inspector before being covered up – Inspector failing to make proper inspection before giving approval – Foundations laid by builder of house inadequate to carry load of building – Consequent damage to structure of house occurring after house coming into hands of subsequent purchaser – Liability of authority for inspector's negligence.

Negligence – Duty to take care – Owner of realty – Builder – Duty to subsequent purchaser in respect of hidden defects – Negligence in construction of house – Foundations badly laid so as to create hidden defect – Defective foundations causing damage to house after purchase by subsequent purchaser – Builder owing duty of care to a purchaser of the house – Builder liable for negligence to subsequent purchaser – Immaterial that builder owner of realty.

Negligence – Duty to take care – Statement – Statement by professional adviser – Reliance – No need to prove reliance on advice by plaintiff where negligence in giving advice on safety of buildings etc likely to result in bodily injury – Surveyor – Building inspector – Failure to make proper inspection of foundations of house before giving byelaw approval – Foundations inadequate – Subsequent damage to structure of building caused by settlement – Liability for cost of repairs.

Negligence – Damage – Physical injury or economic loss – Hidden defects – Building – Inadequate foundations – Builder owner of premises – Liability to subsequent purchaser – Damage to structure of building owing to defects in foundations occurring after building coming into hands of subsequent purchaser – Whether subsequent purchaser entitled to damages for cost of repairs or diminution in market value.

a By s 1 of the Public Health Act 1936 it was the duty of a local authority to carry the Act into execution. Pursuant to that duty, and under the statutory authority contained in s 61 of the Act to make building byelaws, the Bognor Regis Urban District Council ('the council') made byelaws regulating (inter alia) the construction of buildings in their area. The Act provided the council with powers to enforce the byelaws. The byelaws were in standard form and could not be relaxed except with
b the Minister's consent. The byelaws governed every stage of building work; in particular byelaw 18 provided that the foundations of a building should be properly constructed to sustain the loads of the building and to prevent any settlement that might impair its stability. The byelaws also provided for the appointment of surveyors and inspectors to visit building work to see whether the byelaws were being complied with. Offences against the byelaws were punishable by a fine. In 1958 a builder, H,
c bought land in Bognor Regis for the purpose of developing it as a housing estate. He laid out the land in plots. One of the plots was on the site of an old rubbish tip, the tip having been filled in and the ground made up to look like the surrounding land. In October 1958 the builder submitted plans of this plot to the council for byelaw and planning approval. The plans showed that the house to be built on the plot had normal foundations for the type of soil in the area. In October 1958 the council
d gave byelaw approval to the plans, under the 1936 Act, on the printed form for that purpose. The form contained a note that all foundations and drains must be examined by the council's surveyor before being covered up, and that no new premises were to be occupied before being certified by the council's surveyor. A batch of notice forms was sent to the builder, with the form of approval, for him to notify the council of the progress of the work. Planning permission for development of the plot was then granted. Having got the necessary approvals, the builder started
e work on the plot in 1959. While digging the trenches for the foundations he came on the remains of the rubbish tip; so he made the outer trench deeper than usual and reinforced the concrete floor with a steel mesh, but he did not bother about the inner walls. He duly notified the council that the foundations were ready for inspection. The council sent their building inspector to inspect them. The inspector approved the foundations for the purpose of the building byelaws. In doing so the
f inspector failed to carry out his task properly for had he made a competent inspection of the foundations he could easily have detected that the house was being built on a rubbish tip and that, in breach of the byelaws, the foundations laid by the builder were not properly constructed having regard to the nature of the land since they were not strong enough to take the load of the house. Having obtained approval for the foundations, the builder went ahead in building up the house to damp-proof
g course level, and the work at that stage too was passed by the council's surveyor. The house was finished at the end of 1959, and early in 1960 the builder sold it to C. In December 1960 C sold the house to the plaintiff. As the house was new the plaintiff did not herself employ a surveyor but it was common ground that if a surveyor had been employed he could not have found out about the hidden defect in the foundations. The surveyor of the plaintiff's building society passed the house.
h Soon after the plaintiff had moved into the house in January 1961, the walls and ceiling cracked, the staircase slipped and the doors and windows would not close. This was due to subsidence of an internal wall caused by the inadequate foundations. The condition of the house got worse and in 1963 a surveyor instructed by the plaintiff's solicitor found out that the house had been built on a rubbish tip. In 1964 the plaintiff
j issued a writ against the builder and against the council for negligence claiming damages of £2,740 (being £2,240 for the cost of repairing the house and £500 for diminution in its value). The plaintiff's claim against the builder was settled for £625 because it was accepted that on the authorities^a he was exempt from liability for negligence.

^a *I e Bottomley v Bannister* [1932] KB 458 and *Otto v Bolton & Norris* [1936] 1 All ER 960

Held—(i) The council, through their building inspector, owed a duty of care to the plaintiff to ensure that the inspection of the foundations of the house was properly carried out and that the foundations were adequate, for the following reasons— a

(i) There was no basis for the contention that, since under the 1936 Act the council merely had a power to examine the foundations and therefore could not be held liable for failing to exercise that power, it followed that neither could they be held liable for failing to exercise the power with proper diligence; that contention could not be sustained because— b

(a) the effect taken together of the 1936 Act and the byelaws made thereunder by the council was to give the council control over building work and the way it was done (see p 470 e, p 477 g and p 485 d and g, post); (per Lord Denning MR and Sachs LJ) that control carried with it a duty to exercise their powers properly and with reasonable care; in particular the council were bound to take reasonable care to see that the byelaws were complied with and to appoint competent inspectors for the purpose (see p 470 f and h and p 485 j to p 485 a, post); c

(b) (per Sachs and Stamp LJJ) even if all that the council had was a 'mere power', they were nonetheless liable for the negligent exercise of that power as the negligence occurred in the course of a positive exercise of it; the assumption of control over building operations by the making of byelaws was a positive act and thereafter any negligence in the exercise of their control could give rise to liability; thus (per Sachs LJ) failure to inspect the foundations at all might according to the circumstances have constituted negligence; (per Stamp LJ) but for the failure to make a proper inspection the damage could not have occurred to the plaintiff; the situation could not be equated with one where an authority had failed to exercise their powers to prevent damage which would otherwise have occurred in any event (see p 480 b to d, p 486 d to f, p 488 a and b and p 490 g, post); *Geddis v Bann Reservoir Proprietors* (1878) 3 App Cas 430 applied; *East Suffolk Rivers Catchment Board v Kent* [1940] 4 All ER 527 distinguished. d

(ii) It could not be argued that, in view of the fact that the builder, as the owner of the property, could not be held liable under the principle in *Donoghue v Stevenson*^b, therefore the council could not be held liable for passing the builder's bad work because— e

(a) (per Lord Denning MR and Sachs LJ) the distinction between liability for chattels and liability for real property was unsustainable; the principles enunciated in *Donoghue v Stevenson*^b were applicable to an owner of realty; accordingly a builder who created a hidden defect was not absolved from liability merely because he was the owner of the premises which he had built (see p 471 g to p 472 a and e and p 479 c and d, post); dictum of Lord MacDermott in *Gallagher v McDowell* [1961] NI at 41 applied; *Bottomley v Bannister* [1932] 1 KB 458 not followed; *Otto v Bolton & Norris* [1936] 1 All ER 960 overruled; f

(b) (per Stamp LJ) there was no reason to acquit the council of negligence merely because the former owner or builder might not be made liable (see p 489 e and f, post). g

(iii) The building inspector owed a duty of care to the plaintiff as a professional adviser even though the plaintiff had not thought about and placed reliance on the inspector's conduct, because a professional man who gave advice on the safety of buildings, machines or material owed a duty to all those whom he knew, or ought to have known, might suffer injury if his advice were unsound (see p 473 d to g, p 482 b and c, and p 489 b and c, post); *Clay v A J Crump & Sons Ltd* [1963] 3 All ER 687 applied; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575 distinguished; *Robertson v Fleming* (1861) 4 Macq 167 considered. h

(iv) The relationship between the building inspector and the plaintiff was sufficiently proximate to form the basis of a duty of care, although the plaintiff was only a subsequent purchaser, since any defect in the foundations once covered up could not possibly come to light as a result of an intermediate examination but only when the i

^b [1932] AC 562, [1932] All ER Rep 1

a damage appeared, therefore the inspector ought to have had the plaintiff in mind as someone likely to suffer damage if he was negligent in inspecting the foundations (see p 474 c, p 481 h to p 482 a and p 487 a to c, post).

(v) (per Lord Denning MR and Sachs LJ) As between the council and the plaintiff there existed a duty situation because—

(a) although the plaintiff's claim fell within the wide principle stated in *Donoghue v Stevenson*^c, that principle was not of universal application; it was a question of policy whether it should be applied to the novel claim for negligence made against the council; however, since the primary object of the legislation was to protect purchasers of houses from jerry building it followed that, unless there were countervailing reasons of policy which would lead to a contrary conclusion, the council, who could afford to bear the loss, should be held liable to purchasers for failure to carry out the responsibility which had been entrusted to them under the relevant legislation (see p 475 b c and g to p 476 a and p 478 a to c, post);

(b) there were no countervailing reasons why the council should not be held liable; as the builder would be liable for building the house badly there was nothing wrong in holding the council liable for passing the bad work and (per Sachs LJ) it was, in this category of case, particularly important that dual liability of the builder and council should exist; to impose liability on the council would not adversely affect the work of building inspection and to permit this new type of claim in negligence would not in practice lead to a flood of cases which neither the local authority nor the courts could handle (see p 476 b to f, p 483 h and j and p 484 a b d and j, post).

Donoghue v Stevenson [1932] All ER Rep 1 and dicta of Lord Pearson and Lord Diplock in *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER at 321, 325, 326 applied.

(2) The council were liable to the plaintiff for the damage caused by the breach of duty by their building inspector in failing to carry out a proper inspection of the foundations; the plaintiff was not precluded from recovering damages on the ground that her loss was solely economic because (per Lord Denning MR and Sachs LJ) the damage to the house was physical damage and the plaintiff was entitled to recover the cost of repairs: (per Sachs and Stamp LJ) as an action in negligence lay for economic or physical loss, the correct test in ascertaining whether any particular damage was recoverable was not whether it was physical or economic damage, but what range of damage was the proper exercise of the power designed to prevent or what was the character of the duty owed; applying that test there was nothing in the nature of the loss sustained by the plaintiff to preclude a claim being maintained for that loss; accordingly the plaintiff was entitled to recover the damages claimed against the council as representing the cost of repairing the house although (per Sachs LJ) it was doubtful whether damages could be awarded for any reduction in market value (see p 474 f, p 480 f to h, p 481 b to d, p 484 g and p 490 c to f, post).

Dictum of Salmon LJ in *Ministry of Housing and Local Government v Sharp* [1970] 1 All ER at 1027 applied.

Dictum of Lord Denning MR in *SCM (United Kingdom) Ltd v W J Whittall & Son Ltd* [1970] 3 All ER at 250 considered.

Decision of Cusack J sub nom *Dutton v Bognor Regis Urban District Council* [1971] 2 All ER 1003 affirmed.

Notes

For the duty to take care, see 28 Halsbury's Laws (3rd Edn) 7-9, paras 4-7, and for cases on the subject, see 36 Digest (Repl) 12-30, 34-133.

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Archer v Moss, Applegate v Moss [1971] 1 All ER 747, [1971] 1 QB 406.

Bagot v Stevens Scanlan & Co Ltd [1964] 3 All ER 577, [1966] 1 QB 197, [1964] 3 WLR 1162, Digest (Cont Vol B) 68, 486Aa.

^c [1932] AC 562, [1932] All ER Rep 1

- Billings (A C) & Sons Ltd v Riden* [1956] 3 All ER 357, [1957] 1 QB 46, [1956] 3 WLR 704; *aff'd* HL [1957] 3 All ER 1, [1958] AC 240, [1957] 3 WLR 496, Digest (Cont Vol A) 1145, 105b. a
- Blacker v Lake & Elliot Ltd* (1912) 106 LT 533, 36 Digest (Repl) 80, 428.
- Bottomley v Bannister* [1932] 1 KB 458, 101 LJKB 46, 146 LT 68, 36 Digest (Repl) 80, 429.
- Brew Bros Ltd v Snax (Ross) Ltd* [1970] 1 All ER 587, [1970] 1 QB 612, [1969] 3 WLR 657, Digest (Cont Vol C) 605, 486a.
- Candler v Crane, Christmas & Co* [1951] 1 All ER 426, [1951] 2 KB 164, 36 Digest (Repl) 17, 75. b
- Cavalier v Pope* [1906] AC 428, 75 LJKB 609, 95 LT 65, 31 Digest (Repl) 386, 5124.
- Clay v A J Crump & Sons Ltd* [1963] 3 All ER 687, [1964] 1 QB 533, [1963] 3 WLR 866, Digest (Cont Vol A) 75, 486b.
- Donoghue v Stevenson* [1932] AC 562, [1932] All ER Rep 1, 101 LJCP 119, 147 LT 281, 36 Digest (Repl) 85, 458. c
- Earl v Lubbock* [1905] 1 KB 253, 74 LJKB 121, 91 LT 830, 36 Digest (Repl) 107, 532.
- East Suffolk Rivers Catchment Board v Kent* [1940] 4 All ER 527, [1941] AC 74, 110 LJKB 252, 165 LT 65, 105 JP 129, 41 Digest (Repl) 57, 370.
- Gallagher v McDowell Ltd* [1961] NI 26.
- Geddis v Bann Reservoir Proprietors* (1878) 3 App Cas 430, 38 Digest (Repl) 16, 64. d
- Gorris v Scott* (1874) LR 9 Exch 125, 43 LT Ex 92, 30 LT 431, 44 Digest (Repl) 357, 1933.
- Grange Motors (Cymbran) Ltd v Spencer* [1969] 1 All ER 340, [1969] 1 WLR 53, Digest (Cont Vol C) 738, 511d.
- Great Central Railway Co v Hewlett* [1916] 2 AC 511, [1916-17] All ER Rep 1027, 85 LJKB 1705, 115 LT 349, 38 Digest (Repl) 6, 14.
- Greene v Chelsea Borough Council* [1954] 2 All ER 318, [1954] 2 QB 127, [1954] 3 WLR 12, 118 JP 346, Digest (Cont Vol A) 1155, 351a. e
- Groves v Lord Wimborne* [1898] 2 QB 402, [1895-99] All ER Rep 147, 67 LJQB 862, 79 LT 284, 44 Digest (Repl) 357, 1938.
- Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465, [1963] 3 WLR 101, Digest (Cont Vol A) 51, 1117a.
- Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294, [1970] AC 1004, [1970] 2 WLR 1140, Digest (Cont Vol C) 731, 133b. f
- Launchbury v Morgans* [1971] 1 All ER 642, [1971] 2 QB 245, [1971] 2 WLR 602.
- Macfarlane v Gwalter* [1958] 1 All ER 181, [1959] 2 QB 332, [1958] 2 WLR 268, 122 JP 144, 26 Digest (Repl) 471, 1599.
- Mersey Docks & Harbour Board v Coggins & Griffiths (Liverpool) Ltd and McFarlane* [1946] 2 All ER 345, [1947] AC 1, 115 LJKB 465, 175 LT 270, 34 Digest (Repl) 180, 1279. g
- Miller v South of Scotland Electricity Board* 1958 SC (HL) 20.
- Ministry of Housing and Local Government v Sharp* [1970] 1 All ER 1009, [1970] 2 QB 223, [1970] 2 WLR 802, 134 JP 358, Digest (Cont Vol C) 830, 926f.
- Mint v Good* [1950] 2 All ER 1159, [1951] 1 KB 517, 31 Digest (Repl) 384, 5110.
- Nelson v Union Wire Rope Ltd* (1964) 188 NE 2d 769.
- Otto v Bolton & Norris* [1936] 1 All ER 960, [1936] 2 KB 46, 105 LJKB 602, 154 LT 717, 7 Digest (Repl) 347, 46. h
- Phillips v Britannia Hygienic Laundry Co* [1923] 1 KB 539, [1923] All ER Rep 127, 92 LJKB 389, 128 LT 690, *on appeal* [1923] 2 KB 832, 36 Digest (Repl) 92, 497.
- Robertson v Fleming* (1861) 4 Macq 167, 43 Digest (Repl) 116, 1053.
- Rondel v Worsley* [1967] 3 All ER 993, [1969] 1 AC 191, [1967] 3 WLR 1666, Digest (Cont Vol C) 42, 284a.
- SCM (United Kingdom) Ltd v W J Whittall & Son Ltd* [1970] 3 All ER 245, [1971] 1 QB 337, [1970] 3 WLR 694, Digest (Cont Vol C) 728, 77k. i
- Scott v Green & Sons* [1969] 1 All ER 849, [1969] 1 WLR 301, Digest (Cont Vol C) 413, 1861a.
- Sharpe v E T Sweeting & Son Ltd* [1963] 2 All ER 455, [1963] 1 WLR 665, Digest (Cont Vol A) 1143, 87a.

- a *Winterbottom v Wright* (1842) 10 M & W 109, 11 LJ Ex 415, 152 ER 402, 36 Digest (Repl) 107, 531.

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- Bourhill v Young* [1942] 2 All ER 396, [1943] AC 92.
Clark v Kirby-Smith [1964] 2 All ER 835, [1964] Ch 506.
 b *Clayton v Woodman & Son (Builders) Ltd* [1962] 2 All ER 33, [1962] 2 QB 533.
Courteen Seed Co v Hong Kong & Shanghai Banking Corporation (1927) 157 NER 272.
Davis v Foots [1939] 4 All ER 4, [1940] 1 KB 116.
Deyong v Shenburn [1946] 1 All ER 226, [1946] 1 KB 227.
Dimond Manufacturing Co Ltd v Hamilton [1969] NZLR 609.
Driver v William Willett (Contractors) Ltd [1969] 1 All ER 665.
Farr v Butters Bros & Co [1932] 2 KB 606.
 c *Glanzer v Shepard* (1922) 135 NE 275.
Halvorson (Carl M) Inc v Wrights Canadian Ropes Ltd Vancouver Court of Appeal, 15th June 1971.
Haseldine v C A Daw & Son Ltd [1941] 3 All ER 156, [1941] 2 KB 343.
Howell v Betts (1962) 362 SW (2d) 924.
Longmeid v Holliday (1851) 6 Exch 761.
 d *McClelland v Manchester Corporation* [1912] 1 KB 118, [1911-13] All ER Rep 562.
Mutual Life & Citizens' Assurance Co Ltd v Evatt [1971] 1 All ER 150, [1971] 2 WLR 23.
Rowley v Chatham [1970] RTR 462.
Sheppard v Glossop Corp'n [1921] 3 KB 132.
Tartera v Palumbo (1970) 453 SW 2d 780.
Ultramares Corporation v Touche (1931) 174 NE 441.
 e *Weller & Co v Foot & Mouth Disease Research Institute* [1965] 3 All ER 560, [1966] 1 QB 569.

Appeal

- This was an appeal by the second defendants, Bognor Regis Urban District Council ('the council'), from a judgment of Cusack J given on 7th April 1971, and reported at [1971] 2 All ER 1003, on the trial of an action by the plaintiff, Saidee Dutton, against
 f the second defendants for damages for the negligence of their building inspector in approving, for the purpose of the building byelaws, the foundations of a house built by the first defendants, Bognor Regis United Building Co Ltd, and subsequently purchased by the plaintiff. The trial judge awarded the plaintiff £2,115 damages with interest at 6 per cent from the date of the service of the writ against the second defendants. The plaintiff's action for negligence against the first defendant was
 g settled. The facts are set out in the judgment of Lord Denning MR.

Norman C Tapp QC and J J Davis for the council.

John K Wood QC, P S A Rosedale and Sarah Cockburn for the plaintiff.

Cur adv vult

- h 17th December. The following judgments were read.

LORD DENNING MR.

1. The facts

In Bognor Regis there was years ago a rubbish tip. It was filled in and the ground made up so that it looked like the land next to it. You would not have known there had ever been a rubbish tip there.

- j In 1958 a builder, Mr Holroyd (who called himself the United Building Co), bought all the land in that area and proposed to develop it as a housing estate. He called it the Gossamer Estate, and laid it out in roads and plots. One of the plots was on the site of the old rubbish tip. It was plot 28, St Richard's Way. Mr Holroyd employed a local surveyor—Mr Lewis—to make plans and apply for planning permission; and also, of course, for byelaw approval.

On 16th October 1958 Mr Holroyd's surveyor submitted the plans. It was quite a straightforward plan, showing the house with normal foundations for the type of soil usually found in Bognor Regis. On 23rd October 1958 the Bognor Regis Urban District Council gave byelaw approval in their printed form. Their engineer and surveyor sent formal approval to Mr Holroyd's surveyor:

'... I hereby give you notice that the plan(s) of proposed works, viz. Det. House & garage, situate in Plot 28, St. Richards Way for W. Holroyd Esq. which has been deposited by you in accordance with building byelaws with the local authority has been PASSED.

'The passing of the plan(s) operate(s) as an approval thereof only for the purposes of the requirements of the byelaws and of section(s) 37, 61, 63, 64 & 65 of the Public Health Act, 1936.

'Dated this 23rd. day of October, 1958.

E. B. Williams,

Engineer & Surveyor.

'NOTE: All foundations and drains must be first examined by the Surveyor before being covered up.

'No new premises to be occupied before being certified by the Surveyor. The accompanying Notice Forms are to be filled up and returned to the Surveyor as the works proceed, and when completed ...'

Together with that form, there were sent to Mr Holroyd's surveyor a batch of notice forms for him to notify the council's surveyor of the progress of the work. That byelaw approval was followed by planning permission. This was sent on 11th November 1958 by the clerk to the council to Mr Holroyd's surveyor. It said:

'... the Council, on behalf of the West Sussex County Council, hereby PERMIT the following development, that is to say:—Detached House and Garage, Plot 28, St. Richards Way, Gossamer Estate, Aldwick, for W. Holroyd Esq. in the terms of, and subject to compliance with, the details specified in plan and application ... submitted to the Council on 16th October, 1958 ...'

Having thus got the necessary approval, Mr Holroyd, in 1959, started work on plot 28. He dug the trenches for the foundations. When he got down about two feet, he came upon the remains of the old rubbish tip, broken glass, tins and black slimy sludge. So he made the outer trench 3 ft 6 ins deep, which is much deeper than usual; and he reinforced the concrete floor with a steel mesh. But he did not bother much about the inner walls. He notified the council that the trenches were ready for inspection. The council sent a building inspector, Mr Griffiths, to inspect them. He came, and passed them. Mr Holroyd then filled in the trenches with concrete and built up to damp-course level. The council's surveyor came, and passed the work at that stage too. The house was finished towards the end of 1959.

Early in 1960 Mr Holroyd, the builder, sold the house to a Mr Clark. He was in it only for a few months. Then, in December 1960, he put the house up for sale again. Mrs Dutton went to see it. She liked it. She noticed a crack on the wall of the stairs. The agents told her: 'It's nothing. It's settlement. It's a new house, and you always have settlement.' She did not herself employ a surveyor, because it was a new house. But, to buy it, she borrowed money from a building society and their surveyor passed it. She signed the contract on 19th December 1960. She moved in on 11th January 1961. The deed of conveyance was dated 20th January 1961.

Soon afterwards, when Mrs Dutton had only been in a month or two, she became alarmed. The walls and ceiling cracked, the staircase slipped, the doors and windows would not close. She called in a surveyor, Mr Southall. In September 1961 he diagnosed the trouble. It was due to the subsidence of an internal wall. This

a was because that wall had inadequate foundations. The conditions got worse. Mrs Dutton had not much money. She could not afford to put it right. It would cost £2,000, even in 1962, plus surveyor's fees of £240. So it got worse and worse. In 1963 she went to solicitors. They called in an expert surveyor—Mr Carpenter. He had trial holes dug. He found out that the house had been built on a rubbish tip. He said that, at the time when the house was built, this could have been easily seen.

b On 28th February 1964 Mrs Dutton issued a writ against the builder, Mr Holroyd, and the Bognor Regis Urban District Council. Her total damage was £2,740 (being as to £2,240 for cost of repair and £500 diminution in value). The builder, by his insurance company, claimed that he was exempted entirely from liability by the decision of *Bottomley v Bannister*¹ and *Otto v Bolton & Norris*². On that account Mrs Dutton settled the claim against the builder for £625. But Mrs Dutton went on
c against the Bognor Regis Urban District Council. She alleged that their building inspector was negligent in passing the foundations. The council did not call any evidence to deny this. Their building inspector had left and gone to Australia. The judge³ found that the council's inspector was negligent. He said⁴:

d 'I find that it should have been detected. The strength of the foundation should be related to the nature of the ground. The distinction between building a house on rock and building a house on sand has been widely known for many centuries.'

The judge gave judgment in favour of Mrs Dutton for £2,115 (being the full sum of £2,740, less £625 recovered against the builder). The council appeal to this court.

e Never before has an action of this kind been brought before our courts. Nor, so far as we can discover, before the courts of any other countries which follow the common law. It raises issues of far-reaching importance. In these days much work is subject to inspection to see that it is done properly. The inspector is usually the servant of a public authority. If the inspector negligently passes bad work, is the inspector liable himself? And also the authority which employs him? We have been treated to a wide-ranging argument well presented on both sides. Many
f points have been canvassed. In the end it will be found to be a question of policy which we, as judges, have to decide. But, before we come to it, I must deal with several preliminaries.

2. Building byelaws and regulations

g At the time when this house was built, the work was subject to the Public Health Act 1936 and the byelaws made under it by the Bognor Regis council. The byelaws were in standard form and could not be relaxed except with the consent of the Minister. Byelaw 18 dealt expressly with foundations. It said:

h '(1) The foundations of every building shall be—(a) so designed and constructed as to sustain [the loads of the building] and to transmit these loads to the ground in such a manner that the pressure on the ground shall not cause such settlement as may impair the stability of the building, or of any part of the building . . .'

It is plain that the builder in this case failed to comply with that byelaw. He did not construct the foundations properly. They were not strong enough to take the load of the house. Byelaw 6 required the builder to furnish the council—

j 'with not less than twenty-four hours' notice in writing . . . before the covering up of any drain, private sewer, concrete or other material laid over a site, foundation or damp-proof course . . .'

1 [1932] 1 KB 458

2 [1936] 1 All ER 960, [1936] 2 KB 46

3 [1971] 2 All ER 1003

4 [1971] 2 All ER at 1006

We may, I think, assume that the builder in this case duly gave notice to the council. The council's inspector came and inspected the work, but did it so negligently that he passed the bad work. Byelaw 112 enacted that any person offending against any of the byelaws should be liable on conviction to a fine not exceeding £5.

Since 1965, building work has been subject to building regulations made by the Minister under s 4 of the Public Health Act 1961; and he alone can relax them: see s 6 (1). These regulations are much the same as the standard byelaws previously in force. But they are more specific. They require not less than 24 hours' notice in writing before the covering-up of any excavation for a foundation, any foundation or any concrete or other material laid over a site.

3. Power or duty

Much discussion took place before us whether the council were under a *duty* to examine the foundations or had only a *power* to do so. The Public Health Acts do not make this clear. The 1936 Act simply says that it is the duty of the local authority to carry the Act into execution (see s 1 (1)). The 1961 Act says that it is the function of every local authority to enforce building regulations in their district. The word 'function' may mean either a power or a duty.

The reason for this discussion was the case of *East Suffolk Rivers Catchment Board v Kent*⁵. The argument was that if the local authority had a mere *power* to examine the foundations, they were not liable for not exercising that power. But, if they were under a *duty* to do so, they would be liable for not doing it. This argument assumes that the functions of a local authority can be divided into two categories, powers and duties. Every function must be put into one or other category. It is either a *power* or a *duty*. This is, however, a mistake. There is a middle term. It is *control*.

In this case the significant thing, to my mind, is that the legislature gives the local authority a great deal of *control* over building work and the way it is done. They make byelaws governing every stage of the work. They require plans to be submitted to them for approval. They appoint surveyors and inspectors to visit the work and see if the byelaws are being complied with. In case of any contravention of the byelaws, they can compel the owner to remove the offending work and make it comply with the byelaws. They can also take proceedings for a fine.

In my opinion, the control thus entrusted to the local authority is so extensive that it carries with it a duty. It puts on the council the responsibility of exercising that control properly and with reasonable care. The common law has always held that a right of control over the doing of work carries with it a degree of responsibility in respect of the work. Such has long been the case where an employer has the right to control the way in which an independent contractor does his work: see *Mersey Docks & Harbour Board v Coggins & Griffiths (Liverpool) Ltd* and *McFarlane*⁶. It is also the case when an owner or a local authority exercises control over property for the purpose of doing repairs: see *Mint v Good*⁷, *Greene v Chelsea Borough Council*⁸ and *Brew Bros Ltd v Snax (Ross) Ltd*⁹; or over a grating in a highway: see *Macfarlane v Gwalter*¹⁰ and *Scott v Green & Sons*¹¹. So here, I think, the council, having a right of control over the building of a house, have a responsibility in respect of it. They must, I think, take reasonable care to see that the byelaws are complied with. They must appoint building inspectors to examine the work in progress. Those inspectors must be diligent and visit the work as occasion requires. They must carry out their inspection with reasonable care so as to ensure that the byelaws are complied with. But, to whom is

⁵ [1940] 4 All ER 527, [1941] AC 74

⁶ [1946] 2 All ER 345, [1947] AC 1

⁷ [1950] 2 All ER 1159, [1951] 1 KB 517

⁸ [1954] 2 All ER 318, [1954] 2 QB 127

⁹ [1970] 1 All ER 587, [1970] 1 QB 612

¹⁰ [1958] 1 All ER 181, [1959] 2 QB 332

¹¹ [1969] 1 All ER 849, [1969] 1 WLR 301

a that duty owed? And what are the consequences if it is not done?

4. *The position of the builder*

b Counsel for the council submitted that the inspector owed no duty to a purchaser of the house. He said that on the authorities the builder, Mr Holroyd, owed no duty to a purchaser of the house. The builder was not liable for his negligence in the construction of the house. So also the council's inspector should not be liable for passing the bad work. I would agree that, if the builder is not liable for the bad work, the council ought not to be liable for passing it. So, I will consider whether or not the builder is liable. Counsel for the council relied on the case of *Bottomley v Bannister*¹². That certainly supports his submission. But I do not think it is good law today.

c In the 19th century, and the first part of this century, most lawyers believed that no one who was not a party to a contract could sue on it or anything arising out of it. They held that, if one of the parties to a contract was negligent in carrying it out, no third person who was injured by that negligence could sue for damages on that account. The reason given was that the only duty of care was that imposed by the contract. It was owed to the other contracting party, and to no one else. Time after time counsel for injured plaintiffs sought to escape from the rigour of this rule. But they were met invariably with the answer given by Alderson B in *Winterbottom v Wright*¹³:

'If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty.'

e So the courts confined the right to recover to those who entered into the contract. If the manufacturer or repairer of an article did it negligently, and someone was injured, the injured person could not recover: see *Earl v Lubbock*¹⁴ and *Blacker v Lake & Elliott Ltd*¹⁵. If the landlord of a house contracted with the tenant to repair it and failed to do it—or did it negligently—with the result that someone was injured, the injured person could not recover: see *Cavalier v Pope*¹⁶. If the owner of land built a house on it and sold it to a purchaser, but he did his work so negligently that someone was injured, the injured person could not recover: see *Bottomley v Bannister*¹². Unless in each case he was a party to the contract.

f That 19th century doctrine may have been appropriate in the conditions then prevailing. But it was not suited to the 20th century. Accordingly, it was done away with in *Donoghue v Stevenson*¹⁷. But that case only dealt with the manufacturer of an article. The cases of *Cavalier v Pope*¹⁶ (on landlords) and *Bottomley v Bannister*¹² (on builders) were considered by the House in *Donoghue v Stevenson*¹⁷, but they were not overruled. It was suggested that they were distinguishable on the ground that they did not deal with chattels but with real property: see per Lord Atkin¹⁸ and Lord Macmillan¹⁹. Hence they were treated by the courts as being still cases of authority. So much so that in 1936 a judge at first instance held that a builder who builds a house for sale is under no duty to build it carefully. If a person was injured by his negligence, he could not recover: see *Otto v Bolton & Norris*²⁰.

h The distinction between chattels and real property is quite unsustainable. If the manufacturer of an article is liable to a person injured by his negligence, so should

12 [1932] 1 KB 458

13 (1842) 10 M & W 109 at 115

14 [1905] 1 KB 253

15 (1912) 106 LT 533

16 [1906] AC 428

17 [1932] AC 562, [1932] All ER Rep 1

18 [1932] AC at 598, [1932] All ER Rep at 19

19 [1932] AC at 609, [1932] All ER Rep at 25

20 [1936] 1 All ER 960, [1936] 2 KB 46

the builder of a house be liable. After the lapse of 30 years, this was recognised. In *Gallagher v McDowell Ltd*¹, Lord MacDermott CJ and his colleagues in the Northern Ireland Court of Appeal held that a contractor who built a house negligently was liable to a person injured by his negligence. This was followed by Nield J in *Sharpe v E T Sweeting & Son Ltd*². But the judges in those cases confined themselves to cases in which the builder was only a contractor and was not the owner of the house itself. When the builder is himself the owner, they assumed that *Bottomley v Bannister*³ was still authority for exempting him from liability for negligence.

There is no sense in maintaining this distinction. It would mean that a contractor who builds a house on another's land is liable for negligence in constructing it; but that a speculative builder, who buys land and himself builds houses on it for sale—and is just as negligent as the contractor—is not liable. That cannot be right. Each must be under the same duty of care and to the same persons. If a visitor is injured by the negligent construction, the injured person is entitled to sue the builder, alleging that he built the house negligently. The builder cannot defend himself by saying: 'True I was the builder; but I was the owner as well. So I am not liable.' The injured person can reply: 'I do not care whether you were the owner or not. I am suing you in your capacity as builder and that is enough to make you liable.'

We had a similar problem some years ago. The liability of a contractor doing work on land was said to be different from the liability of an occupier doing the selfsame work. We held that each was liable for negligence: see *AC Billings & Son Ltd v Riden*⁴, and our decision was upheld by the House of Lords⁵; see also *Miller v South of Scotland Electricity Board*⁶. I hold, therefore, that a builder is liable for negligence in constructing a house—whereby a visitor is injured—and it is no excuse for him to say that he was the owner of it. In my opinion *Bottomley v Bannister*³ is no longer authority. Nor is *Otto v Bolton & Norris*⁷. They are both overruled. *Cavalier v Pope*⁸ has gone too. It was reversed by the Occupiers' Liability Act 1957, s 4 (1).

5. The position of the professional adviser

Counsel for the council then submitted another reason for saying that the inspector owed no duty to a purchaser. He said that an inspector is in the same position as any professional man who, by virtue of his training and experience, is qualified to give advice to others on how they should act. He said that such a professional man owed no duty to one who did not employ him but only took the benefit of his work; and that an inspector was in a like position. To support this proposition, counsel for the council brought out a long-forgotten case in the House of Lords called *Robertson v Fleming*⁹. It was a Scottish case about the responsibility of a lawyer. Lord Wensleydale said¹⁰:

'He only, who by himself, or another as his agent, employs the attorney to do the particular act in which the alleged neglect has taken place, can sue him for that neglect . . .'

That observation was made in 1861 when the legal profession laboured under the fallacy which I have already mentioned—the fallacy by which it was thought that, when one contracting party was negligent, no one could sue him for that negligence

1 [1961] NI 26

2 [1963] 2 All ER 455, [1963] 1 WLR 665

3 [1932] 1 KB 458

4 [1956] 3 All ER 357, [1957] 1 QB 46

5 [1957] 3 All ER 1, [1958] AC 240

6 1958 SC (HL) 20 at 37-38

7 [1936] 1 All ER 960, [1936] 2 KB 46

8 [1906] AC 428

9 (1861) 4 Macq 167

10 (1861) 4 Macq at 199

a except the other contracting party. That doctrine did not avail manufacturers after 1932: *Donoghue v Stevenson*¹¹; nor did it avail professional men after 1964: *Hedley Byrne & Co Ltd v Heller & Partners Ltd*¹². In neither of those cases, strangely enough, was *Robertson v Fleming*¹³ referred to. But the result of them is to lessen the authority of that case and the observations in it.

b Nowadays, since *Hedley Byrne & Co Ltd v Heller & Partners Ltd*¹², it is clear that a professional man who gives guidance to others owes a duty of care, not only to the client who employs him, but also to another who he knows is relying on his skill to save him from harm. It is certain that a banker or accountant is under such a duty. And I see no reason why a solicitor is not likewise. The essence of this proposition, however, is the *reliance*. In *Hedley Byrne v Heller*¹² it was stressed by Lord Reid¹⁴, by Lord Morris of Borth-y-Gest¹⁵, and by Lord Hodson¹⁶. The professional man must know that the other is *relying* on his skill and the other must in fact rely on it.

c 6. Reliance

Counsel for the council made a strong point here about reliance. He said that, even if the inspector was under a duty of care, he owed that duty only to those who he knew would rely on this advice—and who did rely on it—and not to those who did not. He said that Mrs Dutton did not rely on the inspector and he owed her, therefore, no duty.

d It is at this point that I must draw a distinction between the several categories of professional men. I can well see that in the case of a professional man who gives advice on financial or property matters—such as a banker, a lawyer or an accountant—his duty is only to those who rely on him and suffer financial loss in consequence. But, in the case of a professional man who gives advice on the safety of buildings, or machines, or material, his duty is to all those who may suffer injury in case his advice is bad. In *Candler v Crane, Christmas & Co*¹⁷, I put the case of an analyst who negligently certifies to a manufacturer of food that a particular ingredient is harmless, whereas it is in fact poisonous; or the case of an inspector of lifts who negligently reports that a particular lift is safe, whereas it is in fact dangerous. It was accepted that the analyst and the lift inspector would be liable to any person who was injured by consuming the food or using the lift. Since that case the courts have had the instance of an architect or engineer. If he designs a house or a bridge so negligently that it falls down, he is liable to everyone of those who are injured in the fall: see *Clay v AJ Crump & Sons Ltd*¹⁸. None of those injured would have relied on the architect or the engineer. None of them would have known whether an architect or engineer was employed, or not. But beyond doubt, the architect and engineer would be liable. The reason is, not because those injured relied on him, but because he knew, or ought to have known, that such persons might be injured if he did his work badly.

g This view is in accord with a case in the USA, *Nelson v Union Wire Rope Ltd*¹⁹. During the building of a court house, a lift plunged down six floors with 19 workmen aboard. It had been regularly inspected by an insurance company and passed as safe. The insurance company made these inspections gratuitously in order to promote their business. The inspector was negligent. He passed the lift as safe when it was unsafe. The Supreme Court of Illinois, by a majority, held that the insurance company were

11 [1932] AC 562, [1932] All ER Rep 1

12 [1963] 2 All ER 575, [1964] AC 465

j 13 (1861) 4 Macq 167

14 [1963] 2 All ER at 583, [1964] AC at 486

15 [1963] 2 All ER at 594, [1964] AC at 502-503

16 [1963] 2 All ER at 601, [1964] AC at 514

17 [1951] 1 All ER 426 at 433, [1951] 2 KB 164 at 179

18 [1963] 3 All ER 687, [1964] 1 QB 533

19 (1964) 199 NE 2d 769

liable for the negligence of the inspector. They said²⁰ that the defendant's liability—
 'is not limited to such persons as might have relied upon it to act but extends instead to such persons as defendant could reasonably have foreseen would be endangered as the result of negligent performance.'

I quite agree.

7. Proximity

Counsel for the council submitted that in any case the duty ought to be limited to those immediately concerned and not to purchaser after purchaser down the line. There is a good deal in this, but I think the reason is because a subsequent purchaser often has the house surveyed. This intermediate inspection, or opportunity of inspection, may break the proximity. It would certainly do so when it ought to disclose the damage. But the foundations of a house are in a class by themselves. Once covered up, they will not be seen again until the damage appears. The inspector must know this or, at any rate, he ought to know it. Applying the test laid down by Lord Atkin in *Donoghue v Stevenson*¹, I should have thought that the inspector ought to have had subsequent purchasers in mind when he was inspecting the foundations—he ought to have realised that, if he was negligent, they might suffer damage.

8. Economic loss

Counsel for the council submitted that the liability of the council would, in any case, be limited to those who suffered bodily harm; and did not extend to those who only suffered economic loss. He suggested, therefore, that although the council might be liable if the ceiling fell down and injured a visitor, they would not be liable simply because the house was diminished in value. He referred to the recent case of *SCM (United Kingdom) Ltd v W J Whittall & Son Ltd*².

I cannot accept this submission. The damage done here was not solely economic loss. It was physical damage to the house. If counsel's submission were right, it would mean that, if the inspector negligently passes the house as properly built and it collapses and injures a person, the council are liable; but, if the owner discovers the defect in time to repair it—and he does repair it—the council are not liable. That is an impossible distinction. They are liable in either case. I would say the same about the manufacturer of an article. If he makes it negligently, with a latent defect (so that it breaks to pieces and injures someone), he is undoubtedly liable. Suppose that the defect is discovered in time to prevent the injury. Surely he is liable for the cost of repair.

9. Limitation of action

Counsel for the council also said that, if this action were allowed, it would expose the council to endless claims. The period of limitation would only start to run when the damage was done, i.e. when the cracks appeared in the house. This would mean that they might be liable many years hence. I do not think that is right. The damage was done when the foundations were badly constructed. The period of limitation (six years) then began to run. That appears from *Bagot v Stevens Scanlan & Co Ltd*³. Diplock LJ said that—

'having regard to the nature of the duty . . . alleged to have been breached in this case . . . in effect to see that the drains were properly designed and built, the damage from any breach of that duty must have occurred at the time when the drains were improperly built, because the plaintiff at that time was landed with property which had bad drains when he ought to have been provided with

²⁰ (1964) 199 NE 2d at 779

¹ [1932] 2 AC at 580-581, [1932] All ER Rep at 11

² [1970] 3 All ER 245, [1971] 1 QB 337

³ [1964] 3 All ER 577 at 579, [1966] 1 QB 197 at 203

a property which had good drains, and the damage, accordingly, occurred on that date.'

The council would be protected by a six year limitation, but the builder might not be. If he covered up his own bad work, he would be guilty of concealed fraud, and the, period of limitation would not begin to run until the fraud was discovered: see *Archer v Moss*⁴.

b ro. Policy

This case is entirely novel. Never before has a claim been made against a council or its surveyor for negligence in passing a house. The case itself can be brought within the words of Lord Atkin in *Donoghue v Stevenson*⁵; but, it is a question whether we should apply them here. In *Home Office v Dorset Yacht Co Ltd*⁶ Lord Reid said that the words of Lord Atkin expressed a principle which ought to apply in general 'unless there is some justification or valid explanation for its exclusion'. So did Lord Pearson⁷. But Lord Diplock spoke differently. He said⁸ that it was a guide but not a principle of universal application. It seems to me that it is a question of policy which we, as judges, have to decide. The time has come when, in cases of new import, we should decide them according to the reason of the thing.

d In previous times, when faced with a new problem, the judges have not openly asked themselves the question: what is the best policy for the law to adopt? But the question has always been there in the background. It has been concealed behind such questions as: Was the defendant under any duty to the plaintiff? Was the relationship between them sufficiently proximate? Was the injury direct or indirect? Was it foreseeable, or not? Was it too remote? And so forth.

e Nowadays we direct ourselves to considerations of policy. In *Rondel v Worsley*⁹ we thought that, if advocates were liable to be sued for negligence, they would be hampered in carrying out their duties. In *Home Office v Dorset Yacht Co Ltd*¹⁰ we thought that the Home Office ought to pay for damage done by escaping borstal boys, if the staff was negligent, but we confined it to damage done in the immediate vicinity. In *SCM (United Kingdom) Ltd v W J Whittall & Son Ltd*¹¹ some of us thought that economic loss ought not to be put on one pair of shoulders, but spread amongst all the sufferers. In *Launchbury v Morgans*¹² we thought that, as the owner of the family car was insured, she should bear the loss. In short, we look at the relationship of the parties; and then say, as a matter of policy, on whom the loss should fall. What are the considerations of policy here? I will take them in order.

g First, Mrs Dutton has suffered a grievous loss. The house fell down without any fault of hers. She is in no position herself to bear the loss. Who ought in justice to bear it? I should think those who were responsible. Who are they? In the first place, the builder was responsible. It was he who laid the foundations so badly that the house fell down. In the second place, the council's inspector was responsible. It was his job to examine the foundations to see if they would take the load of the house. He failed to do it properly. In the third place, the council should answer for his failure. h They were entrusted by Parliament with the task of seeing that houses were properly built. They received public funds for the purpose. The very object was to protect purchasers and occupiers of houses. Yet, they failed to protect them. Their shoulders are broad enough to bear the loss.

4 [1971] 1 All ER 747, [1971] 1 QB 406

5 [1932] AC at 580, [1932] All ER Rep at 11

j 6 [1970] 2 All ER 294 at 297, [1970] AC 1004 at 1027

7 [1970] 2 All ER at 321, [1970] AC at 1054

8 [1970] 2 All ER at 325-326, [1970] AC at 1060

9 [1967] 3 All ER 993, [1969] 1 AC 191

10 [1970] 2 All ER 294, [1970] AC 1004

11 [1970] 3 All ER 245, [1971] 1 QB 337

12 [1971] 1 All ER 642, [1971] 2 QB 245

Next I ask: is there any reason in point of law why the council should not be held liable? Hitherto many lawyers have thought that a builder (who was also the owner) was not liable. If that were truly the law, I would not have thought it fair to make the council liable when the builder was not liable. But I hold that the builder who builds a house badly is liable, even though he is himself the owner. On this footing, there is nothing unfair in holding the council's surveyor also liable. a

Then, I ask: if liability were imposed on the council, would it have an adverse effect on the work? Would it mean that the council would not inspect at all, rather than risk liability for inspecting badly? Would it mean that inspectors would be harassed in their work or be subject to baseless charges? Would it mean that they would be extra cautious, and hold up work unnecessarily? Such considerations have influenced cases in the past (as in *Rondel v Worsley*¹³). But here I see no danger. If liability is imposed on the council, it would tend, I think, to make them do their work better, rather than worse. b

Next, I ask: is there any economic reason why liability should not be imposed on the council? In some cases the law has drawn the line to prevent recovery of damages. It sets a limit to damages for economic loss, or for shock, or theft by escaping convicts. The reason is that, if no limit were set, there would be no end to the money payable. But I see no such reason here for limiting damages. In nearly every case the builder will be primarily liable. He will be insured and his insurance company will pay the damages. It will be very rarely that the council will be sued or found liable. If it is, much the greater responsibility will fall on the builder and little on the council. c

Finally, I ask myself: if we permit this new action, are we opening the door too much? Will it lead to a flood of cases which the council will not be able to handle, nor the courts? Such considerations have sometimes in the past led the courts to reject novel claims. But I see no need to reject this claim on this ground. The injured person will always have his claim against the builder. He will rarely allege—and still less be able to prove—a case against the council. d

All these considerations lead me to the conclusion that the policy of the law should be, and is, that the council should be liable for the negligence of their surveyor in passing work as good when in truth it is bad. I would therefore dismiss this appeal. In parting from the case I would like to pay my tribute to the help we have received from counsel on both sides and the very good research they have done in the course of the case. e

SACHS LJ. The facts in the present case are simple, but they raise interesting and important issues of law, and at the outset I would like to pay my tribute to the admirable help received by this court from Mr Tapp and Mr Wood through the lucid and powerful submissions which they presented. f

In 1958 application was made on behalf of one Mr Holroyd, a builder, who was developing an area known as Gossamer Estate, Bognor Regis, for planning permission to erect a detached house for private occupation on plot 28 of which he owned the freehold. On 23rd October 1958 the council notified their approval of the plans deposited in accordance with the byelaws made by them under the Public Health Act 1936. He proceeded with the erection of a house on that plot and can conveniently be referred to as the 'building owner'. In due course an inspector from the offices of the Bognor Regis Council ('the council') came to inspect the foundations to see whether they complied with the above byelaws; without his approval the building work could not in practice have gone ahead. He in fact gave approval, but his inspection was so negligent that he failed to observe that the land in the centre of the plot was of such a nature that the foundations being laid were gravely inadequate. The building then went ahead and so the defective foundations were covered up and hidden from any normal subsequent inspection. g

¹³ [1967] 3 All ER 993, [1969] 1 AC 191 h

- a After its completion the building owner sold the house on plot 28 to a Mr Clarke for £4,050, conveying the property to him on 21st January 1960. On 19th December 1960 Mr Clarke contracted with Mrs Dutton (the plaintiff in this action) to sell her the house for £4,800. It being a new house no surveyor was employed by her to inspect it—but it was in this court common ground that if such a surveyor had been employed he could not have been expected to find out this particular hidden defect.
- b The plaintiff moved into the house on 11th January 1961; by the autumn certain cracks commenced to appear in consequence of the hidden defect; the house began to subside with lamentable results which she had no financial means to remedy. The 1962 cost of the necessary work of curing the structural defects and of repairs was at trial agreed to be £2,240 (including surveyors' fees). To that sum there was added £500 described as the reduction in the value of the house; from the resulting £2,740 there was deducted £625 recovered from Mr Holroyd, and judgment was entered for
- c £2,115. The plaintiff recovered nothing towards the rise over eight years in the cost of the work she could not afford, nor any sum for the gross inconvenience she suffered. The settlement of the claim against the building owner for a mere £625 was due to fears as to the effect on her rights of what later in this judgment is referred to as 'the *Bottomley v Bannister*¹⁴ point.' After that settlement she continued to proceed against
- d the council, claiming that they, as well as the building owner, were liable to her in the circumstances above set out. The council have not chosen to take third party proceedings against the building owner with a view to obtaining a further contribution from him—although it is common ground that this is something they could have done as between the defendants.

- e The various relevant provisions of the Public Health Act 1936 and the byelaws made thereunder by the council having been referred to in the judgment of Lord Denning MR, there is no need to recite them again. But so much depends on the position created by them that it is convenient at the outset to stand away from the points of detail and consider the overall object and the practical effect of the Act and the byelaws as a whole in regard to the erection of dwellings.

- f The object was clearly to ensure that through byelaws made by councils (or by the Minister if a council made none) as backed by powers to enforce them, that each dwelling erected in the council's area should have a standard of sanitation and soundness of construction that would be satisfactory for the health and well-being of those who might live in it. The byelaws were to lay down the requirements, which of course might vary according to the locality, whilst the Act itself provided the council with enforcement powers—'the teeth'. The practical effect of the Act and the byelaws taken together was to give the council through its appointed officers all-embracing control over most of the building operation—and in particular control
- g over sanitation and foundation work. Any work that is not complying with a byelaw can be stopped by the council's officers on their ascertaining that non-compliance. Further, if any work has been done which failed to comply with those byelaws the council can require its alteration or removal and in default could itself remedy the defect. The teeth are to be found in the provisions of the Act, such as ss 65 and 287.

- h In the result no builder dare go ahead with sanitation or foundation work without the approval of the council's surveyor. The latter's control in practice can and often does override that of any site foreman or architect. It is, moreover, an obvious fact that when control is being exercised over work which is subsequently covered up (such as drains and foundations) any fault in the work thus covered will not in the
- i nature of things be discovered on any normal subsequent survey made either on behalf of a purchaser or on behalf of any building society with whose aid the building is being acquired. It is plain that this control was designed to provide a protection against jerry building, similar faults, and their effects—not least to guard against poor drainage, and foundations.

The question whether the Act and the byelaws result in the council having a duty to those who later purchased the dwellings is one as to which a considerable number of points have been raised in the course of the submissions in this court. I have formed the view that in the end the crucial approach is that indicated by Lord Pearson when, in his speech in the *Dorset Yacht* case¹⁵, he said:

'It is true that the *Donoghue v Stevenson*¹⁶ principle as stated . . . is a basic and general but not universal principle and does not in law apply to all the situations which are covered by the wide words of the passage. To some extent the decision in this case must be a matter of impression and instinctive judgment as to what is fair and just.'

In the course of that approach due regard must, of course, be had, inter alia, to how far-reaching may be the effect of holding that such a duty existed. In essence it is a matter of the policy of the common law. Before coming to this crucial stage, it is as well to dispose of certain points raised on behalf of the council which, if accepted, would result in a decision in their favour without really having to examine the final question as posed by Lord Pearson¹⁵.

As regards each point in turn any examination of the law will, of course, be concerned with the liability of a defendant for negligence which produces hidden or latent physical defects—that is to say defects not detectable on any normal earlier examination before they become apparent to the plaintiff who brings a claim. That is the type of defect with which this appeal is concerned and I would wish to guard against anything said later in this judgment being interpreted as affecting other defects: *Bottomley v Bannister*¹⁷.

In limine comes the submission that the principles in *Donoghue v Stevenson*¹⁸ have no application to realty. In this behalf it was argued that a building owner can never be under any liability to a purchaser or anyone else for defects in the building he has erected save by virtue of some liability created by contract; and that accordingly as a building owner cannot be liable in negligence for hidden defects which he has created then a fortiori the person who caused the defects to arise cannot be liable either. Arguendo this submission came to be styled the *Bottomley v Bannister*¹⁷ point because of what was said in that case, decided just before the judgment in *Donoghue v Stevenson*¹⁸ in the House of Lords. Particular reliance was placed on what Scrutton LJ said¹⁹:

'Now it is at present well established English law that, in the absence of express contract, a landlord of an unfurnished house is not liable to his tenant, or a vendor of real estate to his purchaser, for defects in the house or land rendering it dangerous or unfit for occupation, even if he has constructed the defects himself or is aware of their existence.'

That passage on the face of it strongly supports the contention of the council as also does what was said in similar vein as to a landowner's special position by Lord MacDermott CJ in *Gallagher v McDowell Ltd*²⁰.

In the latter case, however, it was held that building contractors who had erected a house for the Northern Ireland Housing Trust would be liable in negligence to the wife of the first tenant of that house for a defect in the wooden floor of one of the rooms which caused her to sustain an accident and ordered a new trial on that footing. Accordingly, the passages that relate to the liabilities of an owner of realty are obiter. Moreover, *Bottomley v Bannister*¹⁷, being a pre-*Donoghue v Stevenson*¹⁸ decision, must

¹⁵ [1970] 2 All ER 294 at 321, [1970] AC 1004 at 1054

¹⁶ [1932] AC at 580, [1932] All ER Rep at 11

¹⁷ [1932] 1 KB 458

¹⁸ [1932] AC 562, [1932] All ER Rep 1

¹⁹ [1932] 1 KB at 468

²⁰ [1961] NI 26 at 38

a now be looked at in the light of what was decided in the latter case. Such other post-*Donoghue v Stevenson*¹ decisions as were cited to us were at first instance, e.g. *Otto v Bolton & Norris*². As regards *Cavalier v Pope*³, also much relied on by counsel for the council, the House of Lords were concerned with a case where the landlord had allowed the premises which he had let to the plaintiff's husband to get into a dangerous state of disrepair. It is perhaps sufficient for the purposes of the present case to observe that that was not perhaps a comparable instance of actually creating the dangerous state of affairs, nor does it appear that the defect was in any way hidden; on the contrary, the disrepair was so obvious that the plaintiff and her husband had threatened to leave the premises. The facts accordingly bear no relationship to those in the instant case. In the result there is thus nowhere to be found any authority binding this court to hold that the principles enunciated in *Donoghue v Stevenson*¹ cannot apply to an owner of realty.

c It is obvious that a builder who by his negligence creates a hidden defect is liable to anyone suffering damage from it just as a manufacturer is liable when a hidden defect in the goods he makes injures a workman using them and as a producer of consumable goods is liable when a hidden defect injures a consumer. I can find nothing in principle which absolves from liability a builder who creates a hidden defect because he happens to be or to become the owner of the premises built. On the contrary, as Lord MacDermott CJ himself said in *Gallagher's case*⁴, 'the doctrine of *Donoghue v. Stevenson*¹ can apply to defective houses as well as defective chattels' and in my judgment there is no exception behind which landowners as such can shelter. Thus the *Bottomley v Bannister*⁵ point fails.

e *East Suffolk Rivers Catchment Board v Kent*⁶

Next it was urged on behalf of the council that the present case was one to which the well-known decision in *Geddis v Bann Reservoir Proprietors*⁷ as to liability for the negligent exercise of powers did not apply having regard to what was said in the speeches in the *East Suffolk Rivers Catchment Board case*⁶, where the board was held not to be liable for having failed to use in the exercise of its powers reasonable expedition in repairing a breach in a sea wall (which they do not appear themselves to have erected) with the result that the flooding of the plaintiff's land caused by the breach was not abated as promptly as it would have been had such expedition been used⁸. Particular stress was laid on a passage in the speech of Lord Romer where he summarised the principle he considered to be involved in that case. He said⁹:

g 'Where a statutory authority is entrusted with a mere power, it cannot be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power.'

He proceeded to emphasise that the only duty of the board was not to add to such damage as would have been suffered by the plaintiff had they done nothing.

h As a matter of first impression that statement of the law seemed to provide a formidable point in favour of the council. But even on the basis that the instant case is concerned with a 'mere power' there is a very relevant distinction between the

i 1 [1932] AC 562, [1932] All ER Rep 1

2 [1936] 1 All ER 960, [1936] 2 KB 46

3 [1906] AC 428

4 [1961] NI at 41

5 [1932] 1 KB 458

6 [1940] 4 All ER 527, [1941] AC 74

7 (1878) 3 App Cas 430

8 [1940] 4 All ER at 530, [1941] AC at 84

9 [1940] 4 All ER at 543, [1941] AC at 102

facts in the *East Suffolk Rivers Catchment Board* case¹⁰ and the facts now under consideration. Where in a case relating to the exercise of powers the issue arises whether on the facts the cause of any damage is non-feasance or whether that cause is a misfeasance, the borderline can be difficult to discern. The *East Suffolk Rivers Catchment Board* case¹⁰ is one in which the failure to proceed with the building work sufficiently quickly was held to be in essence a case of non-feasance—although Lord Atkin's dissenting speech¹¹ shows how close it came to that borderline. In the present case, on the contrary, the negligence plainly occurred in the course of a positive exercise by the council of its powers. The moment it exercised its power under s 61 of the 1936 Act to make byelaws it assumed control over all such building operations within its area as were the subject of those byelaws. That assumption of control was a positive act and thereafter in my opinion any negligence in its exercise fell within the ambit of the decision in the *Geddis* case¹²; had the council's surveyor failed to make any inspection at all of the foundations that, of itself, might, according to the circumstances, have constituted negligence. But be that as it may, it is quite plain that the approval of the foundations by the council's surveyor was a positive exercise of its powers of control—in the same way as would be the switching on of a green light by a signalman, to adopt the helpful analogy raised *arguendo* by Stamp LJ. Insofar as in the present case we are concerned with the exercise of mere powers, we are dealing with a case of misfeasance.

It follows that on that ground there is, in my judgment, nothing in the decision in the *East Suffolk Rivers Catchment Board* case¹⁰ which can afford a defence to the council; accordingly it is not necessary to consider the further point taken by counsel for the plaintiff, based on passages in the speeches of Viscount Simon LC, Lord Thankerton and Lord Porter¹³ respectively (see also the speech of Lord Atkin¹⁴) that the decision there in substance turned on the question of causation.

Nature of loss

It was strongly contended on behalf of the council that the nature of the loss suffered by the plaintiff was in essence economic and that for economic loss no action would lie in negligence. For my part, however, I would adopt what was said by Salmon LJ in *Ministry of Housing and Local Government v Sharp*¹⁵:

'So far, however, as the law of negligence relating to civil actions is concerned, the existence of a duty to take reasonable care no longer depends on whether it is physical injury or financial loss which can reasonably be foreseen as a result of a failure to take such care.'

That appears to me to accord with the views expressed in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*¹⁶ by Lord Devlin and by Lord Pearce. That proposition must, of course, be taken in conjunction with what Lord Denning MR said in *SCM (United Kingdom) Ltd v W J Whittall & Son Ltd*¹⁷, where he adverted to the need to apply common sense to the particular situation being considered so as to avoid too wide an area of liability for damages being recoverable for some act of negligence.

In the instant case there is ample evidence of physical damage having occurred to the property—but it has been argued that this damage is on analysis the equivalent of a diminution of the value of the premises and does not rank for consideration as physical injury. Counsel for the council found himself submitting that if, for instance,

¹⁰ [1940] 4 All ER 527, [1941] AC 74

¹¹ [1940] 3 All ER at 533, [1941] AC at 88

¹² (1878) 4 App Cas 430

¹³ [1940] 4 All ER at 533, 539, 545, [1941] AC at 87, 96, 105

¹⁴ [1940] 4 All ER at 536-537, [1941] AC at 92-93

¹⁵ [1970] 1 All ER 1009 at 1027, [1970] 2 QB 223 at 278

¹⁶ [1963] 2 All ER 575 at 602-603, 616-617, [1964] AC 465 at 517, 538

¹⁷ [1970] 3 All ER at 250, [1971] 1 QB at 344

a the relevant defect had been in the ceiling of a room then if it fell on somebody's head or on to the occupier's chattels and thus caused physical damage then (subject of course to his other points failing) there would be a cause of action in negligence, but not if it fell on to a bare floor and caused no further damage. Apparently in the former case damages would be limited so as to exclude repairs to the ceiling; in the latter case there would be no cause of action at all. That subtle line of argument failed to attract me and would lead to an unhappily odd state of the law.

b If physical damage is, contrary to my view, a *sine qua non* before a cause of action can arise against a builder or a building owner, then it seems to me to have occurred in the present case. But in my judgment to pose the question is it physical damage or economic damage is to adopt a fallacious approach. In this case—and perhaps generally in cases concerned with the exercise of duties and powers by a public authority—the correct test is: what range of damage is the proper exercise of the power designed to prevent? In this way the question whether any particular damage is recoverable is brought back into the area of policy indicated by Lord Denning MR in his judgment in the *SCM* case¹⁸; and appropriate weight can, if necessary, be given to the fact that this case concerns a house and not a chattel. At this stage, it suffices to say that nothing in the nature of the loss sustained by the plaintiff of itself precludes a claim being maintained for that loss.

d Before coming to this conclusion I have naturally considered the carefully marshalled submissions made with the aid of the most recent edition of the United States Restatement of the Law of Torts but I am unable to accept that in this country, at any rate, anything said there applies to the facts now under review.

e *Proximity, reliance and statute of limitations*

e Before turning to the crucial question in this case there still remain to be considered the submissions made on behalf of the council in relation to three points which can be conveniently considered as a group—although of course each was raised as of itself providing a defence to the action.

f As to proximity, it was contended that there was not a sufficiently close relationship between the council's negligence and the plaintiff as regards the subject-matter of the claim on two grounds, each being said to be sufficient to sustain the council's contention, although of course they should also be looked at in combination. First, it was argued that as the defects were due to bad work by the building owner, any negligence on the part of the council was in law not sufficiently proximate to enable the plaintiff to claim against it. There is, however, no substance in this point—which seems somewhat reminiscent of the out-dated conception which led to arguments being adduced as to the distinction between *causa causans* and *causa sine qua non* and also those touching the one-time doctrine of 'last opportunity'. Nowadays, at any rate, the signalman who has fallen asleep and the engine driver who fails to see the obstacle on the line can both be liable (cf *Grange Motors (Cymbran) Ltd v Spencer*¹⁹); so can an architect, a building contractor and a demolition contractor all concerned with the same site (*Clay v A J Crump & Sons Ltd*²⁰).

h Next came the suggestion that because the plaintiff in the present action was not the original purchaser from the building owner but was next in the line of succession in purchasers the relationship between her and the building owner was not sufficiently proximate. That suggestion overlooks the very essence of the *Donoghue v Stevenson*¹ decision. As regards hidden defects the fact that there have been intermediate purchasers or users is not in point where the defect can only come to light at the stage when the plaintiff is injuriously affected. Here again there is no distinction in this

18 [1970] 3 All ER at 250, [1971] 1 QB at 344

19 [1969] 1 All ER 340, [1969] 1 WLR 53

20 [1963] 3 All ER 687, [1964] 1 QB 533

1 [1932] AC 562, [1932] 1 All ER Rep 1

respect between a defect in a house and a defect in a chattel; so that suggestion also has no substance.

Next came the much pressed point that the plaintiff ought to have established affirmatively that she personally or by her agents relied on the inspection by the council when she entered into the contract to acquire the house. It was correctly pointed out that there was no evidence of any such reliance. In aid of this submission were cited passages in the speeches of Lord Reid, Lord Morris of Borth-y-Gest and Lord Pearce in the *Hedley Byrne* case², and also a number of passages to be found in judgments of appeal courts in the United States. Clearly there can be categories of cases in which the duty to a plaintiff may depend on whether he has placed reliance on the defendants' conduct, be it conduct by way of acts or by way of words. On the other hand, in the vast majority of cases the question whether a plaintiff actually thought about and relied on the defendants' conduct is quite irrelevant; the point in those cases is not whether he thought about the matter and can so state in evidence but simply whether he is entitled to the benefit of a duty owed by the defendant irrespective of whether at the time he thought about that question.

Finally, amongst this group came the submission that in this class of case the discovery of any defect in the foundations—or indeed generally in a building—might only occur after a considerable number of years and that to allow such claims to be maintained would in effect defeat the intent of the statute of limitations. Whatever be the moment a cause of action in negligence arises, there is again no difference in law applicable to negligence producing a defect in a building and negligence producing a defect in a chattel. There is, moreover, much force in the point made by counsel for the plaintiff that as regards buildings the worse the defect the sooner it is likely to be discovered, and the longer it remains undiscovered the less likely it is that negligence can be proved. This point raised on behalf of the council cannot of itself provide a defence.

In coming to that conclusion I have not sought to rely on the dictum of Diplock LJ, sitting at first instance, in *Bagot v Stevens Scanlan & Co Ltd*³. That dictum being concerned with doubts whether admissions to the contrary effect made by both parties were valid, the point does not appear to have been argued there; nor was it the subject of discussion before us. So I prefer to express no concluded view, as the point may be susceptible of argument—especially as the limitation period in this class of case might, having regard to ss 1 (3) and 7 of the Limitation Act 1963, on the basis adopted by Diplock LJ, vary according to whether or not personal injury was suffered by a plaintiff. Much, moreover, may depend on whether the views expressed under the heading 'Nature of loss' are correct.

It follows that none of the above points which have been grouped together can of itself provide the council with a defence. They do, however, raise questions which it is proper to take into account when considering the final question on the lines of approach indicated by Lord Pearson⁴.

A duty situation?

Having thus cleared the way of a number of obstacles each submitted in turn to preclude the plaintiff succeeding in her claim, the stage has now been reached for approaching the final question—as between the council and the plaintiff was there 'a duty situation', to adopt the apt phrase used by Lord Morris of Borth-y-Gest in the *Dorset Yacht* case⁵? For that purpose I will, as stated earlier in this judgment, respectfully adopt the approach signposted by Lord Pearson⁶ in a passage which follows closely the line taken by Lord Morris of Borth-y-Gest.

² [1963] 2 All ER at 583, 594, 617, [1964] AC at 487, 502, 538

³ [1964] 3 All ER 577 at 579, [1966] 1 QB 197 at 203

⁴ In *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER at 321, [1970] AC at 1054

⁵ [1970] 2 All ER at 307, [1970] AC at 1038

⁶ [1970] 2 All ER at 321, [1970] AC at 1054

a Before, however, so doing, it seems convenient to pause and look around to see what is the area into which one has emerged. It is the area of the exercise of functions of bodies created by statute for the benefit of a community or of individuals who form part of that community. It is an area in which the essential purpose of the legislation is to provide a clear measure of protection which the common law does not of itself afford. That protection is its primary object. That area differs from those in which
b between parties (e.g. builder and site owner) whose primary object is their own pecuniary or other advantage and for whom the benefits accruing to others are at least secondary. A fortiori it differs from the area in which the courts are concerned with acts done voluntarily by persons for their own benefit (e.g. the insurers of lifts in the United States cases).

c When first asked the direct question: 'To whom does the council owe a duty when exercising the powers derived from the fasciculus of sections in the 1936 Act commencing at s 61 and headed 'Byelaws with respect to buildings and sanitation?', counsel for the council seemed, if I may respectfully so suggest, hesitant in his reply. Having eliminated special cases—such as those in which some specific communication to the council could be said to produce reliance on the surveyor by the builder or by
d the site owner—the answer in due course came, 'It is under no duty to anybody.' The Act was submitted to be passed for the benefit of the community at large (without imposing any duty justiciable on its behalf), so that a proper standard of building be maintained in the area, but not for the benefit of any category of individuals or any individual. There was thus no duty to any individual and it was urged that no neglect by the council, however gross, could be justiciable at the instance of one who suffered damage.

e That answer and those submissions I reject. The Act was passed to protect those who might come to own or occupy the relevant houses against jerry building and similar faults and was intended to benefit such persons. That protection and benefit was the primary purpose of the relevant provisions of the Act; and that is a purpose which falls within the instructions given to the council by the words in s 1, 'it shall be
f the duty of the following authorities to carry this Act into execution'. It follows that as between the council and the owners and occupiers of houses over the building of which it has control there exists at least in respect of hidden defects of the type under consideration a duty situation—unless (per Lord Reid and Lord Pearson in the *Dorset Yacht* case⁷) there are some countervailing factors which should on policy grounds lead to a contrary conclusion.

g Early amongst the countervailing points relied on by counsel for the council was the suggestion that those who might suffer damage had a sufficient remedy against the building contractor (assuming that the *Bottomley v Bannister*⁸ point was rejected). That seems a poor point for many reasons—for instance the common law does not normally limit the person who suffers damage to a remedy against one of two culpable persons. In the category of case with which we are here concerned it is more-over particularly important that a dual liability should exist. It is commonplace
h today that a development project involving the building of a group of houses by a site owner is often so arranged that everything is done by a specially formed company which may be dissolved when the project is completed; such an arrangement can have taxation advantages and can also afford financial protection if the project results in a loss. Those for whose benefit the Act was passed both need and should have the benefit of such dual liability as may be available in a state of affairs which
i could not have come about if the council had done what it ought to do.

Next came the suggestion that to uphold the plaintiff's claim in this case would open the way to a flood of similar claims against councils and—perhaps more importantly—against others who make inspections under statutory powers, such as factory

7 [1970] 2 All ER at 302, 321, [1970] AC at 1032, 1054

8 [1932] 1 KB 458

inspectors and those who carry out annual tests on motor vehicles for which no renewal of a licence can be obtained without the aid of a test certificate. This could be a formidable point if established to the degree propounded by counsel for the council. But as regards similar claims under the 1936 Act there must be remembered the very great difficulties that normally beset a plaintiff on whom lies the burden of proving that a hidden defect resulted from a surveyor's negligence as opposed to, at highest, from an error of judgment. Practical experience points against any flood of such claims. a
b

As regards inspections under other powers—here again it must be kept in mind that the instant case is concerned with negligence against which normal intermediate examination would not generally afford protection. No doubt there will be some claims made as regards the exercise of other statutory powers; but without a close examination of those particular powers and also of the chances of proving negligence in relation to their exercise no reliable forecasts can be made. For my part I do not find myself in that state of fear in which counsel for the council sought to envelop me. Indeed in the end I find nothing in this point to deter me from deciding this appeal in accordance with the justice of the case. c

As regards the several other points raised, of which it was said that individually or in the aggregate they should on policy grounds lead to the instant claim being excluded from the general ambit of the main principle to be found in *Donoghue v Stevenson*⁹, it seems sufficient, save in one instance, to refer to what I have said earlier in this judgment as to some of the points and to add that as regards the others I am in general agreement with what has been said about them by Lord Denning MR. d

The one point for further mention relates to the measure of damages. What is the answer to the question: what range of damage is the proper exercise of the relevant power designed to prevent? Primarily, it is designed to prevent owners and occupiers having to live in a dwelling built to a lower standard than that prescribed by the Act and the byelaws made under it. *Prima facie* the measure of damage must accordingly include the cost of the work required to raise the dwelling to the requisite standard. In addition the design being to avoid injury to health or to other property due to sub-standard construction, damage suffered under this head would (subject of course to the usual rules as to causation and mitigation) be recoverable and also something for general inconvenience suffered whilst occupying the premises and for disturbance during repairs. e
f

For my part, however, I doubt whether a claim lies for any reduction in the market value of the premises over and above the cost of the relevant work, e.g. if, for instance, a house with underpinned foundations were shown to be worth £300 less in the open market than one with good original foundations. The Act is not concerned with market value as such and it could be consistent with the policy applicable to this class of case to draw a line which would preclude recovery of this type of economic loss (cf the *Gorris v Scott*¹⁰ line of cases). The measure of damages for negligence is not the same as the measure for breach of warranty—and as regards negligence I would also wish to reserve the question whether the measure against a building contractor might not exceed that recoverable against a council. As, however, counsel for the council in the course of his reply specifically disclaimed reliance on any distinction between the two component parts (£2,240 and £500 respectively) of the £2,740 for which the council was held liable, it is not necessary further to consider this doubt of mine. (Some such sum would anyway presumably be appropriate for the wretched inconvenience suffered.) g
h

The suggested countervailing points being found to be ineffective, it follows that as between the council and the plaintiff there existed a duty situation even if the former were exercising mere powers. A fortiori, of course, was there such a situation if, as I would hold, the council were under a duty, imposed by the 1936 Act, to exercise i

⁹ [1932] AC 562, [1932] All ER Rep 1

¹⁰ (1874) LR 9 Exch 125

a control. In either case the plaintiff is entitled to recover damages for the negligence that has been established.

The plaintiff has not raised the question whether a claim for breach of statutory duty would lie in this case in the absence of negligence. So it is unnecessary to consider whether the instant case is one that falls on the *Groves v Lord Wimborne*¹¹ or on the *Phillips v Britannia Hygienic Laundry Co*¹² side of the line. That is a point which may have to be considered on some future occasion, particularly since s 61 of the 1936 Act has been amended by the Public Health Act 1961, so that instead of byelaws there are now always regulations made by the Minister which it has become the duty of councils to enforce.

I would dismiss the appeal.

c **STAMP LJ.** Under s 1 of the Public Health Act 1936 the defendant council had the duty to carry the Act into execution within its area. Under s 61 of that Act it was provided that every local authority might and, if required by the Minister, should make byelaws for regulating (inter alia) the construction of buildings and the materials used in their construction. The council did make such byelaws. In my judgment they must be taken to have done so pursuant to the duty cast on them by s 1 of the Act. The byelaws so made imposed no duties on the council, but having made them, it became one of the functions of the council to see that the byelaws were complied with. They became part of the machinery enabling the council to perform its duty to protect the health and amenities of the local inhabitants. The byelaws did not impose on the council any duty to ensure that a house built within their area was not built on an insecure foundation, but contained machinery enabling them to perform that task, and a powerful sanction if the byelaws were not complied with.

By the joint effect of byelaws 2 and 6 (1) a builder intending to build a house was required to furnish the council, with not less than 24 hours' notice in writing—
(a) of the date and time at which the operation would be commenced; and (b) before the covering up of any drain, private sewer, concrete or other material laid over a site, foundation or damp-proof course. A builder who failed to do this acted at his peril for, by para (2) of byelaw 6, it was provided that if the builder neglected or refused to give any such notice, he should comply with any notice in writing by the council requiring him, within a reasonable time, to cut into, lay open or pull down so much of the building, works or fittings as prevented the council from ascertaining whether any of the byelaws had been contravened. Byelaw 18 (1) provided in effect that the foundations of every building should be so designed and constructed that the stability of the building was not impaired.

The machinery set up pursuant to the Act was well designed to secure that houses built in the area of the council were not jerry-built houses or built on unsound foundations. The machinery gave the council the opportunity, which it took in this case, to see that the house which the plaintiff subsequently purchased was not such a house. The council, however, by its surveyor acted so carelessly that it did not discover the house was built on unstable land. The council's surveyor told the builder that the foundations were passed as satisfactory and showed him the green light to build on what was in fact an unstable foundation. The result was he did build and the plaintiff, when she came to purchase the property, purchased a house which began to fall down. She has suffered loss.

j Before examining the law, or approaching the authorities relied on, I find it convenient to deal first with the submission made on behalf of the council that the injury to the plaintiff was not caused by any act or default of the council. It was, so the argument ran, the builder, and not the council, who carelessly built the house on an insecure foundation, and so created the lack of stability of which

the plaintiff complains. I cannot accept this submission. As I see it, the situation was essentially this. The council had power, derived from the Act and the byelaws made thereunder, either to give or refuse its approval to the foundations; to show the green light or the red. In error, because they had carelessly done their work, they showed the green. In my judgment he who shows the green light in such circumstances as these causes the consequential injury. Let me illustrate this. Let it be supposed that one side of a winding road be under repair and there be a man on duty to ensure that the traffic coming in opposite directions is not on the road at the same time. The man on duty holds up the green flag or shows the green lights or shouts 'Go on' to driver A, not observing, as he should have done, that driver B is coming in the opposite direction. Can it be doubted as a matter of common sense, that it is the man on duty who causes the damage suffered in the ensuing collision? The analogy, like most analogies, is not complete, but serves to illustrate the point. It is not complete because I have assumed no carelessness on the part of driver A, whereas in the instant case it is common ground that at the time the council illuminated the green light, the builder had carelessly laid the foundations. It was, however, precisely to correct such earlier carelessness that the action of the council was taken; and because I accept the submission that but for the council's error the house would, on the balance of probability, never have been built on its insecure foundations, that I accept that the act of the council did cause the injury. In this connection, I refer to the speech of Lord Reid in *Home Office v Dorset Yacht Co Ltd*¹³, where he considers to what extent the law regards the acts of another person as breaking the chain of causation between the defendant's carelessness and the damage to the plaintiff, and where he concludes¹⁴ that if the intervening action—here the action of the builder—was likely to happen, it does not matter whether that action was innocent, tortious or criminal, and remarks that unfortunately, tortious or criminal action by a third party is often the 'very kind of thing' which is likely to happen as a result of the careless act of the defendant. What happened in this case was in my judgment 'the very kind of thing' which was likely to happen if the council was careless.

If it be correct that the action of the council caused injury to the plaintiff, the questions which as I see it fall to be determined are, first, did the council owe a common law duty to the plaintiff not to injure the plaintiff by approving the foundations until they had taken proper steps to ensure that they were fairly laid; not to raise the green flag until they had seen that the road was clear; and secondly, was the injury which the plaintiff suffered an injury for which damages can be recovered?

If some of the remarks in the speech of Lord Atkin in *Donoghue v Stevenson*¹⁵ were to be applied without qualification there would, I venture to think, be no difficulty in answering the questions raised. Lord Atkin said¹⁵:

"The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa", is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them

¹³ [1970] 2 All ER 294 at 298 et seq, [1970] AC 1004 at 1027 et seq

¹⁴ [1970] 2 All ER at 300, [1970] AC at 1030

¹⁵ [1932] AC 562 at 580, [1932] All ER Rep 1 at 11

- a in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'

Persons who might become the purchaser of a house built on an insecure foundation are in my judgment so closely and directly affected by the act of a local authority in passing or refusing to pass the foundations as secure, that the authority ought reasonably to have them in contemplation as being affected when the local authority apply

- b their mind to the question whether they should or should not do so. It is common ground that the defects in the foundations in the instant case were, as they were bound to be, concealed; and no reasonable inspection of the property by any purchaser would disclose the defects, which could only become manifest as the foundations started to settle; and unless the local authority were carrying out an academic exercise, for what other purpose, except primarily to protect future owners of the
- c house, was the exercise performed? And if this case does not fall precisely within any other authority, the court must have in mind what Lord MacMillan said in a much cited passage in his speech in *Donoghue v Stevenson*¹⁶:

- d 'The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed.'

If, in the instant case, the council ought reasonably to have had one in the position of the plaintiff in contemplation as one who might be injured by what it did, I ask the rhetorical question, why should not the local authority be liable to the

- e plaintiff for the injury which she has suffered?
- Of course, the passage in the speech of Lord Atkin¹⁷, which I have quoted, is not to be read literally and without regard to the context, or, as has been said, it would comprehend careless conduct of any kind through any means, causing damage of any kind, whether physical or not, to anyone who could bring himself within the definition of a neighbour. Lord Atkin was not formulating a complete criterion, as
- f was indicated by Lord Reid in the *Hedley Byrne* case¹⁸:

'That decision [in *Donoghue v Stevenson*¹⁹] may encourage [the courts] to develop existing lines of authority, but it cannot entitle us to disregard them.'

- A host of authorities has been cited which it is submitted inhibit this court from concluding that the council was under a liability to the plaintiff. In my judgment, their relevance depends on the view one takes of the facts of the case. I turn in a
- g moment to consider those principally relied on by the council.

- In view of the course which the case took in the court below, counsel for the plaintiff felt unable to contend that this is a case where the council had a statutory duty to inspect the foundations and accepted, as I understand it, that the council in doing what it did was exercising a statutory power. If then, as was submitted on behalf
- h of the council, one came to the conclusion that the council as a result of the carelessness of its officer, merely failed to prevent damage which had already happened, it would, so I think, follow, on the authority of the decision of the House of Lords in *East Suffolk Rivers Catchment Board v Kent*²⁰, that here there was no liability. That case is authority for saying that where a statutory body in exercise of a statutory power fails through foolish error to remedy a damaging situation which has already occurred, it is no more liable for the failure than if it had not exercised the
- i power at all. To constitute a tort, there must be a duty owed to the plaintiff by the defendant not to cause injury and an act of omission which causes it; and on the

16 [1932] AC at 619, [1932] All ER Rep at 30

17 [1932] AC 562 at 580, [1932] All ER Rep 1 at 11

18 [1963] 2 All ER 575 at 580, [1964] AC 465 at 482

19 [1932] AC 562, [1932] All ER Rep 1

20 [1940] 4 All ER 527, [1941] AC 74

facts of the *East Suffolk* case¹, the House of Lords concluded that the authority there had not caused any injury. On the facts of this case, however, I take the view that but for what the council did so carelessly, the house would, on the balance of probability, never have been built on the unstable foundation, and I would hold that that careless act did cause the injury and that this is not a case which is to be equated with one where the authority, while endeavouring to exercise a power to cure a damaging situation, fails to do so.

Nor, in my judgment, is the *East Suffolk* case¹ an authority for the proposition advanced on behalf of the council that it would be wrong, because it would deter statutory bodies from exercising their functions, to hold that a council which had no duty to exercise a power may be in a worse position if, while endeavouring to exercise it, it does so in a way which causes injury to the plaintiff. So to hold would in my view be to fly in the face of the authorities which were analysed in the *East Suffolk* case¹ and establish that although an authority exercising a power is not liable for injury which would have been suffered had it not exercised the power, it is liable to injury carelessly caused in the exercise. Viscount Simon LC in his speech² in that case expressed the view that if what was done had caused fresh damage, the authority would have been liable for that damage. None of their Lordships in the *East Suffolk* case¹ dissented from the statement of the law by Lord Parker of Waddington in *Great Central Railway Co v Hewlett*³:

'...it is undoubtedly a well-settled principle of law that when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damage for negligence may be recovered.'

I add only this in relation to the *East Suffolk* case¹, namely, that regarded as an authority on causation, the facts there were so very different from those in the present case, that I cannot regard it as authority to support the contention that in the instant case, the local authority cannot be regarded as having caused the injury suffered by the plaintiff. There, the event which caused the damage had already happened before the board did that of which complaint is made. Here, as I emphasise again—and this is the basis of my judgment—the house would on the balance of probability never have been built but for the carelessness of the council.

On behalf of the council, reliance was placed on the decision of the House of Lords in *Robertson v Fleming*⁴, as authority for the proposition that where A does something on behalf of B for the benefit of others, including C, if as a result of the carelessness of A in the performance of his task, C loses an intended benefit which would have accrued to him had the act or service been carefully performed, C cannot recover damages against A. Accepting that *Robertson v Fleming*⁴ is authority for the proposition so stated, the proposition does not in my judgment assist the council, but merely shows that I have no duty so to act as to confer an advantage on my neighbour. The proposition assumes that what C loses is an intended benefit and his position after the act of carelessness by A is precisely the same as it was before.

Nor can I equate the facts of the instant case with those in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*⁵, where liability for a careless misrepresentation was established. There, the liability was held to extend only in favour of one who acted in reliance on the misrepresentation; and since in the instant case the plaintiff did not rely on the council, so here, it is submitted, there is no liability. But the speeches in the *Hedley Byrne* case⁵ extended the area of liability and did not restrict it. The speeches there are to be read with regard to the question which fell to be decided, and

1 [1940] 4 All ER 527, [1941] AC 74

2 [1940] 4 All ER at 533, [1941] AC at 87

3 [1916] 2 AC 511 at 519, [1916-17] All ER Rep 1027 at 1029

4 (1861) 4 Macq 167

5 [1963] 2 All ER 575, [1964] AC 465

a I cannot accept that any of their Lordships would have regarded their language as exempting from liability C, a man who having taken on himself the task of directing the traffic, carelessly told B that the road was clear, with the result that A was injured in the ensuing collision. The distinction between the *Hedley Byrne* case⁶ and this case is that there there could be no damage suffered except by a person who relied on what was done and said by the defendant, and the defendant could only have had in contemplation as someone who might be injured by his carelessness, a person who might rely on his statement. Hence, the insistence in the speeches in the *Hedley Byrne* case⁶ on the necessity for reliance by the plaintiff and proximity as a necessary ingredient of the tort. Here, on the other hand, if my approach to the facts be right, injury could be and was suffered by the plaintiff as a result of the council's carelessness, and she was a person so closely and directly affected by the act of the council that they ought reasonably to have had her in contemplation as being so affected. Accordingly, in my judgment it is not necessary for the plaintiff here to establish that the plaintiff relied on the council in order to complete her cause of action.

d Reliance was also placed on such cases as *Cavalier v Pope*⁷ and *Bottomley v Bannister*⁸, as establishing that where injury arises from the defective state of land or of a ruinous house sold or let by the defendant who ceases to be in occupation of the property, he is not generally liable, apart from contract, unless he has acted fraudulently. It would, so the argument runs, be anomalous if the vendor who had erected the house was under no common law duty to a purchaser for injury caused by the careless way in which he or his builder had done so, but the local authority, who played no part in the construction, was nevertheless held to be liable. It is not in my view open to this court to question the true effect of this line of authority. Nor do I see any necessity so to do in order to hold the council liable; for as a matter of logic or common sense, there is, as I see it, no reason to acquit the council of negligence because the former owner or even the builder cannot be made liable. The fact that the owner or builder of a house has no common law duty to a purchaser not to put into the market a *dangerous* house, would not lead to the conclusion that the local authority, taking on themselves to satisfy themselves that the house is built on secure foundations, have no duty to a purchaser to carry out carefully the very task which they have set out to perform.

g I now come to consider the submission advanced by counsel for the council to the effect that it would be an extension of the law to hold that the particular injury suffered by the plaintiff is an injury for which damages may be recovered. It is pointed out that in the past a distinction has been drawn between constructing a dangerous article and constructing one which is defective or of inferior quality. I may be liable to one who purchases in the market a bottle of ginger beer which I have carelessly manufactured and which is dangerous and causes injury to person or property; but it is not the law that I am liable to him for the loss he suffers because what is found inside the bottle and for which he has paid money is not ginger beer but water. I do not warrant, except to an immediate purchaser, and then by the contract and not in tort, that the thing I manufacture is reasonably fit for its purpose. The submission is I think a formidable one and in my view raises the most difficult point for decision in this case. Nor can I see any valid distinction between the case of a builder who carelessly builds a house which, although not a source of danger to person or property, nevertheless owing to a concealed defect in its foundations starts to settle and crack and becomes valueless, and the case of a manufacturer who carelessly manufactures an article which, although not a source of danger to a subsequent owner or to his other property, nevertheless owing to a hidden defect quickly disintegrates. To hold that either the builder or the manufacturer was liable, except in contract, would be to open up a new field of liability, the extent of which could not I

6 [1963] 2 All ER 575, [1964] AC 465

8 [1932] 1 KB 458

7 [1906] AC 428

think be logically controlled, and since it is not in my judgment necessary to do so for the purposes of this case, I do not, more particularly because of the absence of the builder, express an opinion whether the builder has a higher or lower duty than the manufacturer. But the distinction between the case of the manufacturer of a dangerous thing which causes damage and that of a thing which turns out to be defective and valueless lies I think not in the nature of the injury but in the character of the duty. I have a duty not carelessly to put out a dangerous thing which may cause damage to one who may purchase it, but the duty does not extend to putting out carelessly a defective or useless or valueless thing. So again one goes back to consider what was the character of the duty, if any, owed to the plaintiff, and one finds on authority that the injury which is one of the essential elements of the tort of negligence is not confined to physical damage to personal property but may embrace economic damage which the plaintiff suffers through buying a worthless thing, as is shown by the *Hedley Byrne* case⁹. So the point that raises the difficulty in this case does not, as I see it, arise from the fact that the injury suffered here was the loss of the value of the house or the cost of putting it right. What causes the difficulty—and it is I think at this point that the court is asked to apply the law of negligence to a new situation—is that whereas the builder had, as I will assume, no duty to the plaintiff not carelessly to build a house with a concealed defect, yet it is sought to impute a not dissimilar duty to the defendant council. At this point I repeat and emphasise the difference between the position of a local authority clothed with the authority of an Act of Parliament to perform the function of making sure that the foundations of a house are secure for the benefit of the subsequent owners of the house and a builder who is concerned to make a profit. So approaching the matter there is in my judgment nothing illogical or anomalous in fixing the former with a duty to which the latter is not subject. The former by undertaking the task is in my judgment undertaking a responsibility at least as high as that which the defendant in the *Hedley Byrne* case⁹ would in the opinion of the majority in the House of Lords have undertaken had he not excluded responsibility.

In coming to the conclusion that the situation in the instant case was what Lord Morris of Borth-y-Gest¹⁰ there called 'a duty situation', I derive assistance from the conclusion of the majority in the House of Lords in the *Dorset Yacht* case¹¹. There the defendant was held liable not on the ground that it had committed a breach of its statutory duty, nor on the ground that in exercise of its statutory powers it had itself done an act which caused the plaintiff damage, but, as here, for a careless failure or omission while exercising its powers to prevent the happening of that which caused the damage.

If I am correct in my view that the council here was, like the careless architect in *Clay v A J Crump & Sons Ltd*¹², in control of the situation, in that it had taken on itself to see whether or not the foundations were safe and that but for its carelessness the house would not have been built, I am also assisted to my conclusion that the council is here liable on the authority of that case. I too would dismiss the appeal.

I would particularly express my appreciation of the skill of counsel in leading me, however unsuccessful the journey may have been, through what was previously an unknown and at one time seemed an impenetrable forest.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: Doyle, Devonshire, Box & Co, agents for Sparrow & Sparrow, Bognor Regis (for the council); Woodham Smith, Borradaile & Martin, agents for Hubbard & Co, Chichester (for the plaintiff).

Wendy Shockett Barrister.

⁹ [1963] 2 All ER 575, [1964] AC 465

¹⁰ In *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER at 307, [1970] AC at 1038

¹¹ [1970] 2 All ER 294, [1970] AC 1004

¹² [1963] 3 All ER 687, [1964] 1 QB 533

a **Howitt (Widow and administratrix of
Richard Arthur Howitt) v Heads**

YORK ASSIZES

CUMMING-BRUCE J

21st, 22nd OCTOBER 1971

b

Fatal accident – Damages – Assessment – Deduction from damages – Earning capacity of widow – Young widow intending eventually to resume employment – Whether her earning ability factor to be taken into account.

c *Fatal accident – Damages – Assessment – Dependent child – Whether prospects of re-marriage of mother to be enquired into when calculating damages – Law Reform (Miscellaneous Provisions) Act 1971, s 4 (1).*

Fatal accident – Damages – Assessment – Multiplier – Considerations relevant to multiplier since passing of Law Reform (Miscellaneous Provisions) Act 1971, s 4 (1).

d The plaintiff's husband was killed on 26th June 1970 as a result of a road accident for which the defendant was wholly liable. At the date of his death the husband was 21 years of age and had married the plaintiff, then aged 20, only three weeks before the accident. A child was born to the plaintiff widow on 22nd October 1970 of whom the deceased husband was the father. The widow brought an action for damages under, inter alia, the Fatal Accidents Acts 1846-1959 on behalf of herself
e and the child. The deceased had been a post office engineer, earning at the date of his death £20.46 per week. He had prospects of promotion and it was estimated that by the date of the trial of the action he would have been receiving a net remuneration of £26 per week. The widow, who until she ceased work shortly before the birth of the child had been earning £10 a week as the manageress of a confectionery business, stated at the hearing that she would probably be resuming employment at
f some future date—perhaps when the child was at school—as she and her husband had originally intended. The trial judge allowed £18 per week (£936 per annum) for the total dependency of widow and child. The question then arose as to the capital value that should be placed on the loss of dependency.

g **Held** – (i) In calculating under the Fatal Accidents Acts the financial value of the injuries sustained by the widow as a result of her husband's death, the court had to disregard (a) the widow's prospects of remarriage by virtue of s 4 (1)^a of the Law Reform (Miscellaneous Provisions) Act 1971 and (b) her earning potential (despite her expressed intention to return to work) since her capacity to earn was a result of her ability and was not a gain resulting from the death of her husband (see p 495 c to f g and j and p 496 a, post); *Goodger v Knapman* [1924] SASR 347 and *Usher v Williams* (1955)
h 60 WALR 69 followed.

(ii) Although s 4 (1) of the 1971 Act did not expressly provide that the court should not enquire into a widow's prospects of remarriage when calculating the damages payable for the benefit of a child of the deceased, for the purposes of determining in the present case the total sum of damages to be awarded, such an enquiry was immaterial; it was only in relation to the apportionment of the damages awarded
j that it might be relevant (see p 492 h to p 493 a, post).

(iii) Disregarding the widow's prospects of remarriage and her earning potential,

a Section 4 (1) provides: 'In assessing damages payable to a widow in respect of the death of her husband in any action under the Fatal Accidents Acts 1846 to 1959 there shall not be taken into account the remarriage of the widow or her prospects of remarriage.'

the proper multiplier to be applied was 18 and accordingly the capital value to be placed on the loss of dependency was £16,848 (see p 497 f, post). a

Notes

For actions under the Fatal Accidents Acts 1846-1959 and deductions from damages, see 28 Halsbury's Laws (3rd Edn) 100, 101, para 110, and 103, 104, para 113, and for cases on the subject, see 36 Digest (Repl) 211-214, 1111-1132.

For the Law Reform (Miscellaneous Provisions) Act 1971, s 4, see Halsbury's Statutes (3rd Edn) Current Statute Service, p 807. b

Cases referred to in judgment

Davies v Powell Duffryn Associated Collieries Ltd [1942] 1 All ER 657, [1942] AC 601, 111 LJB 418, 167 LT 74, 36 Digest (Repl) 231, 1229.

Goodger v Knapman [1924] SASR 347.

Taylor v O'Connor [1970] 1 All ER 365, [1971] AC 115, [1970] 2 WLR 472, Digest (Cont Vol C) 754, 1194l. c

Usher v Williams (1955) 60 WALR 69, Digest (Cont Vol A) 1209, *2119d.

Cases also cited

Mallett v McMonagle [1969] 2 All ER 178, [1970] AC 166.

Mitchell v Mulholland (No 2) [1971] 2 All ER 1205, [1971] 2 WLR 1271. d

Action

This was an action in which Bernadette Howitt, the plaintiff widow and administratrix of the estate of Richard Arthur Howitt, claimed (i) under the Fatal Accidents Acts 1846-1959 damages for herself and for Richard Paul Howitt her infant son by her deceased husband and (ii) under the Law Reform (Miscellaneous Provisions) Act 1934 damages for the deceased's estate. The deceased died in a road accident on 26th June 1970. The defendant, Brian Arthur Heads, admitted that the death of the deceased was caused by his negligent driving and the sole issue was that of assessment of damages. The facts with regard to that issue are set out in the judgment. e

JFS Cobb QC and *CJ Holland* for the widow. f

JA Cotton for the defendant.

Cur adv vult

22nd October. **CUMMING-BRUCE J.** This is an action for damages under the Fatal Accidents Acts 1846-1959 and the Law Reform (Miscellaneous Provisions) Act 1934, brought by the widow for the benefit of herself and her infant son. The case has for me an element of novelty in that it is the first time that I have to make the assessment of damages since the Law Reform (Miscellaneous Provisions) Act 1971 came into force. As a consequence of that Act, in assessing damages payable to a widow in respect of the death of her husband in any action under the Fatal Accidents Acts, there shall not be taken into account the remarriage of the widow or her prospects of remarriage. I observe that this is a case in which the action is brought for the benefit not only of the widow, but of the infant son of the deceased, and having regard to the language of s 4 (1) of the 1971 Act, it appears that although it is the duty of the court to disregard the prospects of remarriage of the widow—her remarriage in relation to the damages payable to herself—no such exclusion is expressly provided in the case of damages payable for the benefit of children of the deceased. There may be cases in which that difference is of real significance. There was no discussion of this point in argument before me, and counsel for the defendant did not embark on any enquiry as to prospects of remarriage, doubtless having in mind the policy of the Act which had its origin in public distaste for enquiry into the delicate topic of prospects of remarriage after death of the first husband. I have come to the conclusion that, g

h

i

a on the facts of this case, it is not material for any decision that I have to make in determining the total sum to embark on the question of prospects of remarriage. It may fall to be discussed in relation to apportionment, but I am satisfied that it would make no difference to what is described as the global sum.

The death of the deceased took place on 26th June 1970. He was then 21 and the widow, as she is now, was 20. They had been married three weeks before the death of the deceased. The background of the marriage is that they had been courting b for four years. Some five or six months before the marriage they had bought a little house with the aid of a loan of £400, which they were repaying at £2 a week, and during the months before marriage and after purchase of the house, he and she had worked hard on the house, on electrical wiring, plumbing and decoration. The son was born posthumously on 22nd October 1970. Before marriage the widow c had been, in spite of her youth, employed as the manageress in a confectionery business at a remuneration of £10 a week. After marriage she continued working in that employment. Their intention was that she should continue to work until the pregnancy made it sensible for her to stay at home. In evidence (which I accept) in discussion of their long-term plans, the widow said they had contemplated a family d of two children, and that she envisaged she might well return to remunerative employment herself at some future date, when the children were off to school. I appreciate that there are many changes and chances which affect such carefully laid plans, and I do not approach the case on the basis that these two had any settled or clear idea as to what sort of family they would, in the end, decide to have, but the widow, who was a candid witness, did her best to describe their mutual intentions as far as they had got.

e My task is to assess a sum proportionate to the injury resulting from the death of the deceased, so I turn to the facts relevant to dependency. I had the advantage of a paper setting forth computations of the expected net earnings of the deceased over the future years, and computations of his earnings after tax during the period in which he had been employed in his employment. By occupation he was a post office engineer. He had served his apprenticeship. He was at all times employed in that f occupation and, as far as is known, intended to stick to it. On the first page of the computations of expected net income after deduction of income tax and national insurance contributions, there are set out actual earnings for the 26 weeks up to 26th June 1970, when he died, at £20.46 per week take-home pay. Then in the succeeding items on that page, which summarises the calculations set out in subsequent pages, there are computations based on his gross and net remuneration after the rises in pay, increases in basic rates, which took place on 1st July 1970 and 1st July g 1971. The third item shows his remuneration, assuming he had been promoted to the grade of technician (1). That, curiously, shows a drop in gross and net earnings. Counsel for the widow explained to me that that was founded on the fact that in that grade, although there is greater security of employment, there is a fall in gross remuneration and the final item shows what his estimated earnings would have h been assuming he had been promoted to a senior technician. Of course the prospects of such promotion are clouded in uncertainty, but I approach the case on the basis that his history up to his death had been of a man who had settled with stability into skilled employment, in which he appeared to have a secure future with the prospects of added remuneration shown in the paper. Of course the paper does not deal with future changes in basic rate, but confines itself to those increases of which i the court can take note as a result of actual knowledge.

I take the view that I should approach the case on the basis of a net remuneration of £26 and I do so. Now what deductions fall to be made from that sum in relation to those sums which were expended as a result of the personal expense of the deceased? The widow agreed in evidence that by today it would cost at any rate £4 a week to feed her husband. I was told that he did not spend much on his clothing; that he did not smoke; that he had a moderate intake of alcoholic refreshment.

That last feature of his expenditure was elaborated slightly. He used to go out in these early days of marriage about twice a week with his friends. The widow said that he enjoyed going to rugby football matches at weekends, and I accept that he spent a little more then than during the working week. He ran a secondhand car which he used for the purposes of getting to and from his work, and for the purposes of his and her recreation. The petrol expenditure of the car, insofar as he used it for the purposes of going to his place of employment, was, I understand, subject to a contribution towards the petrol cost on such occasions. I had no detail thereof. He was described, and I accept the description, as being a man of some technical capacity and skill in matters mechanical and electronic. Thus he was a person who was able to tinker with his motor car and achieve improvements in its performance which others might have to do expensively at a garage. And he was able to help the widow in the wiring of the house that they bought.

The marriage only endured for a matter of three weeks before he was killed, and thus there is not, and cannot be in this case, any view of the settled habits of the two in matrimony. They had not had time to achieve a routine. But I approach the case on the basis that the widow had married a steady young man who entered marriage eager to build a home. They bought their house with a loan which they were repaying, and he was evidently taking a lot of trouble, giving up a good deal of time, to feather the nest. But it is a case in which there cannot be any detailed enquiry into the financial budget of the family—the more so because during the brief period of cohabitation the widow was still earning £10 a week, and thus was only asking for a modest sum from the deceased as a contribution to the housekeeping. I accepted her evidence that during that period he was behaving in a responsible way and was saving what he could. I find as a fact that after she ceased work the prospect was that the deceased would face the financial responsibilities that they had as a family, so that would place a limitation on the opportunity that he would have for spending money on his amusements. I have come to the conclusion that, taking £26 as the net earnings over a prospective period, the element that represents the widow's dependency is a sum of £18 a week, and it is on the basis of that financial deprivation that I approach the assessment of damages.

Counsel for the widow invited me to add to the pure financial loss, the fact that he subscribed to the family an additional element relating to the financial value to the widow of the services of the deceased, by reason of the fact that he was the kind of man who had both the qualification and the intention of doing the kind of work in the home, or on the car, which in the case of many families has to be met by paid services. I am satisfied that, during the period before marriage, he was indeed working with her in the way described on their little house and affected significant improvements to it, with the result that when it had to be sold after death they got a good deal more for it than they had paid. However, facing the vast number of uncertainties which are inevitable on a history such as this, I have decided that the sum of £18 which I allow for dependency is a fair figure, representing the total dependency of the widow and their son.

On the basis of that dependency I approach the next problem, which is the problem of the capital sum which fairly represents the injury to the widow occurring from the death. I have to do it with rather less guidance from authority than has for many years been possible in Fatal Accidents Acts cases, as a consequence of the new situation flowing from the effect of s 4 (1) of the 1971 Act. Here is a young widow, now aged 21, with one child. Her prospects of remarriage are not to be taken into account. The situation as I see it is this: on the widow's evidence it is likely, being evidently a lady of ability, that when it is convenient for her to make suitable arrangements for their son, she probably will at some stage—perhaps when the boy starts going to school—resume employment, not only to have the advantage of the money, but also because obviously it is likely to make life more interesting for her. And so, peering into the future, I envisage a situation in which it is likely that after a period of

a years, probably not very far ahead, she will resume employment and make a good deal of money every week as a result. That, of course, is on the contingency that she does not remarry with all the implications that that might have—implications which I have to leave out of account.

b What is the correct approach in a Fatal Accidents Acts case to the situation of a widow who has an earning capacity which she will probably use after a fairly short period of years? As far as I know there is no explicit authority in English cases, though there is a good deal of authority to the effect that a wife's private means are not to be taken into account. There is a useful discussion in the well-known textbook, Kemp and Kemp¹, on the relevance or otherwise of a widow's capacity to support herself, and there have been two cases in Australia, one of which was approved in the High Court of Australia, dealing with the matter. In *Goodger v Knapman*² (and I rely on the citation from that case given in the textbook to which I have referred) c Murray LJ said:

d 'Mr. Thomson asked me to make a further reduction by reason of the widow being relieved from the heavier part of her domestic duties and thereby set free to go out and earn something on her own account. I do not accede to the suggestion, as I am unable to see how liberty to work can reasonably be brought within the description of a pecuniary advantage she has derived from the death of her husband. Any money she might earn would be the result of her labour, not of his death.'

The same decision was made by Wolff J in Western Australia in *Usher v Williams*³:

e 'The argument for the diminution of the claim by some allowance for the widow's earning potential proceeds on the theory that the husband's death has released a flood of earning capacity... In my opinion the plaintiff's ability to earn is not a gain resulting from the death of her husband within the principle established by *Davies v. Powell Duffryn Collieries, Ltd*⁴. The widow's ability to work was always there and she could perhaps, as women do, particularly in professions, have preferred to work after marriage. The same argument that is put f forward for the defendants could be applied to any woman who goes out to work through necessity to support herself and her children following her husband's death, and if it can be applied to the widow there is no reason why it should not be used to diminish or extinguish the children's claims in a case where, by her efforts, she is able to support them as well as her husband did in his lifetime... g I therefore hold that the widow's earning capacity is not to be taken into account in diminution of damages.'

I agree with the principle enunciated in those cases and I follow them. I therefore make no deduction in respect of the widow's capacity to earn, even though I am satisfied as a matter of probability that she will fairly soon be obtaining a significant degree of financial independence. So when I approach the capitalisation of the loss, h it appears that the situation is really very different from the assessment of damages that arises in other branches of the law of torts. I have to make a calculation of the financial value of the injuries sustained by the widow. As a result of the 1971 Act I have to close my eyes to what may be reality and close my mind to the financial consequences for the widow of prospects of remarriage. This in many cases inevitably introduces an element of unreality to the assessment of real loss of the widow. j It would not, having regard to the Act, be right for me to express any view at all on what the prospects of remarriage are in this case. In consequence that one element

1 The Quantum of Damages (2nd Edn), vol 2, p 272

2 [1924] SASR 347 at 358

3 (1955) 60 WALR 69 at 80, 81

4 [1942] 1 All ER 657, [1942] AC 601

of reality has to be left out of account as I form my view of the widow's future prospects. And, as a result of the view that I have formed following the Australian cases, I am of the opinion that I must also exclude from my calculation any advantage that the widow may in the future derive from remuneration as a consequence of her own intention to return to work, which in the present case means that I exclude another factor which is a reality in the future life of the widow. a

The exercise on which I embark, in seeking to capitalise her loss therefore has two elements of some artificiality; but by statute I consider that I am bound to postulate one artificiality, and on principle, having regard to the approach of the court to the widow's own capacity to earn, I think it is my duty to introduce the second artificiality. Having regard to the age and good health of the deceased, subject to what is commonly described the changes and chances of life, he had a prospect of remunerative employment of not less than 40 years, and having regard to the widow's health and youth, her expectation of life is at least as good as his. And so, subject as I say to changes and chances of the unknown future, the widow has been deprived of the prospect of a settled and stable financial future afforded by the deceased over a period of some 40 years. b

The reason why there is very little to guide me on the capitalisation of the financial loss is that in past years, through the whole experience of the Fatal Accidents Acts, in such a case the courts, inevitably taking into account the prospect of remarriage of the young lady of 20 or 21 with one child, or sometimes two or more children, have taken the view that that was a real element in the future which should be given great significance according to the facts of the particular case, in curtailing the probable period for which the injury following the death would continue. Now, for the reasons stated, I have to disregard that very important factor. c

Counsel for the widow put in, as an aid to testing the effect of an award of £15,000, some tables showing what the effect would be if such a sum was invested to yield either 3 per cent or 4 per cent and I approach the case on the basis of the guidance given in the House of Lords in *Taylor v O'Connor*⁵. I cite in particular a passage from the speech of Lord Pearson, which I think counsel for the widow had in mind when he caused to be prepared the tables that he put before me. Lord Pearson said⁶: d

'The fund of damages is not expected to be preserved intact. It is expected to be used up gradually over the relevant period—15 or 18 years in this case—so as to be exhausted by the end of the period. [The case with which their Lordships were dealing was a case where the deceased was 53 at the time of death and the respondent 52.] Therefore, what the respondent receives annually—£3,750 in this case—is made up partly of income and partly of capital. As the fund is used up, the income becomes less and less and the amounts withdrawn from the capital of the fund become greater and greater, because the total sum to be provided in each year—the £3,750—is assumed (subject to what is said below), to remain constant throughout the relevant period. It is not difficult, although somewhat laborious, to work out without expert assistance how long a given fund will last with a given rate of net interest and a given sum of money to be provided in each year.' e

Then Lord Pearson gives the first few lines of such a calculation to show the method, which was the method counsel for the widow presented to me. When one looks at counsel's figures showing the consequences of an award of £15,000 invested at 3 per cent on the basis that the loss of dependency was £1,000, so that that is the income one is seeking to afford the widow throughout the future, it appears that on that investment of 3 per cent the fund disappears altogether in the twentieth year. f

⁵ [1970] 1 All ER 365, [1971] AC 115

⁶ [1970] 1 All ER at 379, [1971] AC at 143, 144 g

a And at 4 per cent it disappears in the twenty-third year. Counsel for the defendant called evidence from a stockbroker who made calculations on the ways in which a capital fund might be invested, having regard to the present state of the market, and he pointed out that if the capital sum awarded to the widow was invested in dated stock, that it could command an interest rate of 8 per cent. Of course the disadvantage of investment in a dated Treasury bond is that at the end of the dated period, b the capital is returned intact at its initial value; therefore in the event of the value of money having fallen say by half over a long period, the real value of the capital at the end of the period is one half of what it was initially. Hence it is that those who deal with investment advice always have to do a balancing act between high interest-bearing stock, which will depreciate in real value over the years, and growth stock which is unlikely to command a dividend of more than 3-4 per cent, but which will provide for the preservation of the real value of the capital.

c The stockbroker naturally said that in his experience it was common, after deciding the income that the capital owner required, to give advice striking some sort of balance between the secure interest policy and the low interest value of growth security. On an £18 a week dependency the annual loss of dependency is £936. So that I seek by my award to provide the widow with capital that will afford her and d her son over the foreseeable future an income of £936, and I find in the speeches of the House of Lords in the case to which I have referred an indication that it is by the management of the capital fund that the widow may reasonably expect to counteract the probable fall in the value of money as a consequence of inflation. I have looked at annuity tables and I have taken them into account as providing one test of the appropriateness of the calculations, but I accept unhesitatingly the view e frequently expressed that the actual evidence of such computations (and there is no evidence in this case of actuarial character) is of limited value in assistance in a Fatal Accidents Acts case.

I hope that I have thus indicated the factors that have affected my mind, and I have decided that the capital value that should be placed on the loss of dependency by the widow is the sum of £16,848. If my arithmetic is correct it will be found that f can be represented as a multiplier of 18. There is a claim under the Law Reform (Miscellaneous Provisions) Act 1934 in respect of which I award the conventional sum of £500 which falls to be deducted from the Fatal Accidents Acts claim. There are funeral expenses at £71.23 which fall to be added to the claim under the 1934 Act by way of addition. Those are the figures which I award before dealing with apportionment.

g [His Lordship, after considering the submissions of counsel relating to apportionment, directed that judgment should be entered for the plaintiff widow and administratrix for £18,384.23, apportioned as to £571.23 under the Law Reform (Miscellaneous Provisions) Act 1934, as to £16,348 under the Fatal Accidents Acts 1846-1959 (apportioned as to £14,348 in respect of the widow and as to £2,000 in respect of her infant son) and as to £1,465 interest on £16,919.23 at the rate of 7½ per cent from 27th h August 1970, the date of the service of the writ, until the date of judgment.]

Judgment for the widow accordingly.

Solicitors: Lee & Priestley, Bradford (for the widow); Eaton Smith & Downey, Huddersfield (for the defendant).

John M Collins Esq Barrister.

Commissioners of Customs and Excise v Beecham Foods Ltd

HOUSE OF LORDS

LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD WILBERFORCE, LORD PEARSON AND LORD DIPLOCK

29th OCTOBER, 1ST, 2ND, 3RD, 4TH, 8TH NOVEMBER 1971, 26TH JANUARY 1972

Purchase tax – Chargeable goods – Drugs and medicines – Syrup of blackcurrant containing vitamin C – Ribena – Ribena on market principally as health drink for normally healthy persons – Predominant use as a refreshing drink which might also make good any vitamin C deficiency in diet – Use to increase vitamin C intake of expectant and nursing mothers – Occasional use to prevent recurrence of scurvy – Whether a ‘drug or medicine’ – Whether exempt from charge as a preparation consisting of a scheduled substance and a vehicle – Purchase Tax Act 1963, s 2 (1), Sch 1, Part I, r 1 and Group 33 – Purchase Tax (No 2) Order 1968 (SI 1968 No 1511), art 1, Schedule, Head III.

The respondents manufactured, under the trade name ‘Ribena’, a syrup consisting as to 70 per cent of syrup of blackcurrant BPC (which had a natural vitamin C content), as to 25.6 per cent of syrup BP, and as to 0.19 per cent of added vitamin C. When diluted with water, Ribena provided a drink which was (a) thirst-quenching, (b) pleasant in appearance and taste, and (c) rich in vitamin C. Ribena was predominantly sold and advertised as a health drink to normally healthy persons, in particular children who were allowed and encouraged to have it not only because it was refreshing but also because it would help to make up any vitamin C deficiency there might be in their diet. Expectant and nursing mothers might be advised to take Ribena in order to increase their intake of vitamin C. Ribena was not strong enough to effect a cure for the disease of scurvy, caused by lack of vitamin C, but it could be used to stabilise a cure and prevent a recurrence of the disease. By s 2 (1)^a of the Purchase Tax Act 1963 the goods chargeable to tax were those comprised in the groups listed in Part I of Sch 1 to the Act other than goods which were exempt from all charge to tax under Part I. By s 2 (2), the list of groups in Part I were to be interpreted, inter alia, in accordance with r 1 at the beginning of Part I which provided that where a group began with a general description of the goods comprised in the group, the goods mentioned below in the group (including those mentioned under a heading ‘exempt’) comprised only goods falling within the general description. Section 2 (3) empowered the Treasury to amend Part I of Sch 1 to the Act by order made by statutory instrument. Group 33 of Part I of Sch 1 to the Act comprised ‘Drugs and medicines, manufactured or prepared (except toilet preparations)’ and, as amended, exempted from charge under the heading ‘exempt’ goods specified in the Schedule to the Purchase Tax (No 2) Order 1968^b. Group 35, so far as material, comprised ‘Manufactured beverages, including... syrups, concentrates... for the preparation of beverages’. Article 1 of the 1968 Order provided that ‘Drugs and medicines, manufactured or prepared (except toilet preparations) of any of the classes specified in the Schedule to this Order shall not be included in any class of goods which are chargeable goods’ under the 1963 Act. Head III in the Schedule to the 1968 Order comprised ‘The substances described under this head [which included vitamins], and preparations consisting only of one of those substances and one or more of the following things, namely, an excipient, vehicle, base or preservative...’ The appellants contended that Ribena was a ‘medicine’ within the general heading ‘Drugs and medicines’ to Group 33 and, since it consisted of a vitamin and a

^a Section 2, so far as material, is set out at p 509 f and g, post

^b SI 1968 No 1511

a 'vehicle' (i.e. blackcurrant syrup), was exempt from tax chargeable under Group 33, and therefore under any other group including Group 35, as being goods specified in the Schedule to the 1968 Order; alternatively, that even if Ribena was not a drug or medicine within the general heading to Group 33 it was, being goods specified in the Schedule to the 1968 Order, definitively declared to be a drug or medicine, and hence exempt, by the terms of art 1 of the 1968 Order.

b **Held** (Lord Morris of Borth-y-Gest dissenting) – Ribena was chargeable to purchase tax under Group 35 of Sch 1 to the 1963 Act for the following reasons—

(i) Ribena plainly fell within Group 35 as a manufactured syrup for the preparation of a beverage; the fact that a beverage had medicinal qualities did not prevent it falling within that group; accordingly Ribena was chargeable under Group 35 unless it was a 'medicine' and was thus within the general heading to Group 33 and was exempt from tax by virtue of the exemption contained in that group; in consequence of r 1 in Part I of Sch 1 to the 1963 Act, Ribena could only obtain the benefit of the exemption under Group 33 if it fell within the general heading 'Drugs and medicines'; if it did not fall within that heading it was irrelevant that it was one of the goods specified in the Schedule to the 1968 Order (see p 500 d and g, p 509 b and c, p 510 a and j to p 511 b and p 512 j, post);

d (ii) Ribena did not fall within the general heading 'Drugs and medicines' in Group 33 since it was not a medicine; the broad question was whether it was only an article of diet, included in the diet as being conducive to general health, or a medicine taken for the cure or prevention of some particular disease; on the evidence Ribena was on the market as a 'health drink' for everyone however healthy and was sold to and for normally healthy persons; it was sold neither therapeutically nor prophylactically, but as a diet supplement to those not shown to be in particular need of vitamin C more than any other element of normal diet; it was therefore immaterial that Ribena could be, and in a relatively minute number of cases was, used for purposes which might be described as medicinal (see p 501 e to g, p 506 g, p 508 d to g and p 511 j to p 512 c f and j, post).

f Per Lord Morris of Borth-y-Gest and Lord Pearson. In determining the question whether Ribena was a medicine no assistance could be obtained from the view which the commissioners had, rightly or wrongly, formed with regard to other comparable products. Accordingly (per Lord Pearson) it was right not to allow interrogatories on this matter (see p 503 b and p 512 g, post).

Decision of the Court of Appeal [1971] 1 All ER 701 reversed.

g Notes

For chargeable goods for the purposes of purchase tax, see 33 Halsbury's Laws (3rd Edn) 223-227, paras 383-387, and for cases on purchase tax, see 39 Digest (Repl) 348-351, 822-839.

For the Purchase Tax Act 1963, s 2, Sch 1, Part I, r 1, Group 33 and Group 35, see 26 Halsbury's Statutes (3rd Edn) 635, 675, 690.

h The Purchase Tax (No 2) Order 1968 (SI 1968 No 1511) was superseded by the Purchase Tax (No 1) Order 1970 (SI 1970 No 364) which has in turn been superseded by the Purchase Tax (No 5) Order 1971 (SI 1971 No 1166).

Appeal

j This was an appeal by the Commissioners of Customs and Excise against an order of the Court of Appeal (Russell, Edmund Davies and Cross LJJ) dated 3rd December 1970 and reported [1971] 1 All ER 701 reversing a decision of Ungood-Thomas J dated 9th May 1969 and reported [1969] 3 All ER 135, and holding that a product manufactured by the respondents, Beecham Foods Ltd, under the name 'Ribena' was a drug or medicine within Group 33 of Sch 1, Part I to the Purchase Tax Act 1963 and that it was exempt from charge to purchase tax as being one of the goods specified

under Head III in the Schedule to the Purchase Tax (No 2) Order 1968. The facts are set out in the speech of Lord Reid. a

Jeremiah Harman QC and *J P Warner* for the commissioners.
R J Parker QC and *J G Marriage* for the respondents.

Their Lordships took time for consideration. b

26th January. The following opinions were delivered.

LORD REID. My Lords, the question in this case is whether purchase tax is payable in respect of sales of Ribena. It is a syrup the composition of which is shown on the label on the bottles in which it is sold: c

	Per cent.
'Syrup of Blackcurrant B.P.C.	70
Syrup B.P.	25.6
Vitamin C added19

and it is said to contain not less than 75 mg vitamin C per fluid ounce. Dilution is advised with water, soda water or milk. d

The commissioners maintain that it is taxable under the Purchase Tax Act 1963, Sch 1, Group 35, as a manufactured syrup for the preparation of a beverage. I think that it clearly comes within this class. When diluted the syrup makes a pleasant fruit drink. We have to determine the character of the goods at the stage of sale by the wholesaler to the retailer. This syrup has been on the market for many years. Sales have been very large and there has been widespread publicity and advertising. Any retailer when buying it would know the types of customers who buy it. Some will buy it without regard to any medicinal quality, simply as a pleasant fruit drink. It is rather expensive as a mere fruit drink and no doubt many will buy it with more or less regard to its medicinal properties, and more or less regard to its quality as a pleasant beverage. Some may buy it chiefly for its medicinal qualities. I can see no reason why the fact that a beverage has medicinal qualities should prevent it from falling within this group. It must be a question of fact and degree whether a particular product does fall within the group. Here I think there can be no reasonable doubt. e

But that is only the first step in determining whether this product is taxable. Group 33 comprises drugs and medicines manufactured or prepared (excluding toilet preparations) and it contains an exemption of goods specified in what is now the Purchase Tax (No 2) Order 1968¹. If Ribena comes within this order admittedly the effect is not only that it is exempt from tax under Group 33 but that it is also exempt from tax under any other group including Group 35. f

So the real question in this case is whether Ribena comes within the scope of that statutory instrument. Head III comprises the substances described under this head (one of which is vitamins) and also preparations consisting of one of these substances and one or more of the following things, namely an excipient, vehicle, base or preservative. The respondents maintain that Ribena consists only of a vitamin and a vehicle. I cannot agree. I think that 'vehicle' must mean a substance which being mixed with the active substance—here vitamin C—serves as a convenient means of conveying the active substance from the manufacturer into the body of the consumer. I cannot regard the blackcurrant syrup as being in the whole circumstances a vehicle within the meaning of the provision. Typically a vehicle would be an inactive substance which is of no independent value to the consumer. It would be too narrow so to confine the term, e.g. the flavour of the vehicle may be important to g

a the consumer. But I think that the vehicle must be ancillary to the active substance. I do not think that that can be said of the blackcurrant juice in Ribena. Taking all the facts from whatever point of view one looks at the matter the blackcurrant juice appears to me to be a main element and probably the most important element in the product.

b The problem can also be approached by asking whether Ribena is in any true sense a medicine within the meaning of Group 33 and the Purchase Tax (No 2) Order 1968. There is no definition of 'medicine' so it must be construed as an ordinary word of the English language. One must look at the whole picture and decide whether, even giving to medicine a wide meaning, Ribena can be so regarded.

c It is said for the commissioners that Ribena is a mere dietary supplement. I do not think that that is at all helpful. Suppose a person needs or thinks he needs more vitamin C than he is likely to get from his ordinary diet. He may take orange juice which to my mind is plainly not a medicine, or he may take tablets of ascorbic acid which to my mind plainly is a medicine. Ribena comes somewhere between the two. Whether it is a medicine must I think be decided on wider grounds. No doubt it is capable of being used as a medicine. The label on the bottle tells you how much to take if you need or think you need a particular quantity of vitamin C. But equally one could by enquiry discover how much orange juice to take to get a particular amount of the vitamin.

d It appears to me that really the only points in favour of the respondents' contention are that Ribena is carefully prepared according to a pharmaceutical formula and that it contains a fairly large amount of the vitamin. So it is more convenient for use for medicinal purposes than other natural or manufactured foods or drinks which contain this vitamin. But I do not think that that makes it a medicine. The fact that a preparation contains some substance which by itself or in a different preparation would clearly be a medicine does not get one very far. Indeed I think that the same preparation sold with one get-up and method of marketing, advertising and user might not be a medicine while the same preparation sold with a different get-up and method of marketing, advertising and user might properly be regarded as a medicine. As with so many English nouns there is no clear limit to the denotation of the word medicine. All the circumstances must be considered and there may be cases where it is extremely difficult to decide whether or not the term medicine is properly applicable. But here I think that however one approaches the matter it would be a misuse of language to call Ribena a medicine and I would therefore allow the appeal. I agree with the view of my noble and learned friend Lord Wilberforce as to costs.

g **LORD MORRIS OF BORTH-Y-GEST.** My Lords, in his careful judgment Ungood-Thomas J² helpfully analysed the provisions of ss 1 and 2 of the Purchase Tax Act 1963 and the relevant provisions of Sch 1. As a consequence I find it unnecessary to refer other than briefly to certain of the issues which have arisen. If Ribena comes within the general description of the goods comprised in Group 33 but is included in the goods mentioned under a heading 'Exempt' then Ribena would be exempt from all charge to tax even though it comes within the general description of goods comprised in another group.

h I turn then to consider Group 33 which is a group comprising drugs and medicines manufactured or prepared (except toilet preparations). It is common ground that Ribena is either manufactured or prepared and that it is not a toilet preparation. If it comes within the general description of being either a drug or medicine then it will be exempt from tax if it is mentioned under a heading 'Exempt'.

j There are two exempt classes. The first is 'Goods complying with the Provisions of Part II of this Schedule'. Part II is headed 'Conditions of Exemption of Drugs and

Medicines Comprised in Group 33, under Para. (1) of Heading "Exempt" in that Group'. Condition 4 in Part II is that:

'There must not appear in the get-up of the goods or on the goods apart from any get-up—(a) any trade mark as defined in the Trade Marks Act 1938 ...'

This condition was not satisfied because the trade mark Ribena does so appear. But had this condition been satisfied and if the other conditions were satisfied then it seems as though it was conceded in the Court of Appeal³ that on that basis Ribena would have been 'exempt'. Such a concession would involve or imply that in the first place Ribena came within the description 'Drugs and medicines'. If the concession was made but is withdrawn or if there was some misunderstanding in regard to it, it would not be fitting that it should form any basis for arriving at a conclusion. In my view, as I will indicate, the question whether Ribena is or is not within the description 'Drugs and medicines' is the central question in the case. I will approach that question on the basis that if any concession was either previously made or implied it should neither guide nor influence decision.

The second exempt class is of goods specified in the Schedule to the Purchase Tax (No 2) Order 1968⁴. Head III of the Schedule to the Order covers:

'The substances described under this head, and preparations consisting only of one of those substances and one or more of the following things, namely, an excipient, vehicle, base or preservative, or of two or more of those substances whether with one or more of the following things, namely, an excipient, vehicle, base or preservative, or not ...'

One of the substances described under Head III is 'Vitamins'. So the question arises whether Ribena is a preparation consisting of vitamins and one, or more than one, vehicle. This question was very fully explored by Ungood-Thomas J⁵ who in his judgment amply sets out his reasons for deciding that Ribena is within the particular description relied on in Head III of the Schedule. In turn this question was fully examined and explained by Russell LJ, who set out his reasons for agreeing on this question with the learned judge. Both Edmund Davies and Cross LJ came to the same conclusion and set out their reasons. I do not find it necessary to reiterate the various matters that arise in connection with this question. I agree with Ungood-Thomas J⁵ and with all the members of the Court of Appeal³.

Article 1 of the Purchase Tax (No 2) Order 1968 is in these terms:

'Drugs and medicines, manufactured or prepared (except toilet preparations) of any of the classes specified in the Schedule to this Order shall not be included in any class of goods which are chargeable goods within the meaning of the Purchase Tax Act 1963.'

On a first reading of these words anyone might be pardoned for supposing that it was being said that a preparation which was within one of the classes specified in the Schedule was either a drug or a medicine. Hence the point was taken that the form of the statutory instrument was such that it declared definitively that everything in the Schedule is a drug or medicine, manufactured or prepared. But in this connection it has to be remembered that r 1 in Part I of Sch 1 to the Purchase Tax Act 1963 is in these terms:

'Where a Group begins with a general description of the goods comprised in the Group, the goods mentioned below in the Group (including those mentioned under a heading "Exempt") comprise only goods falling within the general description.'

³ [1971] 1 All ER 701, [1971] 1 WLR 326

⁴ SI 1968 No 1511

⁵ [1969] 3 All ER 135, [1969] 1 WLR 1518

a In agreement with the Court of Appeal⁶ I have reached the conclusion that the point which was taken (i.e. that the statutory instrument declares definitively that everything in the Schedule is a drug or medicine, manufactured or prepared) is not sound. The exemption of goods which are specified in the Schedule to the Purchase Tax (No 2) Order 1968 will only operate in the case of goods which to begin with fall within the general description of the goods comprised in the group.

b It follows from what I have said that in my view the main question calling for decision is whether Ribena is a 'medicine'. No one has suggested that it could be described as a drug. In approaching this main question I do not consider that assistance can be derived from considering what view the commissioners may, whether rightly or wrongly, have formed or what attitude they may have adopted in regard to some other goods or other preparations. What then is a medicine? Ungood-Thomas J⁷ pointed to a dictionary definition of medicine (when used in a sense other than a substance) as 'the science and art concerned with the cure, alleviation, and prevention of disease, and with the restoration and preservation of health'. In line with Ungood-Thomas J I think that a fair approach is to regard a medicine as a medicament which is used to cure or to alleviate or to prevent disease or to restore health or to preserve health.

d It is clear that some goods may be comprised under more than one group of Sch 1 to the Purchase Tax Act 1963. This is shown by the fact that one of the rules provides that where goods are chargeable at more than one rate, tax is to be chargeable in respect of them at the higher or highest of those rates. The direction on a bottle of Ribena is that, being concentrated, it should always be mixed with water or soda water or cold milk. It can fairly be described as a concentrate for the preparation of a beverage. I consider therefore that it is comprised within Group 35. This circumstance does not, however, in any way affect the question whether it is also within Group 33. Something which may properly be described as a medicine within Group 33 may at the same time be a beverage within Group 35. As the legislature has accepted this, and has not introduced any such test as that of predominant user, it cannot be that something which, fairly examined and viewed, is in fact a medicine will cease to be a medicine merely because many people, finding it palatable, consume it as a beverage.

f As Ungood-Thomas J⁸ pointed out, purchase tax is a tax on the wholesale value of goods which are purchased; enquiry as to the classification of goods is directed at the wholesale stage. I agree therefore that whether a particular item is or is not a medicine cannot depend simply on its ultimate use or on the intention of an individual purchaser. So, at the wholesale stage, what is Ribena? Does a purchaser buy something that is only a medicine (in which case unless it is an exempt medicine there will be a tax at the rate of 25 per cent); or something that is only a beverage (with tax at the rate of 15 per cent); or something that is both a medicine and a beverage (in which case unless it is an exempt medicine the tax will be at the rate of 25 per cent)? For the reasons which I have given if Ribena is both a medicine and a beverage then as it is an 'exempt' medicine it will be exempt from all charge to tax either as a medicine or as a beverage.

h Ungood-Thomas J⁹ said that roughly five-sixths of the Ribena sold is sold through grocers and only one-sixth through chemists. If, even while recognising that there may perhaps be five times as many grocers as chemists, this is thought to be some sort of indication that there are more people who buy Ribena in order to consume it as a beverage than there are who buy it to consume it or take it as a medicine, this cannot effect the question to be decided. If Ribena fairly and properly regarded is a medicine and is and can be used as a medicine and if similarly fairly and properly

6 [1971] 1 All ER 701, [1970] 1 WLR 326

7 [1969] 3 All ER at 141, [1969] 1 WLR at 1527

8 [1969] 3 All ER at 141, [1969] 1 WLR at 1526, 1527

9 [1969] 3 All ER at 145, [1969] 1 WLR at 1532

regarded it is also a beverage and is and can be used as a beverage then its character and description cannot vary or be altered according as the nature and extent of its use by different groups of purchasers fluctuates. a

What then is Ribena? The ingredients are recorded on the bottles that contain it. As I have mentioned it is, as Ungood-Thomas J¹⁰ and all members of the Court of Appeal¹¹ have held, a preparation that is within the particular description relied on in Head III of the Schedule to the Purchase Tax (No 2) Order 1968. The important substance which the preparation contains is vitamin C. The other parts consist of materials prepared in accordance with the formulae of the British Pharmaceutical Codex and the British Pharmacopoeia. The clear conclusion of the learned judge in regard to Ribena was thus expressed¹²: b

It has always contained a minimum of vitamin C, originally 30 milligrammes per fluid ounce in accordance with the British Standard of what I understand to be the body's requirements of vitamin C, and later 75 milligrammes per fluid ounce in accordance with different, American standards. The 30 milligramme standard was checked and, where necessary, made good by adding vitamin C, for example when the black currant crops were of poor quality; and the 75 milligramme standard is similarly maintained, although for the 75 milligramme standard some substantial addition of vitamin C is always required. This case is in fact limited to a period throughout which Ribena has been kept on the 75 milligramme standard. Ribena has thus an assured vitamin C content, corresponding to a medically-ascertained standard of the body's daily needs. It is thus clearly suitable, in appropriate cases, for use as a medicine.' c

Having found that Ribena is clearly suitable in appropriate cases for use as a medicine, Ungood-Thomas J proceeded to consider the extent of its use as a medicine. His first conclusion was that Ribena is appropriate for use therapeutically only in rare and exceptional cases. His next conclusions related to its use prophylactically. Some bottles of Ribena (smaller in size than the usual size but whose labels were much as usual) are labelled 'For Sale in Clinics only'; the sale of these through local authority clinics is in total appreciably less than 1 to 2½ per cent of the total sales of Ribena. One witness (Dr Bell) gave evidence that he had recommended liquids containing vitamin C for nursing mothers and bottle-fed babies and (after heavy saturation doses of vitamin C) for children suffering from vitamin C deficiency in order to maintain the required vitamin C level until normal conditions of supply through proper diet were restored. In such cases he had allowed mothers to choose from various liquids including Ribena. He acknowledged that his recommendation of vitamin C for nursing mothers was not a frequent occurrence and might relate to 'a hard-up or feckless mother'. In this connection Ungood-Thomas J pointed out that it would be much less costly to take vitamin C in tablet form than to take it by consuming Ribena. d
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The labels on the bottles of Ribena show the precise ingredients and the minimum content of vitamin C and indicate the quantities suitable to be taken. In the advertisements the emphasis throughout is on the ingredient vitamin C for the purpose of maintaining and improving health and increasing vitality. It has not been suggested that the claims as to the content of vitamin C are other than correct. Nor can it be denied that a certain intake of vitamin C is necessary for the preservation of health. If, therefore, the consumption of Ribena results in an intake of vitamin C and if one of the reasons why people consume it is so that there will be an intake of vitamin C which will preserve and maintain health it would seem as though what is being consumed comes within the definition of medicine. That it is consumed for health h
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¹⁰ [1969] 3 All ER 135, [1969] 1 WLR 1518

¹¹ [1971] 1 All ER 701, [1971] 1 WLR 326

¹² [1969] 3 All ER at 142, [1969] 1 WLR at 1528

a reasons is supported by the facts as found (a) that Ribena is a good deal more expensive than are soft drinks and (b) that its sales are higher in winter than in summer. It is not suggested that the name medicine may only be used in reference to what is taken on the orders of or the prescription of a doctor. Nor is it suggested that only something unpleasant of taste is to be regarded as medicine.

b What is said, however, is that Ribena is described as, and well described as, a 'health drink'. But this description would seem merely to suggest that Ribena is both a medicine and a beverage. The phrase attaches equal importance to the preservation of health and to the quenching of thirst. If both objectives may be simultaneously attained neither need be excluded. It is further said that in any reasonably normal diet there will be an adequate intake of vitamin C and that consequently any further consumption resulting from taking Ribena is neither necessary nor of value. But if something which can properly be called a medicine c is taken by someone who need not take it the nature of what he takes is not changed.

Ungoed-Thomas J¹³ was referred to a report made in 1967 by the Standing Joint Committee on the Classification of Proprietary Preparations. Under the National Health Service Act 1946 patients being treated under the general medical services are entitled to be provided with 'proper and sufficient drugs and medicines and d prescribed appliances'. This does not cover food nor, for example, ordinary beverages. But the Act does not define 'drugs and medicines' and there are many substances which are on the borderline between drugs and foods. It was clear therefore that medical practitioners needed guidance whether substances on the borderline could or could not be 'prescribed': expenditure of public money would be involved. In general the committee regarded a drug as a substance that has a pharmacological effect in the body and is used to prevent or treat disease; they regarded a food as a e substance that is taken to replace the physiological waste of tissue to supply energy and heat and to build up tissues. Where then should vitamin preparations be placed? The advice of the committee was as follows:

f 'Vitamin preparations should be regarded as drugs when used, for example, in the management of actual or potential vitamin deficiency. They should be regarded as foods when used routinely for persons such as healthy school children, factory workers and athletes and should not for this purpose be ordered on Form E.C.10.'

They classified Ribena as a food rather than a drug. This considerably influenced Ungeod-Thomas J. He posed the test whether Ribena is on the market for routine use by healthy persons or for use for the management of actual or potential vitamin g deficiency. He considered that Ribena was used routinely by healthy persons and therefore should be regarded as a diet supplement. In agreement with the Court of Appeal¹⁴ I do not think that the advice of the committee referred to above affords a correct test in the present case. The medical practitioner has to decide what to prescribe for a particular patient. So he will know whether a particular patient h does or does not need a particular medicine and if the patient does not need it it would be wrong to prescribe it and (at least in some cases) thereby to involve the expenditure of public money for an unnecessary purpose. So if Ribena is both a medicine and a beverage a doctor would not prescribe it for someone who did not need it as a medicine. We are here concerned with a very different question from that which was considered by the committee. For purchase tax purposes some i liquids may be both medicines and beverages. The only question here is whether Ribena is within this cross-section.

It seems to me that Ribena both can be used and is used 'in the management of actual or potential vitamin deficiency' and that as such it is a medicine which is taken

¹³ [1969] 3 All ER at 141, 142, [1969] 1 WLR at 1527

¹⁴ [1971] 1 All ER 701, [1971] 1 WLR 326

to preserve and maintain health. Vitamin C (which is ascorbic acid) might be taken in tablet form. The medical and therapeutic effect will be the same whether taken in a liquid or in a tablet and vitamin C tablets would doubtless be within the description of 'Drugs and medicines'. It may well be the case that very many who consume Ribena both as a medicine and as a beverage and who do so in order to ensure that they will have no vitamin deficiency are not in fact in any peril of having such a deficiency. But this merely illustrates that something that can properly be called a medicine may be consumed by those who do not need to consume it. As Edmund Davies LJ said¹⁵:

'A preparation does not cease to be medicinal simply because it is taken by those who do not in reality need it and to whom it can do no good, even though they may think otherwise ...'

Furthermore if Ribena is a medicine if taken to supply an ascertained vitamin deficiency it can hardly cease to be a medicine if taken (even unnecessarily in most cases) to make sure that there will be no deficiency.

If Ribena is both a medicine and a beverage the circumstances that it is largely consumed as a beverage does not change its character. No test of predominant user is laid down. Nor can the motives that prompt consumption (if in any way material) ever be ascertained with any precision. Those who buy and consume may be the more content to take what they believe to be a needed medicament because they take it while pleasantly satisfying another need. These matters were adverted to by Russell LJ when he said¹⁶:

'I only remark in particular that Ribena is a pharmaceutical preparation; its function is to get vitamin C into human bodies in case they should need it; it is sold and advertised on the basis of that function; to describe it as a health drink is not to deny but rather to affirm these matters; to say that it is merely a fruit beverage is difficult to reconcile with its relatively considerably greater cost, its greater sales in winter than in summer, and the recommendation of dosages on the bottles.'

While I think that the case is a difficult one I have not been persuaded that the Court of Appeal¹⁷ reached a wrong conclusion and I would dismiss the appeal.

LORD WILBERFORCE. My Lords, in my opinion Ribena is a health drink, of a kind which is not a drug or medicine but which is chargeable with purchase tax under the group 'Manufactured beverages . . . and syrups, concentrates . . . for the preparation of beverages'. I think that this would be the conclusion of the average housewife or shopper, a class which pays for the greater part of 30 million (equated) bottles a year, but no member of which was called at the trial. I propose to give briefly some reasons why the law should reach this result.

We are here operating in a frontier zone of some width between food or nutrition and medicine. The frontiers are perpetually shifting as medical knowledge, fashion, and standards of life change; they will not be the same in every society or every age. The mediaeval garden grew as medicines many plants and flowers now recommended as dietary or culinary ingredients. Conversely until recently food was not, or at least not scientifically, esteemed for its chemical content. One cannot imagine Lucullus or Henry VIII calculating his protein intake.

Modern fashions direct attention to the presence in food of proteins, carbohydrates, minerals and vitamins, and this works in two directions. Nutrition experts and doctors relate their presence or absence to conditions of health or illness; and consumers in general, especially those responsible for others, such as children or invalids, are becoming accustomed to prefer products which contain them. Manufacturers of

¹⁵ [1971] 1 All ER at 711, 712, [1971] 1 WLR at 337

¹⁶ [1971] 1 All ER at 707, [1971] 1 WLR at 332

¹⁷ [1971] 1 All ER 701, [1971] 1 WLR 326

a food and drink have naturally not neglected to respond to this appeal, often in the creditable belief that by including vitamins etc in what they sell they are offering a better product and, incidentally or purposively, one which will sell better.

Vitamins are chemical substances found naturally in many fruits and vegetables. It appears that they can be naturally synthesised by mammals but the art of doing this has been lost by homo sapiens, who has evolved instead the science of synthesis in a laboratory. They can now be manufactured and sold singly or in compounds, in small or massive concentration. It is this variety in the manner of administration which has given rise to many of the arguments in this case. The respondents contend that vitamins *ipsa natura* are drugs or medicines; the commissioners argue that they are not, or at least not necessarily so. The extreme arguments on either side are, in my opinion, fallacious or at least inconclusive. It does not follow that because vitamins in food 'are good for you' (if they are) they are drugs or medicines, any more than what originates from the River Liffey. Nor are they drugs or medicines because a doctor advises that their intake be increased. Nor because they are pharmaceutically prepared, or because they are prepared from ingredients which conform with the British Pharmaceutical Codex, are they necessarily drugs or medicines; for the Codex sets a standard for many things (e.g. syrup, BP, blackcurrant juice, and even blackcurrants) which, by themselves, cannot be drugs or medicines. They are in the Codex because they may be used as ingredients in making drugs or medicines. An argument much relied on was to say that Ribena must be looked at in the wholesale stage and that what is decisive is what is in the bottle. As the bottle discloses the presence of 75 mg of vitamin C per fluid ounce, this makes it a drug or medicine. This argument contains multiple fallacies. First, it does not follow from the fact that purchase tax is levied on the wholesale price that the goods in question must be isolated at the wholesale stage. To do so would be arbitrary and irrelevant. What is taxed is goods; the method of manufacture and the market to which they are directed and in which they are used can surely not be neglected. Secondly, it cannot be right to concentrate attention on an analysis of what is in the bottle. The range between, say, morphine and a placebo is infinitely varied and mere analysis will often fail to give an answer. In this frontier area very similar products, or even products chemically the same, may be drugs or medicines or beverages according to how they are presented, or how they are sold. Thirdly, the mere presence of vitamin C is insufficient to constitute a drug or medicine. The vitamin itself is not necessarily either.

On the other hand, the commissioners' extreme argument is unappealing. They say that Ribena is and is marketed as a dietary supplement and that this shows that it is not a drug or medicine. But this is too simple. One cannot encapsulate a complex situation in a phrase. A dietary supplement may be a medicine or it may not. A health food, or health drink, may be a medicine or it may not; to call a product one of these things does not solve the problem. What it does, and this may be valuable, is to call attention to the existence in the time in which we live, and in which Ribena is sold, of the wide frontier zone to which I have called attention and which includes products which other times might have considered either clearly food or clearly medicine. The description health drink is helpful and relevant but not yet decisive.

The respondents' strongest argument, to my mind, which has to be met, is based on the actual content of vitamin C in Ribena—75 mg per fluid ounce, which is made up by an addition to the natural vitamin C of laboratory-produced ascorbic acid (another name for the same thing) and which quantity corresponds with the standard set by nutritional authorities in the United States of America for the intake necessary for daily health. The scientific validity of this is in fact precarious; both the 'saturation' theory, in itself, is doubtful and even if it is accepted the saturation figure is one on which experts disagree—the United States of America has, it appears, come down to 60 mg while the British experts think that 30 mg are enough. But laying scepticism aside and assuming that a daily intake figure has some scientific validity, the question remains whether goods which are sold with this quantity in them are medicines or not.

Again, as often happens with frontier cases, each side tried a sorites argument. A doctor prescribes vitamin C pills—clearly a medicine; next time the patient buys the same or similar pills at the counter—still a medicine; then he buys a liquid concentration of the same vitamin—still a medicine; finally a neighbour suggests Ribena. The commissioners start at the other end. Their consumer buys oranges to give him his daily vitamin C; then natural orange juice; then concentrated orange juice, or blackcurrant juice; finally Ribena with added vitamin C. Each argument may be forensically satisfying, but each fails to conclude the matter. The question remains where the invisible line is crossed.

We must, in my opinion, look at the whole picture. Ungoed-Thomas J¹⁸ has done just this and that is why I agree with his judgment. On the respondents' side is the fact I have mentioned of the degree of concentration of vitamin C; on their side, too, is the fact that Ribena sells more in winter than in summer, showing at least that it is not an ordinary soft drink, and that it costs more than ordinary soft drinks. The label on the bottle, with its reference to ingredients and suggestion as to 'dose' (although the word is not used) is on the respondents' side. It is sold in chemists or pharmaceutical departments of great stores, although much more is sold in grocers. On the other hand its advertisements, directed at the normal healthy person and aspiring athletes, the scale of consumption (30 million bottles a year) and its key description 'The great natural health drink of our time' seem to me to place it in a category, perhaps the creation of our age but undoubtedly a thriving creation, of health food, something which modern man takes not therapeutically, or prophylactically, but as part of his way of better living. Ungoed-Thomas J puts it thus¹⁹:

'Ribena seems to me, in accordance with the refrain of those advertisements, to be on the market as a "health drink", a health drink for everyone however healthy. On the evidence, including in particular that of the advertisements and sales to which I have referred, it would seem to me to flout common sense to conclude otherwise than that it is mainly and generally at any rate on the market for, and sold to and for, normally healthy persons; sold neither therapeutically nor prophylactically but as a diet supplement to those not shown to need vitamin C in particular more than any other element of normal diet but to the ordinary reader and listener of such advertisements as I have mentioned.'

I think this is exactly right. It is to my mind satisfactorily confirmed by the 1967 Report of the Standing Joint Committee on the Classification of Proprietary Preparations appointed by the Ministry of Health. This was concerned with the classification of borderline substances for the purpose of deciding whether they should be provided free, as drugs and medicines, under the National Health Service Act 1946. In para 5 of the report the committee said:

'Vitamin preparations should be regarded as drugs when used, for example, in the management of actual or potential vitamin deficiency. They should be regarded as foods when used routinely for persons such as healthy school children, factory workers and athletes.'

And of toilet preparations, which may be medicated, they say:

'The fact that a drug is present does not of necessity convert the preparation as a whole into a drug . . . They [preparations used for their prophylactic value] are—like foods—in the category of substances which the individual should be expected to provide for himself as requirements of ordinary life.'

No doubt the committee was dealing with a different problem but there seems to me both logic and satisfaction in finding that a similar solution can be given to the questions whether a patient should get Ribena free under the National Health Service and whether a consumer should get it free of purchase tax. The passage quoted has the merit of good sense.

¹⁸ [1969] 3 All ER 135, [1969] 1 WLR 1518

¹⁹ [1969] 3 All ER at 146, [1969] 1 WLR at 1532

a There are a number of subsidiary arguments and contingent issues, on which it is unnecessary to do more than express agreement with Ungood-Thomas J²⁰. I refer only to one, for if decided one way, it would of itself decide the appeal. This arises under the Purchase Tax (No 2) Order 1968¹, Head III of the Schedule. The effect of this is to exempt from charge under the group 'Drugs and Medicines' (and consequently altogether) preparations consisting only of a vitamin and an excipient, vehicle, base or preservative. Accepting that Ribena comes within this description
b (as to which I feel considerable doubt) the exemption in my opinion does not help it unless it is previously established that Ribena is a drug or medicine. The exemption, as other exemptions under the Act, only applies to goods coming within the head of charge, so that if, as I think, Ribena is not within the latter, it is not exempt.

That Ribena, whatever else it may be, falls within the beverages group appears to me perfectly clear, and since it does not come under 'Drugs and medicines', it is chargeable under that group. I would allow the appeal.

c In the Court of Appeal² a concession was, it appears, made on behalf of the commissioners which undoubtedly influenced the decision of that court. Your Lordships thought it right in this House to allow it to be withdrawn. In my opinion it is only fair to the respondents that this situation should mitigate the costs which they should pay and I would propose that, while the commissioners should have their costs of
d the trial and in this House, there should be no order as to the costs in the Court of Appeal.

LORD PEARSON. My Lords, the question is whether the health drink Ribena is chargeable with purchase tax. Ribena is composed as to 70 per cent of a prepared syrup of blackcurrant juice (which has by nature a content of vitamin C), as to 25·6
e per cent of a syrup of sugar and as to 0·19 per cent of added vitamin C. When diluted with water it makes a palatable drink.

Section 2 of the Purchase Tax Act 1963 provides, so far as is material for the purposes of this appeal, as follows:

f '(1) Subject to the provisions of this section, the goods which are chargeable goods are those comprised in the Groups listed in Part I of Schedule 1 to this Act, other than goods which are exempt from all charge to tax under the said Part I; and the rates of tax chargeable in respect of chargeable goods of any class are those prescribed by the said Part I.

'(2) The list of Groups in the said Part I shall be interpreted in accordance with the rules set out at the beginning of the said Part I.

g '(3) The Treasury may by order made by statutory instrument—(a) make any change in the classes of goods which are chargeable goods . . . (c) amend Part I of Schedule 1 to this Act.'

Section 17 has needed to be considered, but I think in the end it is not material for the purposes of this appeal.

h The rules set out at the beginning of Part I of Sch 1 are, so far as material, as follows:

'NOTE:—The list in this Part of this Schedule is to be interpreted in accordance with the following rules.

'1. Where a Group begins with a general description of the goods comprised in the Group, the goods mentioned below in the Group (including those mentioned under a heading "Exempt") comprise only goods falling within the general description.

i '2. Goods comprised in a heading "Exempt" are exempt from all charge to tax.

'3. A heading "Not chargeable under this Group" is to be taken as excluding the goods referred to from any charge to tax under that Group (but not other Groups), and not as restricting or extending the descriptions of goods to be treated as comprised in the Group.

²⁰ [1969] 3 All ER 135, [1969] 1 WLR 1518 2 [1971] 1 All ER 701, [1971] 1 WLR 326
 1 SI 1968 No 1511

'4. Where any goods are chargeable at more than one rate, tax is to be chargeable in respect of them at the higher or highest of those rates.'

Then, still in Part I of Sch 1 to the Act, there is prescribed in Group 35 a tax rate of 15 per cent for 'Manufactured beverages, including . . . syrups, concentrates . . . for the preparation of beverages . . .', subject to certain exceptions which are not material for this appeal. As Ribena is a syrup of blackcurrant juice and sugar, with a percentage of vitamin C, and when diluted with water forms a palatable health drink, I have no doubt that it falls within those words of Group 35 and so is *prima facie* chargeable with purchase tax at the rate of 15 per cent. But, having regard to the rules, one has to look further and see whether Ribena is chargeable at some higher rate, or is exempt, under some other group. The commissioners' contention is that Ribena does not fall within any other group and so is chargeable simply under Group 35. The respondents' contention is that Ribena falls within Group 33, and is comprised in a heading 'Exempt' in that Group and therefore, by virtue of r 2, is exempt from all charge to tax.

The provisions of Group 33, as originally enacted, were as follows:

'GROUP 33

'comprising Drugs and medicines, manufactured or prepared (except toilet preparations).

'Goods not comprised below in this Group . . . 25%.

'Exempt

'(1) Goods complying with the provisions of Part II of this Schedule.

'(2) Goods specified in the Schedule to the Purchase Tax (No. 2) Order 1961 as amended by the Purchase Tax (No. 1) Order 1962.'

Part II of the Schedule remains, substantially at any rate, in the same form. It is headed 'Conditions of Exemption of Drugs and Medicines comprised in Group 33, under Para. (1) of Heading "Exempt" in that Group.' Condition 4 provides:

'There must not appear in the get-up of the goods or on the goods apart from any get-up—(a) any trade mark as defined in the Trade Marks Act 1938 . . .'

I understand that condition 4 rules out Ribena because the name 'Ribena' is in itself a trade mark. In any case Ribena would have to be a drug or medicine in order to gain exemption under Part II of the Schedule, and so would raise the same question as arises under Part I of the Schedule, as will be shown.

In Part I of Sch 1 to the Act, in Group 33, the second paragraph of the heading 'Exempt' has been frequently amended by Treasury orders made under s 2 (3) of the Act. It will be sufficient to refer to the Purchase Tax (No 2) Order 1968 which provides:

'1. Drugs and medicines, manufactured or prepared (except toilet preparations) of any of the classes specified in the Schedule to this Order shall not be included in any class of goods which are chargeable goods within the meaning of the Purchase Tax Act 1963.

'2. (1) In Group 33 of Part I of Schedule 1 to the Purchase Tax Act 1963, in paragraph (2) of the heading "Exempt", for the reference to the Purchase Tax (No. 1) Order 1967 there shall be substituted a reference to this Order.

'(2) The Purchase Tax (No. 1) Order 1967 is hereby revoked.'

There is a curious duplication of provisions in this 1968 Order. Article 1 confers exemption on drugs and medicines manufactured or prepared (except toilet preparations) of any of the classes specified in the Schedule to the Order. The effect of art 2 is that goods specified in the Schedule to the Order are exempt, but (by virtue of r 1) only if they are drugs and medicines manufactured or prepared (except toilet preparations). There seems to be no satisfactory explanation of the duplication. However that may be, I think it is clear that Ribena is not entitled to exemption from purchase

a tax unless it is a drug or medicine. As it is clearly not a drug, the material question is whether it is a medicine. It is to be noted that although Ribena is clearly a beverage (to be exact a syrup for the preparation of a beverage) and so *prima facie* chargeable under Group 35, it will nevertheless by virtue of r 2 be entitled to exemption from all charge if it is a medicine and exempt from charge under Group 33.

b I should mention in passing that, but for a concession that was made in the Court of Appeal³, there would have been a serious question whether if Ribena were a medicine it would be within any of the classes specified in the Schedule to the 1968 Order. The opening words of Head III of the Schedule are as follows:

‘The substances described under this head, and preparations consisting only of one of those substances and one or more of the following things, namely, an excipient, vehicle, base or preservative . . .’

c The substances described under this head include vitamins. The serious question would have been, in the convenient phrase that was used, whether the vitamin C content of Ribena could be regarded as ‘a vitamin in a vehicle’. Having regard to the small bulk and cost of the vitamin C content and the large bulk and cost and attractive taste and appearance of the liquid content (the syrup of blackcurrant juice and sugar), there is at least much doubt whether the liquid content can reasonably be considered a mere vehicle for carrying the vitamin C content. But as the concession was made and the appeal can be decided on another ground, I will not deal further with this point.

d The decisive question is whether Ribena is a medicine as well as a beverage. The facts have been amply, and I think very accurately, summarised by Ungood-Thomas e J⁴, and I will only state the general impression which they convey to my mind, taking into account the appearance of the bottle and its contents and the statements on the label as well as the known taste of the contents. Ribena when diluted with water provides a drink which is (a) thirst-quenching, (b) pleasant in appearance and taste and (c) rich in vitamin C. It is bought and consumed for those three reasons, and I think they are all operative and effective reasons. Though taken by adults as well as f children, Ribena is to a large extent a family drink, and I think it is reasonable to infer that in the typical case, when a child asks for and is given a drink of Ribena, he is glad to have it because he is thirsty and he likes the taste, and he is allowed and encouraged to have it because it may be good for him. It may be good for him because by virtue of its content of vitamin C it acts as a safeguard and a harmless safeguard; if there would otherwise be a deficiency of vitamin C in the diet, the regular or frequent g drinking of Ribena makes good the deficiency; if (as is usually the case) there is already enough vitamin C in the other ingredients of the diet, the surplus intake of vitamin C resulting from the inclusion of Ribena in the diet does no harm. The possible benefit to the health which may result from including Ribena in the diet is naturally stressed in the label on the bottle and in the general advertising and presumably plays an important part in inducing customers to pay the rather high price which is h charged for Ribena (now 22½p for the smaller bottle). It is significant that the sales are greater in winter than in summer; the rest of the diet is more likely to be deficient in vitamin C in the winter when fresh vegetables and fruit are less readily available. It is also significant that the makers of Ribena fortify its naturally good content of vitamin C with a synthetic addition. It is reasonable to suppose that the health element in this health drink plays a considerable part in making it attractive to i customers. But I do not think this fact makes it a medicine.

It seems to me that in deciding whether or not Ribena is a medicine as well as a beverage, the broad general question is whether it is only an article of diet, included in the diet as being conducive to general health, or a medicine taken for the cure

3 [1971] 1 All ER 701, [1971] 1 WLR 326

4 [1969] 3 All ER 135, [1969] 1 WLR 1518

or prevention of some particular disease. On this question Ungood-Thomas J's conclusion, with which I agree, was as follows⁵:

'Ribena seems to me, in accordance with the refrain of those advertisements, to be on the market as a "health drink", a health drink for everyone however healthy. On the evidence, including in particular that of the advertisements and sales to which I have referred, it would seem to me to flout common sense to conclude otherwise than that it is mainly and generally at any rate on the market for, and sold to and for, normally healthy persons; sold neither therapeutically nor prophylactically but as a diet supplement to those not shown to need vitamin C in particular more than any other element of normal diet but to the ordinary reader and listener of such advertisements as I have mentioned.'

I think Ungood-Thomas J was right in directing attention mainly to the main body of consumers of Ribena. There are, however, some special cases. Expectant mothers and nursing mothers may be advised to take Ribena in order to increase their intake of vitamin C. But in such cases Ribena is not being used as a medicine. There is no disease or illness involved, but only a special dietary requirement, because in a sense the diet has to provide for two persons instead of one. Similarly, in the case of bottle-fed babies, the milk which they get may be deficient in vitamin C, and if so the addition of Ribena as an element in the diet will correct the deficiency, but there is no disease or illness involved. On the other hand there are cases in which a bachelor or an elderly person may have an unbalanced diet, deficient in vitamin C, and if continued long enough this can produce illness and even a disease—sub-clinical scurvy or in an extreme case frank scurvy. In such a case Ribena is not strong enough to be prescribed as a cure for the disease. The disease is cured by means of vitamin C tablets of the required strength. There is however the later stage when some vitamin C may be required to stabilise the cure and prevent a recurrence of the disease, and for these purposes either mild tablets or, if the expense is not a deterrent, Ribena can be used. It seems to me that in such a case the use of Ribena is on the borderline between the medicinal and the dietary. Even if the use in some of these cases can be reckoned as medicinal, it forms such a minute proportion of the total use that it should not affect the decision.

On the question whether the court's decision as to the chargeability of Ribena should be affected by the commissioners' treatment of other products, I think the view expressed by Pennycuik J in dealing with an application for interrogatories was correct. He said:

'So far as the interrogatories relating to purchase tax are concerned I feel no doubt that they should not be allowed. The liability of purchase tax in respect of any particular product must depend on the proper application of the statutory provisions to that particular product and the question whether purchase tax is or is not charged on comparable products is in its nature irrelevant to that question.'

I would allow the appeal, and I would agree that the order as to costs should be as proposed by my noble and learned friend Lord Wilberforce.

LORD DIPLOCK. I agree with those of your Lordships who consider that Ribena is a 'syrup or concentrate for the preparation of a beverage' and is not a 'drug or medicine, manufactured or prepared'.

I would allow the appeal.

Appeal allowed.

Solicitors: Solicitor, Customs and Excise; Simmons & Simmons (for the respondents).

S A Hatteea Esq Barrister.

^a Texaco Ltd v Mulberry Filling Station Ltd

CHANCERY DIVISION

UNGOED-THOMAS J

16th, 17th, 18th, 19th, 23rd, 24th, 25th, 26th, 30th NOVEMBER, 1ST, 14th DECEMBER 1971

- ^b *Trade – Restraint of trade – Agreement – Petrol filling station – Solus agreement – Legal charge – Agreement in legal charge between owner of garage and petrol supplier to purchase, resell and advertise exclusively supplier's products – Reasonableness of restraints – Limitation of tie to five years – Loan at low rate of interest repayable during period of tie – Reasonableness in reference to interests of parties – Reasonableness in interests of public – General considerations of economic and social policy – Relevance – No evidence that restraints severely and arbitrarily restricting freedom to trade.*

Injunction – Interlocutory injunction – Principle governing grant – Breach of contractual negative stipulation – Strong prima facie case of breach – Interlocutory injunction not available as matter of course – Balance of convenience – Maintenance of status quo – Protection of plaintiff's interests – Damages inadequate remedy.

- ^d The defendant, a limited company controlled by T, owned a petrol filling station at Croydon. The defendant wished to redevelop the property and, in order to obtain financial assistance for this purpose, entered into an agreement in January 1965 with the plaintiff, a petrol company, with T as surety. The agreement was in the form of a legal charge containing solus tie provisions, whereby the plaintiff
- ^e advanced £36,000 to the defendant and the defendant charged the property with repayment of the sum advanced in 40 half yearly instalments of £900 each, with interest, and not otherwise. In May 1965 the Monopolies Commission made a report^a following which undertakings were given by the major petrol companies (including the plaintiff) to the Board of Trade the effect of which was that the defendant was enabled, on 12 months' notice to the plaintiff, to determine the solus ties in the legal
- ^f charge at any time after 6th August 1971. In 1967 T contemplated selling the Croydon petrol station and buying another one at Mitcham. The plaintiff was keen that he should do so and that he should enter into a similar solus tie agreement with it in regard to the Mitcham petrol station. Accordingly the plaintiff was prepared to help T obtain the money required to buy and improve the Mitcham station. On 30th June 1967 the plaintiff wrote to the defendant a 'letter of understanding' setting out the
- ^g terms on which finance was to be provided, on a 15 year basis. Under the terms suggested H Ltd was to advance £40,000 on loan to the defendant, against a guarantee by the plaintiff secured by a first charge on the Mitcham station and a second charge on the Croydon station, the loan to be repayable over the initial five year period by half yearly instalments, with a right to apply to the plaintiff to refinance the operation, and a further refinancing to cover the last five years of the 15 year period. The proposed
- ^h terms further envisaged that during the subsistence of the charge there would be tie provisions, that the existing legal charge in respect of the Croydon station would be redeemed and the redemption money re-advanced to the defendant under a new legal charge on the same terms, except that either party would have the right to require redemption on the fifth anniversary of the date of the charge or at any time thereafter, and that the defendant would grant the plaintiff an option to
- ^j purchase the freehold of the Croydon station for £90,000 on certain terms. The purchase of the Mitcham station was completed in August 1967 by a conveyance to a company ('the Mitcham company') virtually owned and controlled by T. By a legal charge of 18th August between the Mitcham company and the plaintiff, the Mitcham

^a Report on the Supply of Petrol to Retailers in the United Kingdom (Chairman R F Levy QC) HC 264

company charged the property with repayment of any sums payable under the plaintiff's guarantee of repayment of a loan of £40,000 agreed to be made to the Mitcham company by H Ltd, and repayable by instalments, and entered into *solus* tie obligations with the plaintiff. The option agreement was never executed. The plaintiff decided against purchase of the Croydon station at £90,000 but a representative of the plaintiff told T that he would recommend purchase at £75,000. In these circumstances, the defendant entered into a legal charge dated 30th January 1968, the purpose of which was to obtain a tie that would run from January 1968, and would conform to the undertakings required by the Board of Trade in consequence of the Monopolies Commission report and would not be exposed to such objection on account of its duration as the 1965 tie might be. The defendant thereby charged the Croydon station with repayment to the plaintiff of £32,400 advanced (i.e. the amount not repaid under the 1965 charge) repayable by half yearly instalments and not otherwise of the same amounts and dates except that the final instalment was repayable on 1st August 1972. The defendant and T jointly and severally covenanted with the plaintiff that during the continuance of the security the defendant would carry on at the property the business of a petrol station and would purchase its total requirement of motor fuel from the plaintiff and would not sell or advertise any other brands at the Croydon station. By a further legal charge of 30th January 1968 the defendant charged the Croydon property with payment of the moneys secured by the Mitcham charge of August 1967. Subsequently the plaintiff decided not to proceed with the exercise of the option to purchase the Croydon station. The defendant continued to retail the plaintiff's petrol in accordance with its obligations until January 1971 when there was an unofficial strike of the plaintiff's tanker drivers. From 4th to 13th January there was no delivery of the plaintiff's petrol to the defendant's station. On 12th January the defendant took delivery of another brand of petrol, as it was entitled to do under the terms of the charge in view of the failure of delivery by the plaintiff, but continued to do so after the strike had ended and the plaintiff was able and willing to deliver its petrol. The plaintiff accordingly commenced proceedings against the defendant and sought an interlocutory injunction pending judgment at the trial to restrain the defendant from further breaches of the tie agreement. The defendant contended, *inter alia*, that the 1968 legal charge, on whose covenants the plaintiff relied, was no more than a notional replacement of the 1965 legal charge and that the restraints were therefore for the period from 22nd January 1965 until 1st August 1972, i.e. for seven years and seven months, and were in consequence void. The defendant further contended that the restraints contained in the tie agreement were void on considerations of general application which it was alleged affected reasonableness whether in the interests of the parties or the public, e.g. (a) whether a loan at a low rate of interest by a supplier to a retailer resulted in mis-allocation of resources, (b) whether the low interest rate induced the retailer to enter into the trade in ignorance of the real cost that he was incurring, (c) how far the tie was required to provide security for the suppliers' investment, (d) whether price stability was affected by the *solus* tie, (e) whether the tie secured economies in distribution, and (f) how far services provided by the supplier to the retailer were advantageous and dependent on the tie system.

Held – (i) The plaintiff had established a strong *prima facie* case that the covenants were not void as being in restraint of trade because—

(a) the 1968 legal charge relied on by the plaintiff was not a notional replacement of the 1965 legal charge but was a separate new legal charge for a new consideration as part of a new transaction; and the ties relied on by the plaintiff were accordingly for the period appearing on the face of the 1968 legal charge, i.e. four years and seven months (see p 522, f and g post);

(b) the restraints were reasonable in reference to the interests of the parties since (i) it was common ground and in accordance with the authorities that the test of such

a reasonableness was whether such restraints were no more than were required for the protection of the covenant; and (2) the restraints were part of a commercial contract in which there was bargaining equality between the parties; and the court would not interfere (with reference to the interests of the parties) with such contracts (see p 524 j and 525 a to d, post); speeches in *Eso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1967] 1 All ER 699 referred to;

b (c) the restraints were reasonable in reference to the interests of the public since such interests referred to the interests of the public as recognisable and recognised by law and therefore as capable of judicial application by being recognised in a principle or proposition of law, and it did not refer to the interests of the public at large; so that the question which such reasonableness in the interests of the public raised was not whether the abolition of the restraint might lead to a different organisation of industry or society and thus, on a balance of many considerations, to the economic or social advantage of the country; but whether the restraint was, in industry and society as at present organised and with reference to which the law operated, reasonable in the interests of the public as recognised in a principle or proposition of law; and, thus considered, the restrictions were reasonable in reference to the interests of the public expressed in the proposition that the public had an interest in men being able to trade freely subject (inter alia) to reasonable limitations which conformed with the contemporary organisation of trade; speech of Lord Wilberforce in *Pharmaceutical Society of Great Britain v Dickson* [1968] 2 All ER at 707, 708 considered; accordingly much of the evidence directed to general considerations of economic policy was irrelevant; but on the balance of such considerations the decision would also be that the plaintiff had established a strong prima facie case (see p 527 a to f, post).

e (ii) Having shown a strong prima facie case or probability of success at the trial, the plaintiff had sufficiently established, for the purposes of an interlocutory injunction, the contractual right on which it relied; and it was conceded that such a right, if established, had been violated; the principle of *Doherty v Allman*^b that the plaintiff was entitled to perpetual injunction, as of course, to restrain violation of a contractual negative stipulation established at the trial, did not extend to interlocutory injunctions pending trial; consequently on the application for such an injunction (as for interlocutory injunctions generally) the governing consideration became the maintenance of the status quo pending the trial; the maintenance of such status quo meant in general the maintenance of the contemporary situation including what had resulted from past violations of the plaintiff's prima facie right but excluding any repetition of the violations; in deciding whether such status quo should be maintained regard must be had to the balance of convenience and the extent to which any advantage to the plaintiff could be cured by the payment of damages rather than by granting an injunction; accordingly on the findings in this case the interlocutory injunctions claimed should be granted (see p 528 f and p 529 c d and j to p 530 b and c, post); *Doherty v Allman* (1878) 3 App Cas 709 distinguished.

h Notes

For agreements in restraint of trade, see 38 Halsbury's Laws (3rd Edn) 20, para 13; for restraint of trade being void unless reasonable in relation to the parties and the public, see *ibid*, 22-26, paras 21-27, and for cases on the subject, see 45 Digest (Repl) 443-449, 271-297.

For the principles governing the grant of interlocutory injunctions, see 21 Halsbury's Laws (3rd Edn) 365, 366, paras 765, 766, and for cases on the subject, see 28 (2) Digest (Reissue) 968-973, 67-103.

Cases referred to in judgment

A-G of Commonwealth of Australia v Adelaide Steamship Co Ltd [1913] AC 781, [1911-13] All ER Rep 1120, 83 LJPC 84, 109 LT 258, 45 Digest (Repl) 395, 119.

b (1878) 3 App Cas 709

- Dickson v Pharmaceutical Society of Great Britain* [1967] 2 All ER 558, [1967] Ch 708, [1967] 2 WLR 718; *affd* HL sub nom *Pharmaceutical Society of Great Britain v Dickson* [1968] 2 All ER 686, [1970] AC 403, [1968] 3 WLR 286, Digest (Cont Vol C) 994, 288a. *Doherty v Allman* (1878) 3 App Cas 709, 39 LT 129, 42 JP 788, 28 (2) Digest (Reissue) 958, 14.
- Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1967] 1 All ER 699, [1968] AC 269, [1967] 2 WLR 871, Digest (Cont Vol C) 985, 132a.
- Hamstead and Suburban Properties Ltd v Diomedous* [1968] 3 All ER 545, [1969] 1 Ch 248, [1968] 3 WLR 990, Digest (Cont Vol C) 559, 154a.
- Jenkins v Jackson* (1888) 40 Ch D 71, 58 LJCh 124, 60 LT 105, 36 Digest (Repl) 319, 651.
- Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535, [1891-94] All ER Rep 1, 63 LJCh 908, 71 LT 489, 45 Digest (Repl) 444, 275.
- North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1914] AC 461, [1914-15] All ER Rep 752, 83 LJB 530, 110 LT 852, 45 Digest (Repl) 442, 261.
- Underwood (E) & Son Ltd v Barker* [1899] 1 Ch 300, 68 LJCh 201, 80 LT 306, 45 Digest (Repl) 506, 941.

Cases also cited

- British Motor Trade Association v Gilbert* [1951] 2 All ER 641.
- Cleveland Petroleum Co Ltd v Dartstone Ltd* [1969] 1 All ER 201, [1969] 1 WLR 116.
- Donmar Productions Ltd v Bart* [1967] 2 All ER 338, [1967] 1 WLR 740.
- Harman Pictures NV v Osborne* [1967] 2 All ER 324, [1967] 1 WLR 723.
- Haynes v Doman* [1899] 2 Ch 13.
- McEllistrim v Ballymacelligott Co-operative Agricultural and Dairy Society Ltd* [1919] AC 548.
- Monkland v Jack Barclay Ltd* [1951] 1 All ER 714, [1951] 2 KB 252.
- Morris (Herbert) Ltd v Saxelby* [1916] 1 AC 688, [1916-17] All ER Rep 305.
- Petrofina (Gt Britain) Ltd v Martin* [1966] 1 All ER 126, [1966] Ch 146.
- Sefton (Earl) v Tophams Ltd* [1965] 3 All ER 1, [1965] Ch 1140.
- Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd* [1934] AC 181, [1934] All ER Rep 38.

Motion

This was a motion, by notice dated 30th March 1971, by the plaintiff, Texaco Ltd, in an action commenced by writ issued on 16th March 1971 by the plaintiff against the defendant, Mulberry Filling Station Ltd. By this motion the plaintiff sought an order restraining the defendant from doing whether itself or by its agents or servants or otherwise howsoever the following acts or any of them until after judgment or further order: (1) purchasing otherwise than from the plaintiff any motor fuel for sale at or for use at or about the defendant's filling station, 48 Beddington Lane, Beddington, Croydon, (2) selling or advertising for sale at the filling station any brand or brands of motor fuel or fuels other than those supplied by the plaintiff. The facts are set out in the judgment.

P R Oliver QC and D J Nicholls for the plaintiff.

A J Balcombe QC and Gavin Lightman for the defendant.

Cur adv vult

14th December. **UNGOED-THOMAS J** read the following judgment. The plaintiff's motion is for an interlocutory injunction pending judgment at the trial to restrain the defendant from (1) purchasing otherwise than from the plaintiff any motor fuel for sale or use at the defendant's filling station at 48 Beddington Lane, Croydon, and (2) selling or advertising for sale at that station any brand of petrol not supplied by the plaintiff.

The issues

It is common ground (a) that what is sought to be restrained is what the defendant has covenanted not to do; (b) that such agreement is of a kind (i.e. a solus tie agreement) that is subject to the legal doctrine which avoids certain contracts as being

- a in restraint of trade; (c) that the plaintiff has to establish a strong prima facie case or the probability that it will succeed in establishing at the trial that the covenants will not, in accordance with that doctrine, be held void; that if such prima facie case or probability of success is established, that it will then follow that the right in respect of whose violation the plaintiff seeks relief is also thus established; (d) that if such right is so sufficiently established, then there had been a violation of the right.
- b This common ground leaves in dispute, as is rightly acknowledged by both parties, (1) whether the plaintiff has established such strong prima facie case or probability that the covenants are not void; (2) whether in the circumstances injunction by way of interlocutory relief should, in the exercise of the court's judicial discretion, be granted.

The facts

- c I will deal first with the facts leading to the action. The plaintiff's original name was Regent Oil Co Ltd, but it changed that to its present name in November 1967. The defendant was at all material times until October 1968 wholly or virtually owned and controlled by George William Tandy. The defendant has at all material times been owner of 48 Beddington Lane, Croydon, and carried on there the business of a petrol filling station.
- d By a legal charge dated 22nd January 1965, between the defendant of the first part, the plaintiff of the second part and Mr Tandy as a surety of the third part, the plaintiff advanced to the defendant £21,000 and agreed to advance to it a further £15,000 (totalling, with the £21,000, £36,000) against architect's certificates in respect of redevelopment of the defendant's garage which the defendant agreed to carry out. The sums advanced were made repayable in 40 half yearly instalments of £900
- e each, totalling £36,000, with interest, commencing on 1st February 1966, and not otherwise; and they were charged on the petrol station land. It contained ties wide enough to cover the relief sought in this action.

- In May 1965 the Monopolies Commission made a report¹ in accordance with which the defendant was enabled by 12 months' notice to the plaintiff to determine the 1965 legal charge solus ties, including covenants of the kind relied on by the
- f plaintiff, at any time after 6th August 1971. By June 1967 Mr Tandy was contemplating selling the Croydon station and buying another station at Mitcham, and the plaintiff was keen that he should do so, and that he should enter into a solus tie agreement with it with regard to the Mitcham station. The plaintiff was therefore prepared to help Mr Tandy to get the money which he required to buy and improve the Mitcham station. One obvious source contemplated for such moneys was the proceeds of sale of the Croydon station and another source was a loan. There
- g was danger, however, that the Mitcham station would be sold before the Croydon station could be sold at an acceptable price, and in the circumstances the purchase of the Croydon station by the plaintiff was discussed between representatives of the plaintiff and Mr Tandy.

- h However, by this time the plaintiff had its settled methods and procedure for providing its tied retailers with loans and for purchasing stations. The loans were no longer made by the plaintiff but by Manufacturers Hanover Trust Co Ltd at the plaintiff's request and on the plaintiff's guarantee of repayment secured by a legal charge to Hanover and to the plaintiff and containing in the legal charge to the plaintiff solus tie provisions. No difficulty arose over the loan by Hanover or over the legal charge in its favour. The plaintiff's purchase procedure was by way
- j of option to the plaintiff which might apparently be entered into by the decision of authorised officials in the plaintiff and then by the exercise of that option by the board of directors on the recommendation of higher officials in the plaintiff.

The option created difficulty and some conflict of evidence before me. I had the

i 1 Report on the Supply of Petrol to Retailers in the United Kingdom (Chairman R F Levy QC) HC 264

advantage of oral evidence from Mr Euinton and Mr Taylor, representatives of the plaintiff, and of Mr Tandy and Mr Lambert, who was the defendant's solicitor when the defendant was controlled by Mr Tandy. Mr Euinton was an impressively honest and able witness. Mr Tandy was jovial, forthright, somewhat impetuous and it is no reflection on him to say not of the same intellectual calibre as the other witnesses. But he was what is called 'a character' who had succeeded in making a success of the Croydon station despite its recognised disadvantages. Mr Lambert was rightly very much concerned to protect Mr Tandy against Mr Tandy's somewhat more care-free inclinations, but with the result that Mr Lambert and Mr Tandy were apparently inclined to pursue somewhat divergent courses. This, I am satisfied, goes far to account for the somewhat diverging attitudes and knowledge appearing in the legal correspondence on the one hand and in Mr Tandy's vivid and detailed oral evidence on the other hand.

I am satisfied, however, on the evidence as a whole that the option figure of £90,000 mentioned in the legal documents arose out of what Mr Tandy had suggested had been mentioned to him by someone or other, and his evidence was that he throughout considered £75,000 as what was to be the real figure. Mr Tandy also clearly realised from what Mr Euinton and Mr Taylor had told him that although there was, as he expressed it, a 99½ per cent certainty that the option would be exercised (as indeed had such options in every similar case) and that Mr Euinton recommended its exercise, yet as the exercise was a matter for decision by higher authority in the plaintiff, there was the possibility, however faint, that it would not be exercised. It is not surprising that Mr Lambert was very worried at the prospect of Mr Tandy buying the Mitcham station without the certainty that the plaintiff was the purchaser of the Croydon station.

On 30th June 1967 what has been referred to as a letter of understanding made 'subject to contract' was written by the plaintiff to the defendant marked 'For the attention of Mr G. Tandy'. The letter opened by stating that the plaintiff set out below 'the terms agreed between us', and it said that 'These are long term proposals founded on a 15 year basis'. Then I continue the quotation in para 1 (a):

'Manufacturers Hanover Trust Company ("the Bank") will advance you on loan for an initial period of 5 years, against a Guarantee to be given to the Bank by ourselves, the sum of £40,000 which shall bear interest [I need not refer to the rate] payable half-yearly in arrears. (b) The loan will be advanced to assist you to purchase and redevelop the above mentioned premises [i.e. the Mitcham station]. Of this loan the sum of £30,000 will be paid on legal completion and the balance of £10,000 will be advanced when the redevelopment has been fully completed in accordance with the plans agreed between us.'

Paragraph 2 said that the guarantee would be secured by a first charge on the Mitcham station and a second charge on the Croydon station.

Paragraph 3 provided that the loan would be repayable over the initial five year period by half yearly instalments and that the defendant would be given the right to apply to the plaintiff at the expiration of that period to refinance the operation: and then that the refinancing would again provide for further refinancing at the end of the second five year period to cover the last five years of the total 15 year period. Paragraph 4 provided that the charge would additionally stipulate that during its subsistence there should be tied provisions, which were set out, and an obligation on the defendant to accept deliveries of motor fuel in minimum 4,000 gallon loads (which is referred to in the jargon of the industry as 'the drop') and also a rebate. Paragraph 7 provided:

'The above transaction is conditional upon:—(a) The existing Legal Charge in respect of Mulberry Filling Station, Croydon, being redeemed and the redemption money being re-advanced to you under a new Legal Charge on the

a same terms, except that either party shall have the right to require redemption on the fifth anniversary of the date of the new Charge or at any time thereafter; and (b) You granting us an option, for a nominal consideration, to purchase the freehold of Mulberry Filling Station for the price of £90,000, such option to be exercisable by us on giving you written notice at any time between the date of the new Legal Charge in respect of Mulberry Filling Station and either its expiry date or a date being two months after notice to redeem the same is given to us, whichever is the later.'

b On 13th July 1967 Mr Tandy contracted to purchase the filling station at Mitcham, and that purchase was completed in August 1967 by a conveyance of the station to Mulberry Filling Station (Mitcham) Ltd, a company wholly or virtually owned and controlled by Mr Tandy. Under a legal charge dated 18th August 1967 between c the Mitcham company and the plaintiff, the Mitcham company charged its Mitcham station property with repayment to the plaintiff of any sums payable by the plaintiff under its guarantee of repayment of a loan of £40,000 agreed to be made to the Mitcham company by Hanover and repayable by instalments, and the Mitcham company entered into solus tie obligations with the plaintiff and agreed with the plaintiff to make specified improvements to the station. These sums were for the d purchase and improvement of the Mitcham station.

As appears from correspondence, by 31st October 1967 Mr Tandy had signed the option provided for in the letter of understanding. It is common ground that it was never executed and that a document produced was the unexecuted and undated option agreement engrossment. It provided that the option to purchase the Croydon station for £90,000 should be exercisable, so far as material, at any time before (1) e the repayment in full of all moneys due to the plaintiff under a legal charge dated (then there was a blank) day of (then there was a blank) 1967 between the defendant, the plaintiff and Mr Tandy (which in the event was the legal charge dated 30th January 1968, between those same parties which I mention below); or (2) the commencement of retail sale by the Mitcham company of the plaintiff's products from the Mitcham station in accordance with the above legal charge dated 18th August f 1967 between the Mitcham company and the plaintiff, whichever should first occur.

On 16th January 1968 the plaintiff's solicitors wrote to the defendant's solicitors that on completion of the first and second charges to them (being those contemplated in the letter of understanding) 'the option agreements' would be exchanged. Mr Euinton told Mr Tandy between 26th and 30th January that the plaintiff had decided against a purchase of £90,000, and Mr Euinton said that he would recommend the purchase at £75,000. It was in these circumstances that the defendant entered into g the legal charge containing the ties on which the plaintiff relies.

By this legal charge dated 30th January 1968, between the same parties as to the legal charge of 22nd January 1965, the defendant charged the Croydon station land with repayment to the plaintiff of the sum of £32,400 'now paid' to the defendant. The sum was of the amount not repaid under the 1965 legal charge and was similarly h repayable by half yearly instalments, and not otherwise, of the same amounts and on the same dates except that the final instalment of £24,300 was repayable on 1st August 1972. This was, according to Mr Euinton, the plaintiff's main representative to give evidence, 'a notional replacement'. This legal charge contained various obligations and ties on the defendant in favour of the plaintiff of which I need only refer to those which I shall now mention.

j The defendant and Mr Tandy jointly and severally covenanted with the plaintiff that during the continuance of 'this security' the defendant would carry on at the property charged the business of a petrol station, and then so covenanted in these terms under which the injunction is sought. By cl 3 (VI) (ii):

'A. will purchase his total requirements of motor fuel for sale at and for use at or about the said property from the [plaintiff] and will not have upon or sell

from the said property at any time any other brand or brands of motor fuel nor advertise any other brands thereon in any way B. will purchase from the [plaintiff] on its standard terms and will at all times keep sell advertise conspicuously display and exclusively use for his own consumption on the said property the [plaintiff's] brands of petroleum products (other than motor fuel) transmission oils lubricating greases preservatives anti-freeze and speciality oils C. The products referred to in paragraphs A and B of this sub-clause are hereinafter collectively referred to as "the specified products".' a

The defendant and Mr Tandy jointly and severally further covenanted with the plaintiff that the defendant—

'(viii) will place his orders so as to enable deliveries to be made to the said property of not less than Four Thousand (4,000) gallons of motor fuel at any one time and not less than one ton lots of lubricating oils and lubricating greases.' c

The plaintiff covenanted with the defendant by cl 4:

'... that the [plaintiff] will during the continuance of this security pay to the [defendant] a rebate of three halfpence per gallon on all motor fuels purchased by the [defendant] from the [plaintiff] hereunder for resale at the said property...' d

The plaintiff further covenanted with the defendant by cl 5 (2) that during the continuance of that security it would use its best endeavours to supply the defendant with all the requirements of the specified products, and by sub-cl (A) that the plaintiff would not be responsible for any failure to make deliveries or delay in making deliveries due to any circumstance not within its immediate control; and by (B) if by any such circumstance the availability from any of the plaintiff's sources of supply was curtailed or interfered with as either to delay or hinder the plaintiff or to prevent it from supplying the full quantity of the specified products, the plaintiff should be at liberty to withhold, reduce or suspend deliveries; and by (C) that the defendant would be free to purchase from other suppliers to make good any deficiency so arising. e

By a legal charge also of 30th January 1968 between the defendant and the plaintiff it was recited that the legal charge of 18th August 1967 between the plaintiff and the Mitcham company had been entered into at the request of the defendant, and that it was agreed on the treaty for it that the moneys thereby secured should be further secured and that in pursuance of such agreement the defendant thereby charged the Croydon station property with payment of the moneys secured by the Mitcham charge of 18th August 1967. f

On 2nd February 1968 the plaintiff's solicitors wrote to the defendant's solicitors that it seemed that as the result of further discussion the option terms had been amended to make the price £75,000 and that the option would not be exercisable after 29th February 1968. In the first week of February the plaintiff told Mr Tandy that it was not going to exercise the option. It appeared from the evidence that the decision was made partly because the Croydon station was found to be not of a measurement that would enable the development of it desired by the plaintiff possible and partly because a station at Pond Street, Croydon, which the plaintiff supplied and where it wanted a five year tie became available for purchase by the plaintiff at the price of £86,000. g

The plaintiff has not disclosed documentary evidence that presumably exists and which would throw light on its decision, nor put in any evidence from the official who, I am told, made the decision. I conclude for the purposes of this motion on the evidence as it stands that the plaintiff's having obtained the five year tie from the defendant was a material consideration in its deciding not to proceed with the exercise of the Croydon station option. h

In October 1968 all the shares in the defendant were sold to Dartstone Ltd, which i

a has since remained the beneficial owner of those shares and in control of the defendant. By a deed made on 21st October 1968, between the defendant of the first part, Mr Tandy of the second part, Dartstone of the third part, Norstead Investments Ltd of the fourth part and the plaintiff of the fifth part supplemental to the legal charge dated 30th January 1968 between the defendant, the plaintiff and Mr Tandy, after reciting that the whole share capital of the defendant was vested in Dartstone,

b (1) the plaintiff released Mr Tandy from his covenants in the legal charge, (2) Dartstone and Norstead jointly and severally covenanted with the plaintiff to observe and perform all the covenants by the defendant or Mr Tandy and all provisions in the legal charge to the intent that all its covenants and provisions should thenceforth be read and take effect as if Dartstone and Norstead had originally been parties thereto in place of Mr Tandy.

c Clause 3 is in these terms:

‘It is hereby expressly agreed and declared by and between the parties hereto that save as hereinbefore provided all the covenants terms conditions and provisions of the Legal Charge [i.e. of 30th January 1968 which I have dealt with] shall remain in full force and effect.’

d The defendant, now under Dartstone control, continued until January 1971 to retail the plaintiff’s petrol in accordance with their obligations of the legal charge of 30th January 1968, confirmed by the deed of 21st October 1968.

e In January 1971 there was an unofficial strike of the plaintiff’s tanker drivers, and therefore from 4th to 13th January there was no delivery of the plaintiff’s petrol to the defendant’s station. On 12th January the defendant took delivery of VIP petrol, as it was entitled to do in view of such failure of delivery, in accordance with the express terms to which I have referred of the legal charge. However, it continued to do so after the strike ended and the plaintiff became able and willing to deliver its petrol. So on 16th March 1971 the plaintiff issued the writ in this action.

The restraint of trade issue

f I will come now to the restraint of trade issue. The classical statement of the modern doctrine is, of course, in the well-known speech of Lord Macnaghten in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd*²:

‘All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions . . . It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.’

h The doctrine has been much considered since, and has been the subject of observations which are by no means easy to reconcile. But we are only concerned with those aspects of the doctrine which are in issue between the parties. It is common ground between the parties that (1) the restraints in this case are of a type (i.e. petrol sales tied agreements) which, as I have already said, are within the restraint of trade doctrine and nonetheless so because it is included in a mortgage of realty; (2) under

i that doctrine (a) a covenant to be reasonable in the interests of the parties must protect some legitimate trade interest of the covenantee and impose no greater restriction than is reasonable for protection of that interest; (b) the onus of proving reasonableness in the interests of the parties lies on the covenantee, and

reasonableness in the interests of the public on the covenantor; but, I interject, this is hardly material once the whole case has been deployed as it was before me; (c) reasonableness has to be tested as at the time when the restraint is entered into; (d) the mere postponement of a right to redeem a mortgage is not in itself unreasonable. There was a dispute as to other aspects of the law affecting reasonableness. a

It will be convenient to deal with the matters in dispute in the following order. (1) What is the duration of the restraints in this case? (2) Certain considerations peculiar to these particular restraints which the defendant claimed affected reasonableness between the parties. (3) Certain considerations of general application which may affect reasonableness, whether in the interests of the parties or the public; and (4) some governing considerations of law. b

First, then, (1). The defendant submitted that the legal charge of 30th January 1968, on whose covenants the plaintiff relied, was no more than a notional replacement of the legal charge of 22nd January 1965, and that the restraints were therefore for the period from 22nd January 1965, until 1st August 1972, that is seven years and seven months, and consequently void. As Mr Euntion agreed, the purpose of the new charge in 1968 was to obtain a tie that would run from January 1968, would conform to the undertakings required by the Board of Trade in consequence of the Monopolies Commission report, and would not be exposed to such objection on account of its duration as the 1965 tie might be. There was no additional money passed from the plaintiff to the defendant in 1968, so that there was no new advance in this sense in 1968. The 1968 legal charge was for the amount outstanding under the 1965 legal charge. But the 1968 charge was part of the transaction under which the plaintiff lent £40,000 to the Mitcham company. The letter of understanding of 30th June 1967 made the Mitcham loan conditional on the 1965 charge being replaced by a specified new charge (which in the event was the 1968 charge), and the second legal charge of 30th January 1968 recited that the loan to Mitcham had been made at the defendant's request. c

It is clear from the evidence as a whole that the 1968 legal charge relied on by the plaintiff was entered into in consideration of the plaintiff making the Mitcham loan under the Mitcham legal charge at the defendant's request as part of the 'package' transaction outlined in the letter of understanding. The 1968 legal charge relied on by the plaintiff was therefore not 'a notional replacement' of the 1965 legal charge but in reality and in law a separate new legal charge for a new consideration as part of a new transaction. Consequently, the covenant in restraint relied on by the plaintiff was for the period appearing on the face of the 1968 legal charge, that is four years and seven months, and not for the period of seven years, seven months submitted by the defendant. d

(2) The defendant submitted that its being precluded from redeeming the legal charge before the period of nearly four years and seven months, in view of what I have just stated, was unreasonable in the interests of the parties in view of certain considerations peculiar to this case. It was rightly pointed out that if the 1965 legal charge had not been replaced by the 1968 legal charge it could have been determined by the defendant covenantor on 6th August 1971, under the undertakings to the Board of Trade, that is before the expiration of the 1968 legal charge restraint on 1st August 1972. It was suggested that this meant that the defendant suffered and the plaintiff gained by replacing the 1965 tie by the 1968 tie. True, the defendant could have refused to enter into the 1968 legal charge and thus obtained the advantage of the 1965 tie expiring on 6th August 1971; but by not doing so it obtained the 'package' deal to which I have already referred. e

It was suggested that the restraints were, however, not reasonable because in the event the plaintiff did not purchase the Croydon station as provided or contemplated by the deed. But since it is common ground that reasonableness has to be decided as at the time when the restraint is entered into its reasonableness cannot depend upon f

a the event. The failure to purchase the Croydon station properly falls to be considered and will be considered on the second main issue, namely the granting of an injunction. In my view, this suggestion is ill-founded.

(3) Considerations of general application claimed to affect reasonableness, whether in the interests of the parties or of the public.

b (a) Whether a loan at low rate of interest by the supplier to the retailer, as by the plaintiff to the defendant in this case, results in mis-allocation of resources. The defendant contended that although such low rate of interest might be compensated for by a higher charge for petrol to the retailer, yet since the interest was a fixed overhead charge and the total charge for petrol varied according to the amount sold to the retailer, then there would at least be a tendency for the price to be raised to the consumer, and, if the retailer's efficiency resulted in the purchase of more petrol c by him, it would result in more being paid to the supplier and not in less being charged to the consumer.

d Although this contention may well be correct as an appraisal of a tendency, at any rate if considered theoretically and in isolation, I find difficulty in attempting to assess it, and its practical significance was not perceptible. It appeared from the evidence that some misallocation that might be more directly and readily recognised was not occurring. Thus it appeared that since the introduction of solus tie agreements there had not been any substantial increase in the number of stations, nor that the services and amenities which they provide are excessive or such as the public do not require.

e (b) Whether a low interest rate induces the retailer to enter into the trade in ignorance of the real cost which he was incurring. It is said this was apt to occur because he might not appreciate how far the low rate of interest was offset by increased cost of petrol or how much petrol he would sell. It is clear, however, on the other hand, that it is a substantial advantage to the retailer to have a low interest rate in early years when he is building the turnover which is expected to justify the loan, provided, however, that the duration of the tie is not so long as to result in the later disadvantages of the increased cost of petrol substantially exceeding the early f advantages of low interest. It seems to me that a five year tie allows of no such danger, at any rate in our case, nor indeed in any other case referred to.

g (c) Insofar as the low rate of interest is counter-balanced by higher petrol charges to retailers generally as contrasted with such charges made to retailers individually according to their purchases, then it is understandable that the inefficient retailers may be subsidised to the detriment of the efficient retailers and the public. Again, it is difficult to assess the practical significance of this, and certainly in our case it was not established. As far as I can judge there is no substantial significance in this consideration.

h (d) How far the tie is required to provide security for the suppliers' investment. (i) It was suggested that there was insufficient refining by them in this country to meet the country's demands, with the implication, so I understood, that there was no need for ties to secure outlets for the refineries. Refineries, however, produce inevitably many products, and although the plaintiff's refineries have produced less petrol than is consumed here, it produces substantially more of the other products than can be consumed here. So the plaintiff is an importer of petrol but exporter of other refinery products. (ii) The defendant contended that provided suppliers were efficient they could sell in a competitive market and therefore would not require j ties to secure their investment. This, to my mind, is at first blush an attractive proposition, but it certainly has limitations. It does not pretend to suggest that a tie is positively disadvantageous to the security of investment, nor that it does not, by producing some sense of security of outlet for the suppliers, encourage investment by them. Further, despite its theoretical attraction, I find it difficult again to conclude with any assurance what the effect or fear of the tie system being abolished would in practice be. It seems to me quite speculative.

(e) Whether price stability is affected by the solus tie. The defendant suggested that it was impossible to show whether prices would remain stable or not if solus ties were abolished. The evidence, however, shows that the wholesale prices of petrol without tax have remained remarkably stable over the years under the tie system, and that the retail prices have kept remarkably low compared with retail prices in general (and this is in line with the Monopolies Commission report that the solus tie has exerted a downward pressure on prices). Thus, so far as I can judge, I would conclude that the solus tie system has in fact worked in favour of low prices. a

(f) Whether the tie secures economies in distribution. It was submitted by the plaintiff that the tie resulted in deliveries ('the drop') being in comparatively large quantities with obvious consequential economies. It was said that it achieved not only savings in delivery but substantial savings in sales staff. It was claimed that appreciably more staff would be necessary to obtain sales in a competitive free-for-all between suppliers if retailers could switch from supplier to supplier for unassured periods or for their requirements as they arose. There was acute conflict of view whether abolition of ties would result in exclusive or multi-brand retailing; but this suggestion by the plaintiff of economies under the tie system held, so it seems to me, as against both other forms of retailing. The defendant's attack on this suggestion was principally against the significance of the tie as a means of securing the large 'drop'. It was submitted that it could be achieved without a tie by discount according to the size of the 'drop'. Again I find it difficult to assess what the result of any feasible discount would be on the size of the 'drop' in an untied retail trade. I am satisfied that in fact the tie has produced substantial economies in distribution. Whether those economies could have been obtained or preserved without the tie in January 1968, or indeed now, seems to me to be just speculative. b

(g) How far services provided by the company to the retailer are advantageous and are dependent on the tie system. It seems that the costs borne by the company for such services are of no very substantial amount. They could doubtless be provided at cost to the retailers insofar as such cost is now borne by the company, and promotion schemes like teabags given to the public might be regarded as money better spent on reducing petrol prices, a criticism, however, which in this case, as in the case of advertising generally, might or might not be well founded in any particular instance, but which again was not established in evidence and with regard to which I am not in a position to come to any satisfactory conclusion. c

There were some other considerations affecting reasonableness that were referred to, but as they were admittedly subsidiary it is not necessary to pursue them. They were not such as to have any decisive effect on this application. So far as the considerations canvassed are relevant, (d) is relevant to reasonableness in the interests of the parties and (e) and (f) to reasonableness in the interests of the public, and in each of those three cases I conclude in favour of the plaintiff. The other questions which seemed to be directed to reasonableness in the interests of the public (though some, such as (b) might perhaps apply also to reasonableness in the interests of the parties) do not provide any answer that tells substantially in favour of either party to this application. So to whatever extent it may be argued whether any other questions than (g) are directed to the interests of the parties or the public or both, my overall conclusion would in any event be in favour of the plaintiff. d

The limitation of the tie to within five years allows for roughly 20 per cent of the ties in the trade ending in each year. In particular, when coupled (as the ties generally are) in solus agreements with loans at a low rate of interest repayable during the period of the tie, the result seems to me to combine freedom of trade with freedom of contract about as satisfactorily as can be devised. It seems to me that the evidence in our case is in line with the observations in the speeches in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*³. e

a The ratio decidendi on the restraint of trade issue

Some of the general considerations canvassed in our case partly, and some exclusively, depend on economic or business judgment. In the authorities there are observations to the effect that the question whether or not the tie is no more than is required for the protection of the covenantee, and therefore by common consent in our case reasonable in the interests of the parties, is a matter for business decision by the parties provided that the contract is a commercial contract in which there is bargaining equality. A petrol tie agreement between supplier and retailer is a commercial contract and it has been authoritatively said (e.g. in the *Esso* case⁴ speeches) that in general at any rate retailers have been at no disadvantage in bargaining with the suppliers over scarce petrol station sites; and no such bargaining inequality has been suggested in our case.

It seems to me right in principle and in accordance with the habitual inclination of the court, not to interfere with business decisions made by businessmen authorised and qualified to make them. This seems to me a proper recognition of freedom of contract within the doctrine of restraint of trade. And I for my part would prefer to rest my decision, so far as it is concerned with reasonableness in the interests of the parties, on this ground.

Such a decision would, of course, still leave the restraint open to attack on the ground that it is not reasonable in the interests of the public; e.g. the duration of the tie could be so attacked. The considerations which have been canvassed not only involve business and economic judgments which, if they are the relevant considerations, may be decisive of the conclusion of the court; they are also considerations which are prevalent throughout a considerable industry, and a decision of a court affected by such business and economic judgments on the generally limited evidence which happened to be adduced before it in a particular case may have widespread effects on economic and business policy throughout the industry. Such business and economic judgments are by their nature matters for policy decisions by business administration, government or parliament. This certainly does not mean that considerations of public interest within the doctrine of restraint of trade should be so decided, but it does tend to indicate that public interests within that doctrine are not concerned with such considerations. The doctrine grew in earlier years in comparatively simple economic and social conditions. They raised no such abstruse economic considerations as have been the subject of the expert evidence and divergent forecasting deployed in our case. Such considerations are of a different order altogether from such questions as whether a prohibition on an employee or vendor being engaged in some trade within three miles of a place is unreasonable, or indeed from the considerations in the *Nordenfelt* case⁵ itself.

The submissions and evidence in our case invite the question: what is the doctrine's purpose and scope? It arises from the deep concern of our common law with the personal liberty of the citizen. So innate is personal liberty to us as a people and thus to our common law that our common law has identified it with public policy. The doctrine of restraint of trade deals with the relationship of two consequential liberties: to contract and to trade. Lord Macnaghten's formulation⁶ sets the bounds between these liberties. It thus contains as its general fundamental proposition 'All interference with individual liberty of action in trading and all restraints of trade . . . are contrary to public policy', subject to exception if it is reasonable both with reference to the interests of the parties and of the public. Reasonable in the interests of the parties seems to me to have been sufficiently defined for present purposes as agreed by common consent of the parties in our case in accordance with the authorities, that the restraint is reasonable if it is no more than adequate for the protection of the legitimate interests of the covenantee.

⁴ [1967] 1 All ER 699, [1968] AC 269

⁵ [1894] AC 535, [1891-94] All ER Rep 1

⁶ [1894] AC at 565, [1891-94] All ER Rep at 18

But what is meant by reasonableness with reference to the interests of the public? It is part of the doctrine of restraint of trade which is based on and directed to securing the liberty of the subject and not the utmost economic advantage. It is part of the doctrine of the common law and not of economics. So it must, of course, refer to interests as recognisable and recognised by law. But if it refers to interests of the public at large, it might not only involve balancing a mass of conflicting economic, social and other interests which a court of law might be ill-adapted to achieve; but, more important, interests of the public at large would lack sufficiently specific formulation to be capable of judicial as contrasted with unregulated personal decision and application—a decision varying, as Lord Eldon LC put it, like the length of the chancellor's foot.

This seems to me in line with Sir Nathaniel Lindley MR's indication, in *E Underwood & Son Ltd v Barker*⁷, that a contract reasonable in the interests of the public cannot be held invalid 'on grounds of public policy unless some specific ground can be clearly established'. He added that he could think of no such ground except 'some pernicious monopoly'. Lord Parker of Waddington, delivering the conclusions of the Privy Council in *A-G of Commonwealth of Australia v Adelaide Steamship Co Ltd*⁸, interpreted this in view of the history of monopolies in this country as monopoly in the popular sense of being 'calculated to enhance prices to an unreasonable extent', and thus automatically traditionally considered as against public policy.

In *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd*⁹, the possible advantages of regulating the market and of large scale organisation were recognised. Economic conditions and experience had developed. The difficulty of appraising whether a restraint was reasonable with reference to the interests of the public at large became correspondingly more difficult. It appears, in my respectful view, that the legal assumption that 'pernicious monopoly' was contrary to the public interest survived the era in which it could be taken as axiomatically true in fact, and it was thus dealt with in effect by invoking the public interest directly instead of through the 'pernicious monopoly' assumption which had been taken to express it. But this involved the danger of leaving the interests of the public at large and so subject to the objections which I have ventured to make.

In *Dickson v Pharmaceutical Society of Great Britain*¹⁰ Sachs LJ, in considering reasonableness with reference to the interests of the public, weighed a number of business and economic considerations and on balance formed his conclusion, as I have also felt obliged to do in this case. Lord Wilberforce agreed with Sachs LJ's conclusion, but the passage in which he did so, if, as I trust, I do not do it injustice, seems to me to bring out clearly both the difficulties of deciding what is relevant to public interests within the doctrine and the advantage of the public interests being dealt with through propositions recognised by the law. Lord Wilberforce said¹¹:

'If, moreover, one proceeds as did SACHS, L.J.,¹² to weigh the considerations of public interest—the second limb of LORD MACNAGHTEN's formula¹³—I think that equally the restraints do not survive the test. I would so hold on the simple ground, which I think is the relevant ground in this connection, that there is nothing here to displace the normal proposition that the public has in the absence of counter-vailing considerations an interest in men being able to trade freely in the goods which they judge the public wants and that these restraints clearly, severely and arbitrarily restrict this freedom. More special arguments to the effect that the restraints might cause a reduction in the number of pharmacies I would regard as less secure. Before I could accept them I should require persuasion first that

⁷ [1899] 1 Ch 300 at 305

⁸ [1913] AC 781 at 796, [1911-13] All ER Rep 1120 at 1124

⁹ [1914] AC 461, [1914-15] All ER Rep 752

¹⁰ [1967] 2 All ER 558 at 574, [1967] Ch 708 at 759

¹¹ [1968] 2 All ER 686 at 707, 708, [1970] AC 403 at 441

¹² [1967] 2 All ER at 574, [1967] Ch at 759

¹³ [1894] AC at 565, [1891-94] All ER Rep at 18

a this type of consideration may properly be taken into account in relation to the common law doctrine of restraint of trade (as contrasted with proceedings in the Restrictive Practices Court) . . .’

If my analysis and approach are correct, unreasonableness in the interests of the public refers to the interests of the public as recognised in a principle or proposition of law and not to the interests of the public at large. The question which such

b unreasonableness raises would thus not be whether the restraint might be less in a different organisation of industry or society or whether the abolition of the restraint might lead to a different organisation of industry or society, and thus, on balance of many considerations, to the economic or social advantage of the country, but whether the restraint is in fact in our industry and society as at present organised, and with reference to which our law operates, unreasonable in the public interest as recognised

c and formulated in such principle or proposition of law.

For my part, I prefer to decide that the restraints relied on in this case are reasonable in the interests of the public, not on balance of existing or possible economic advantages and disadvantages to the public but because there is, in conditions as they are, no unreasonable limitation of liberty to trade. It seems to me to follow that much of the evidence in our case directed to general considerations of economic policy was

d irrelevant.

Lord Wilberforce¹⁴ stated the public interest in terms relevant to the case before him in ‘the normal proposition that the public has in the absence of countervailing considerations an interest in men being able to trade freely . . .’; and I would venture to express the public interest in terms relevant to our case and which appear to me to be consonant with Lord Wilberforce’s proposition of law, i.e. that the public has

e an interest in men being able to trade freely subject (inter alia) to reasonable limitations which conform with the contemporary organisation of trade. The restrictions in our case are reasonable in reference to the interests of the public as expressed in this proposition. But—although only in the interests of the parties and by way of precaution in the present state of the law—I would also decide this issue in the plaintiff’s favour on the balance of the general considerations which I have already tried

f to deal with in detail. Thus I decide the restraint of trade issue in favour of the plaintiff.

Should an interlocutory injunction be granted?

I come now to the second main issue, namely whether, on the footing that the plaintiff succeeds on the restraint of trade issue, an injunction should be granted. The defendant first submitted that the injunction should not be granted in view of

g delay by the plaintiff in bringing the proceedings and this motion. As I have already stated, the breach of the tie occurred in the middle of January 1971. It seems that it was on 30th January that the plaintiff knew that the breach had definitely occurred. The writ was not issued until 16th March 1971. It appears that the plaintiff had failed on some similar earlier application owing to insufficient evidence with regard to its business, and it thus naturally took care to ensure that the evidence was ample

h in this case. On 30th March, the day after completion of the evidence, the plaintiff served notice of motion with the evidence. The defendant’s evidence was completed on 4th May, and it was then that the plaintiff first learned that the defendant was relying on the unreasonableness of the restraint with reference to the interests of the public. The plaintiff thus had to obtain an economic expert’s evidence to counter the defendant’s economic expert’s evidence. On 21st June the evidence was completed.

i In view of considerable conflict of evidence, cross-examination was clearly necessary. Up to this point there appears to me to be no such delay as would disentitle the plaintiff to an injunction. The defendant, however, then complains that the plaintiff proceeded by motion instead of by application for speedy trial. But proceeding to trial would almost certainly not have produced as early a hearing by any means as the hearing of this motion, and it might well have led to considerable delays over

interlocutory matters. It does not seem to me that the defendant's complaint of delay is well founded. a

Insofar as it was suggested that speedy trial would have had the advantage of discovery in particular, it is not a complaint founded on delay. The absence of discovery is a common factor in interlocutory applications, and insofar as it may be considered to be relevant at all, it seemed to me to go only to the question of probability of success at the trial. In this case absence of discovery is not of decisive significance, in my view, in considering the court's discretion to grant an injunction. b

It was submitted that no injunction should be granted because the plaintiff was not coming for equitable relief with clean hands. The uncleanness suggested arose from the plaintiff's failure to proceed with the option to purchase the Croydon station. It has been convenient earlier in this judgment to review as part of the relevant history leading to the action the facts relevant to this submission. It is clear that when the defendant signed the legal charge relied on it knew through its representative, Mr Tandy, that the plaintiff would not exercise the option at £90,000, but that Mr Euntou would recommend its exercise at £75,000. c

I am also satisfied on the evidence that the defendant, through Mr Tandy, knew throughout that the plaintiff might, in its own interest, decide not to exercise the option. It was a risk which Mr Tandy took on behalf of the defendant with his eyes wide open. But, as I have said, it was a material consideration in the plaintiff's decision not to proceed with the option that the defendant had already entered into the new tie by the 1968 legal charge. This has very understandably been attacked as dirtying the plaintiff's hands. But, uncommendable though this might be, it does not appear to me to be such in the circumstances as to disentitle the plaintiff to relief by injunction, particularly as, in view of the deed of 21st October 1968, to which the plaintiff and defendant were parties, the defendant agreed that all the provisions of the legal charge, including the covenants relied on by the plaintiff, should 'remain in full force and effect'. d

To obtain an injunction the plaintiff must establish a strong prima facie case or probability that it will succeed at the trial on the restraint of trade issue. Of that probability I am satisfied. Violation of the right so established on that issue is conceded. The governing consideration then becomes the maintenance of the status quo pending the trial. In deciding on whether the status quo shall be so maintained, regard must be had to the balance of convenience and the extent to which any damage to the plaintiff can be cured by payment of damages rather than by granting an injunction. The burden of proof lies on the plaintiff throughout. e

The plaintiff, however, as an exception to this rule, submitted (on the footing that it succeeded before me on the restraint of trade issue) that as the right in respect of whose violation it claimed relief was a contractual negative obligation, an injunction should follow as a matter of course in accordance with the principle stated by Lord Cairns LC in *Doherty v Allman*¹⁵. It is in these terms: f

'If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury—it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves.' g

Those obiter observations were made not with regard to an interlocutory injunction but a perpetual injunction; not on motion but at the trial; and on the footing that there was no dispute as to the validity of the covenant relied on. Lord Cairns LC's reference to 'balance of convenience' is readily associated in our generation with h

a interlocutory injunction; yet in Lord Cairns LC's generation Kekewich J in *Jenkins v Jackson*¹⁶, referred to it as comprising considerations relevant to the granting of perpetual injunctions; and even much later Kerr on Injunctions¹⁷ also so referred to it. It seems to me unlikely that Lord Cairns LC directed his mind to interlocutory injunctions at all; but about this there can be no certainty.

b If, of course, as here, the validity of the covenant is in dispute on an interlocutory application, it might well be that the judgment at the trial, after full discovery and evidence, will not be in accord with the interlocutory conclusion on a prima facie case and probability of success. And even if validity is not disputed on the motion, it is subject to being in issue at the trial; and it does not seem to me that the possibility of its being put in issue (for example, in the light of subsequent information and advice on it) can be justly ignored.

c Of course, the required degree of judicial conviction of success at the trial can vary from near certainty to something appreciably less, and the application of the *Doherty v Allman*¹⁸ rule to applications for interlocutory injunctions would make the injunction automatic on the probability of success at the trial being established, irrespective of the degree of such probability and every matter which, in accordance with the general rule, it is right for the court to take into consideration. The result would be that a probability of success barely established, without the advantage of full evidence and opportunity for full consideration, would result in an injunction in circumstances in which, until trial, the absence of injunction would be no disadvantage of any substance to the applicant and injunction would cause most serious harm to his opponent. It is not difficult to conceive of such a situation.

d The plaintiff referred to *Hampstead and Suburban Properties Ltd v Diomedous*¹⁹.
e However, the crucial sentences there have to be read bearing well in mind the careful qualifying words and the significance of the maintenance of the status quo to which I shall come.

So my conclusion is that the principle of *Doherty v Allman*¹⁸ does not apply to interlocutory injunctions.

f The defendant submitted that the maintenance of the status quo means maintenance of the present situation as contrasted with the maintenance of the situation as it was before the defendant's breach of covenant. The maintenance of this status quo as submitted by the defendant includes the purchase and sale by the defendant of petrol other than the plaintiff's. It thus makes the court's governing consideration the maintenance of a state of affairs in which the defendant is violating the plaintiff's strong prima facie right; a quite unacceptable proposition. On the other hand, the maintenance of the situation as it was before the defendant's breach of covenant involves more than maintaining the situation. It involves the contrary, namely abandoning the situation in order to restore an earlier situation. But the choice of meaning of status is not just between these alternatives. It can, and does generally at any rate, in my view, refer to the maintenance of the contemporary situation including what has resulted from past violations of the plaintiff's prima facie right but excluding any repetition of the violations. (I am not here concerned with mandatory
g injunctions.)
h

i The maintenance of the status quo would thus, in case of, say, a building involving strong prima facie trespass, mean leaving, as it is, so much as has been built but not permitting any repetition of the prima facie trespass by building more, and it would in our case mean no more repetition of the strong prima facie breach of covenant which has been established. The maintenance of such a situation recognises the limitation arising from the prima facie character of the right established on the one hand and the objections to the court countenancing future breaches of such right on the other hand.

16 (1888) 40 Ch D 71 at 77

17 A Treatise on the Law and Practice of Injunctions, 6th Edn, p 32

18 (1878) 3 App Cas 709

19 [1968] 3 All ER 545 at 550, [1969] 1 Ch 248 at 259

On matters relevant to the maintenance of the status quo the only consideration that was relied on to any substantial extent was the danger of it becoming insolvent as the result of the enforcement of the restraint. This was prayed in aid as affecting the balance of convenience in its favour: but it became clear, even on the evidence from the defendant, that this was not sustainable. Any advantage to the defendant from the defendant's present suppliers as compared with the plaintiff would clearly not be decisive on insolvency. There was a consensus that the station is not a good station site, and that its substantial success for a period was due to the character of Mr Tandy and of the competition at that time. The defendant's evidence showed that it can be sold now subject to the tie for as much as it will fetch at the end of the tie period, and that it would probably fetch more if it is sold for a purpose other than a petrol station. Otherwise the considerations (including the need for restraints to protect the plaintiff's outlets and investment and the inadequacy of damages as a remedy) told clearly in favour of an injunction being granted.

My overall conclusion is that the plaintiff is entitled to the relief which it claims.

Injunction granted.

Solicitors: *Stephenson, Harwood & Tatham* (for the plaintiff); *Parker, Thomas & Co* (for the defendant).

Jacqueline Metcalfe Barrister.

Thompson (Inspector of Taxes) v Salah

CHANCERY DIVISION

MEGARRY J

29th NOVEMBER 1971

Capital gains tax – Short-term gains – Disposal of asset – Contract to dispose of asset – Contract for sale of land – Contract not in writing and so unenforceable – Conveyance executed by separate documents – Vendor executing legal charge for full value of property in favour of purchaser – Conveyance of fee simple to purchaser on following day in consideration of release from covenant for repayment under legal charge – Contract for sale constituting disposal although unenforceable – Legal charge to be ignored for purpose of computing gain – Vendor liable for gain assessed on full value of property – Finance Act 1962, ss 12 (2), 13 (7).

On 11th July 1962 land and houses were conveyed to the taxpayer's wife for nearly £26,000. On 30th September 1963 the wife conveyed part of the property to a purchaser. For the purposes of short-term capital gains tax the cost of the property retained was just over £6,500. In 1964 the wife received from K an offer of £20,000 for the property retained and, without entering into any written contract of sale, she accepted the offer. If she had conveyed the property in the usual way, there would have been liability for tax on just under £13,500. Instead, on 18th September 1964, she executed a legal charge for £20,000 in favour of K, and the next day conveyed the fee simple in the property to K in consideration of K releasing her from her covenant for repayment under the legal charge. In those circumstances the taxpayer contended before the General Commissioners that the wife, by mortgaging her property, had relinquished her right in it but acquired the right of equity of redemption; by mortgaging the property for its full value of £20,000 she had acquired an equitable right which had no market value and which she disposed of for no value; and a mortgage did not constitute a disposal for the purposes of short-term gains tax. The General Commissioners discharged an assessment to short-term gains tax in respect of the disposal of the land retained. The Crown appealed.

Held – (i) The taxpayer's contentions were unsound because—

(a) a legal charge did no more than give the chargee the same protection, powers and remedies as if a mortgage term of 3,000 years had been created in his favour, so that when the wife executed the legal charge on her property she did not relinquish

a her legal right in the property, but retained her legal fee simple quite apart from her rights in equity (see p 533 f, post);

b (b) the creation of a legal charge did not thereby reduce the value of the fee simple; a purchaser would still pay a vendor the full value of the fee simple, out of which the vendor would discharge the mortgage and so convey the unencumbered fee, or the purchaser would agree to take a transfer both of the fee simple and the mortgage debt in which case the owner would still receive the full value by being released from the debt charged on the house (see p 533 g to j, post).

c (ii) The Crown's appeal would be allowed because the contract for the sale of the retained land, although not in writing and so unenforceable by action, constituted the 'disposal' by virtue of s 12 (2)^a of the Finance Act 1962, and under s 13 (7)^b of that Act capital gains were to be computed on the basis that the property was disposed of free of any subsisting interest or right by way of security and for this purpose the legal charge accordingly fell to be ignored; the transaction was in substance a sale even though it was carried out by two separate documents (see p 534 f and g, post).

Notes

For the law relating to short-term capital gains, see Supplement to 20 Halsbury's Laws (3rd Edn) paras 182, 542A.

d For the Finance Act 1962, ss 12, 13, see 42 Halsbury's Statutes (2nd Edn) 345, 348.

For the year 1970-71, ss 12 (2), 13 (7) of the 1962 Act were replaced by ss 162 (2), 164 (8) of the Income and Corporation Taxes Act 1970.

For the year 1971-72 and subsequent years of assessment the charge to tax under Case VII of Sch D (short-term gains) has been abolished by s 56 (1) of the Finance Act 1971.

e Case stated

At a meeting of the General Commissioners for the division of Central Birmingham held on 13th November 1969 Mohammed Salah ('the taxpayer') appealed against an assessment to income tax for the year of assessment 1964-65, made on him under Case VII of Sch D by virtue of s 10 of the Finance Act 1962, in respect of the short-term gains of his wife, in the sum of £13,066.

f The question in issue before the commissioners was whether a transfer of property by the taxpayer's wife in September 1964 gave rise to a gain from the disposal of an asset, taxable under s 10 of the Finance Act 1962. The taxpayer's wife was resident and ordinarily resident in the United Kingdom in the year 1964-65.

The commissioners found the following facts admitted or proved on the evidence adduced at the hearing of the appeal: (a) On 11th July 1962 the taxpayer's wife purchased property in Alcester Road South, Birmingham 14 ('the Alcester Road property') for £25,850. (b) On 30th September 1963 a portion of the Alcester Road property was sold to Shell Mex and BP Ltd for £30,000. (c) The value of the property sold was apportioned between the part sold and the part retained by the taxpayer's wife and a chargeable gain of £10,000 in respect of the part sold was agreed. (d) In 1964 the taxpayer's wife received an offer from Kenash Property Development Ltd ('Kenash') to buy the remainder of the Alcester Road property at the price of £20,000 which was the full market value of the property. The taxpayer's wife agreed to accept this offer but no written contract of sale was entered into by her. (e) For short-term gains purposes the cost to the taxpayer's wife of the remainder of the Alcester

a Section 12 (2) provides: 'For purposes of Case VII, where a contract is made to acquire or dispose of an asset (including an asset not in existence or not ascertained at the time of the contract), the contract shall be deemed to be the acquisition or disposal of the asset (for the consideration provided for by the contract), and the conveyance or transfer of an asset or of an interest or right in or over an asset in pursuance of a contract previously made shall not be deemed to be an acquisition or disposal of the asset.'

j b Section 13 (7) provides: 'An asset shall be treated as having been acquired free of any interest or right by way of security subsisting at the time of any relevant acquisition of it, and as being disposed of free of any such interest or right subsisting at the time of the disposal.'

Road property was £6,551 and on a sale thereof for £20,000 she would incur a liability to short-term gains of £13,449. (f) The taxpayer's wife sought advice as to the reduction or avoidance of her prospective liability to short-term gains in respect of the proposed sale to Kenash. She was advised to complete the sale to Kenash by the two documents next referred to. (g) By a mortgage dated 18th September 1964 the taxpayer's wife mortgaged the remainder of the Alcester Road property to Kenash for £20,000. (h) By a conveyance dated 19th September 1964 the taxpayer's wife conveyed the equity of redemption in the property comprised in the said mortgage to Kenash in consideration of her release from the obligation to repay the mortgage of £20,000. (i) The taxpayer's wife then ceased to have any further interest in the property.

It was contended on behalf of the taxpayer: (a) that by mortgaging the property the taxpayer's wife had not disposed of it; (b) that under the rules of equity the taxpayer's wife, by mortgaging the property, relinquished her right in it but acquired the right of equity of redemption; (c) that by mortgaging the property for its full market value of £20,000 the taxpayer's wife acquired an equitable right which had no market value; (d) that the taxpayer's wife made a disposal of the equity of redemption at its market value, which was nil; (e) that no capital gains tax liability could arise from the disposal; (f) that no tax was payable under the short-term gains tax legislation.

It was contended by the Crown: (a) that the transaction between the taxpayer's wife and Kenash was one transaction by way of sale at a price of £20,000, which was implemented by two deeds; (b) that a conveyance of property for a consideration constituted a disposal for short-term gains unless otherwise exempted, and the conveyance was not so exempted; the taxpayer's wife received from Kenash £20,000 subject to an obligation to repay it which was immediately released and this constituted a receipt to her of that sum; (c) that, alternatively, the legal effect of the deed was to vest the unencumbered fee simple of the property thereby conveyed to Kenash. The consideration moving to the taxpayer's wife was the release of a debt of £20,000, which sum had been paid to her at or immediately before the date of the deed and which accordingly had a market value of £20,000; (d) that the assessment should be determined at £13,449.

The commissioners felt that it was never the intention of the Finance Act 1962 to permit such a transaction, but on the evidence before them they upheld the taxpayer's appeal and discharged the assessment.

The Crown appealed by way of case stated to the High Court.

P L Gibson for the Crown.

P G Whiteman for the taxpayer.

MEGARRY J. This is an appeal by way of case stated from the General Commissioners for the division of Central Birmingham. Counsel for the taxpayer has told me that he feels unable to contend in support of the decision of the commissioners, and so I can be relatively brief in my judgment. I think, however, that I ought to set out my reasons shortly, as I understand that the point has, or may have, some relevance to capital gains tax generally; and in any case I am reversing the decision of the commissioners.

The actual case concerns an assessment to short-term capital gains tax for 1964-65 under the Finance Act 1962, s 10, in a sum of rather over £13,000 made on the taxpayer in respect of a transfer of property made by his wife. The property consists of land and houses in the Birmingham area which became vested in the taxpayer's wife under a conveyance dated 11th July 1962 for nearly £26,000. By a conveyance dated 30th September 1963 the wife conveyed part of the property for £30,000, and it was agreed that after apportionment there was a chargeable gain of £10,000. No question arises about this disposition. For the purposes of short-term capital gains tax the cost of the property retained was just over £6,500.

- a* In 1964 the wife received an offer of £20,000 for the property retained from Kenash Property Development Ltd (which I shall call 'Kenash'); and without entering into any written contract of sale, she accepted the offer. If she had conveyed the property in the usual way, there would have been liability for tax on just under £13,500, and so she took advice as to how the burden could be reduced or avoided. She was given advice, and plainly acted on it. She executed a legal charge for £20,000 dated 18th September 1964 in favour of Kenash. By a conveyance the next day, 19th September, she conveyed the fee simple in the property to Kenash in consideration of Kenash releasing her from her covenant for repayment under the legal charge. In those circumstances the taxpayer contended that no short-term capital gains tax was payable and the assessment should be discharged. In reciting their decision in para 8 of the case stated the commissioners said no more than that they—
- c* 'felt that it was never the intention of the Finance Act 1962 to permit such a transaction, but on the evidence before us we upheld the [taxpayer's] appeal and discharged the assessment.'

The question of law stated for the opinion of this court is—

- d* 'whether on the facts and evidence before us our decision as set out in paragraph 8 above was erroneous in law.'

The case stated discloses no more than this of the process of reasoning whereby the commissioners reached their conclusion, nor of which of the legal arguments they accepted and which they rejected.

- e* With one exception, all the contentions advanced by the taxpayer, as recorded in the case stated, are clearly and obviously wrong. One contention was that under the rules of equity the wife, by mortgaging the property, 'relinquished her right in it but acquired the right of Equity of Redemption'. Whatever might be said about this proposition in relation to a mortgage by conveyance of the fee simple before 1926, it is plain nonsense in relation to a legal charge. Such a charge, authorised for the first time by the Law of Property Act 1925, s 87, does no more than give the chargee 'the same protection, powers and remedies' as if a mortgage term of 3,000 years had been created in his favour. When the wife had executed the legal charge on this property she had not 'relinquished her right in it'; for she retained her legal fee simple, quite apart from her rights in equity.
- f*

- g* Two other contentions were that 'by mortgaging the property for its full market value of £20,000, [the taxpayer's wife] acquired an Equitable Right which had no market value', and that '[the taxpayer's wife] had made a disposal of the Equity of Redemption at its market value, which was nil'. In my judgment these propositions betray an obvious confusion of thought. If a man owns the fee simple in a house worth £10,000 and then borrows £6,000 on the security of the house he does not thereby reduce the value of his fee simple to £4,000. He still owns a fee simple worth £10,000, but that fee simple is now encumbered by a debt of £6,000. A purchaser will still pay £10,000 for the house if he takes no more than what the owner has, namely, the fee simple. Out of that £10,000 the owner can discharge the mortgage and so convey the unencumbered fee. Alternatively, the purchaser may agree to take a transfer both of the fee simple and the mortgage debt. In that case the owner of the house still receives £10,000 for it, £4,000 in the form of cash and £6,000 by means of his being relieved of the burden of the debt for this amount. In popular parlance, I suppose one may regard the owner's interest in the house as being worth a mere £4,000; but that figure is achieved only by striking a balance between the value of his fee simple and a particular form of obligation, namely, the debt charged on the house. A man's property, retained by him unchanged, will not gradually sink in value to nil and then to a minus quantity as his debts pile up and he slides into insolvency, nor does his house or his interest in it fluctuate up and down in value with every debit and credit in his bank account merely because the house stands charged to the bank to secure his overdraft.
- j*

I do not know which of these propositions the General Commissioners accepted: they are all insupportable. The only other contention for the taxpayer that is recorded, other than general assertions that no tax was payable and that the assessment should be discharged, was that 'by mortgaging the property, [the taxpayer's wife] had not disposed of it'; and that by itself, saying nothing of the conveyance, plainly does not carry the taxpayer to victory. In fact, that is the only argument of the taxpayer that counsel for the Crown was able to accept; for under the Finance Act 1962, s 12 (9), a mortgage does not constitute a disposal. a
b

With the taxpayer's unarguable arguments out of the way, I may turn to the true position. I am primarily concerned with the question of what amounts to an acquisition and disposal of an interest or right in or over assets (Finance Act 1962, ss 10 (1), 12 (1)); and for this purpose the Act makes special provision. Counsel for the Crown put his submissions under three heads. First, where a contract is made to acquire or dispose of an asset, and that contract is duly carried out, it is the contract and not the conveyance that constitutes the acquisition or disposal: s 12 (2); and see Sch 9, para 1 (1). Here, there are clear findings by the General Commissioners that there was a contract. Among the facts admitted or proved there appear the following statements: c

'In 1964, [the taxpayer's wife] received an offer from Kenash to buy the remainder of the Alcester Road property at the price of £20,000, which was the full market value of the property. [The taxpayer's wife] agreed to accept this offer but no written contract of sale was entered into by her [Then, a little further on:] ... [the taxpayer's wife] sought advice as to the reduction or avoidance of her prospective liability to Short Term Gains in respect of the proposed sale to Kenash. She was advised to complete the sale to Kenash by the two documents next referred to'; d
e

and, of course, those two documents are the mortgage and the conveyance. It is true that there was no written contract, but, of course, that does not mean that there was no contract; even if a contract is supported by neither writing nor part performance, it remains a contract despite being unenforceable by action. Secondly, by s 13 (7) (and see s 12 (9)), any capital gains are to be computed on the basis that the property was acquired and disposed of free of any subsisting interest or right by way of security. For this purpose, the legal charge accordingly fell to be ignored. Thirdly, the transaction was in substance a sale even though it was carried out by two separate documents. The legal charge provided for repayment in six months' time; but there was obviously no reality in that provision. In my view, the two deeds taken together constitute a conveyance just as much as did the old device of lease and release. In my judgment all three submissions are sound. f
g

It follows that I consider that the General Commissioners were wrong in law in the conclusion that they reached. One may indeed sympathise with them in being asked to apply the complexities of the ten pages of the statute book occupied by ss 10 to 13 of the Act in relation to the law of mortgages; and, not for the first time, the expression 'equity of redemption' may have proved to be a will-o'-the-wisp in the morass. But wrong they were; and this simple device for escaping the consequences of short-term capital gains tax, a device which would no doubt have attracted to itself many eager customers, has proved a device which escapes nothing. On the face of the case stated there is a small discrepancy in the amounts, for the assessment is said to be on £13,066 and the argument was for £13,449; but it is accepted that the latter is the correct figure and that the taxpayer should be assessed on that. Accordingly, I hold that the decision of the commissioners was erroneous in law, that the appeal should be allowed, that the taxpayer should be assessed on £13,449, and that any necessary directions should be given for this purpose. h
j

Appeal allowed.

Solicitors: Solicitor of the Inland Revenue; Alan Lorenz & Co (for the taxpayer).

K Buckley Edwards Esq Barrister.

Crawford v Houghton

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND GRIFFITHS JJ

14th DECEMBER 1971

Road traffic – Construction, weight, equipment and use of vehicles – Regulations – Using vehicle on road which fails to comply with regulations – Using – Owner of vehicle – Liability – Vehicle being driven on road by third party at owner's request – Whether owner using vehicle – Road Traffic Act 1960, s 64 (2), as substituted by the Road Traffic (Amendment) Act 1967, s 6 (1).

Although the owner of a vehicle may be 'using' the vehicle for the purposes of s 64 (2)^a of the Road Traffic Act 1960, as amended, when it is being driven by his servant, he is not using it when it is being driven by a person other than his servant even though it is being driven at the owner's specific request and with his full knowledge (see p 538 g and h and p 539 a, post).

Dictum of Lord Parker CJ in *Windle v Dunning and Son Ltd* [1968] 2 All ER at 48 applied.

Notes

For using a vehicle on a road which fails to comply with the regulations governing the construction and use of vehicles, see 33 Halsbury's Laws (3rd Edn) 634, para 1069, and for a case on the subject, see 45 Digest (Repl) 70, 205.

For the Road Traffic Act 1960, s 64, see 28 Halsbury's Statutes (3rd Edn) 241.

Cases referred to in judgment

Carmichael & Sons Ltd v Cottle [1971] RTR 11.

Macleod v Penman, Hamilton v Blair and Meechan, Hawthorn v Knight 1962 JC 31, 1962 SLT 69, 45 Digest 135, *1178.

Windle v Dunning and Son Ltd [1968] 2 All ER 46, [1968] 1 WLR 552, 132 JP 284, Digest (Cont Vol C) 921, 205a.

Cases also cited

Griffiths v Studebakers Ltd [1924] 1 KB 102.

James & Son Ltd v Smea [1954] 3 All ER 273, [1955] 1 QB 78.

Mousell Brothers Ltd v London & North Western Railway Co [1917] 2 KB 836, [1916-17] All ER Rep 1101.

Case stated

This was an appeal by way of case stated by the justices for the city of Liverpool in respect of their adjudication as a magistrates' court sitting at Dale Street, Liverpool, on 19th April 1971. The respondent, James Houghton, chief constable of Liverpool and Bootle, preferred an information against the appellant, Carl Crawford, charging that he on 17th May 1970 did use a motor vehicle on the road without a valid licence or insurance and in contravention of several of the regulations of the Motor Vehicles (Construction and Use) Regulations 1969^b made under s 64 of the Road Traffic Act 1960.

The following facts were found. At 1.20 pm on 17th May 1970 Inspector Menzies of the Liverpool and Bootle Constabulary saw a man called Mr Gaule driving the vehicle referred to in the information along West Derby Road, Liverpool, away from the city. It was bearing trade plates of which the licensee was a firm called Barrow Engineering Autos of Seel Street which has no connection with either the appellant or Mr Gaule. The vehicle bore no licence, no wings, no mirrors inside or out, no horn, no lights or reflectors. The speedometer had no cable. The vehicle had an angle-iron frame and crash-bar with sharp corners. There were sharp edges on the scuttle, and

^a Section 64, so far as material, is set out at p 536 j, post

^b SI 1969 No 321

the rear valance was hanging down. It had no hand brake. At 1.55 p.m. Inspector Menzies saw the appellant who had arrived at the scene and asked him if he were the owner. He replied 'Yes, we bought it as a write-off'. The inspector asked him if it was being used on account of his business and he replied 'Yes, it is being taken to Kirkby'. The vehicle was adapted for racing on a track in stock car races and there was a meeting of that nature taking place at Kirkby Stadium that afternoon.

It was contended on behalf of the appellant that the evidence showed that the appellant was not present when the vehicle was being used by Mr Gaule and that the prosecution had failed to prove that the appellant knew that Mr Gaule was using the vehicle on a road or intended so to do. Further, there was no evidence that Mr Gaule was the appellant's servant and so the appellant could not be guilty of the offences, which were offences of strict liability, without it being proved that he knew the essential facts which constituted the offences.

The justices convicted the appellant and he was later fined £10 on each count and his licence endorsed where appropriate.

J Briggs for the appellant.

E Somerset Jones for the respondent.

LORD WIDGERY CJ. This is an appeal by case stated from justices for the city of Liverpool sitting as a magistrates' court at Liverpool on 19th April 1971. In the course of their adjudication they convicted the appellant of ten offences all concerned with the condition and use of a particular motor vehicle on a particular occasion. The motor vehicle is described as a stock car, but all that the case stated tells us by way of amplification of that information is that it seemed to have failed to comply with practically every known regulation affecting motor cars; there was an unauthorised use of trade plates, the vehicle had not got an excise licence, it had not got any wings, it had not got a mirror, it had not got an instrument capable of giving audible and sufficient warning of approach, it had not got lights, and so the catalogue goes on, ten offences altogether. At 1.20 p.m. on 17th May 1970 a somewhat astonished police officer saw this vehicle being driven on the highway by a Mr Gaule. The vehicle was stopped, and after a short interval the appellant arrived on the scene, obviously having come there because of some association with the vehicle. The police officer asked the appellant if he was the owner, and he replied, 'Yes, we have bought it as a write-off'. The inspector then asked if it was being used on account of his, the appellant's, business, and the appellant replied 'Yes, it is being taken to Kirkby', and the reference to its being taken to Kirkby was that there was a stock car racing meeting at Kirkby Stadium that afternoon and the vehicle was going to Kirkby on the appellant's behalf for the purposes of that meeting.

The justices gave the following opinion in the course of their case. They said that they were of opinion that in view of the evidence of the police officer, there was evidence that Mr Gaule had been using the vehicle with the authority of the appellant and with his knowledge and that therefore the appellant was using the vehicle.

The only argument before us, and it has been an interesting and valuable argument, is whether it was correct to convict the appellant in these circumstances of the offence of using the defective vehicle. The regulations which were breached are regulations made under the Road Traffic Act 1960, and the section, which is s 64 (2)¹, provides as follows:

'Subject to the provisions of this section, a person—(a) who contravenes or fails to comply with any such regulations as aforesaid; or (b) who uses on a road a motor vehicle or trailer which does not comply with any such regulations or causes or permits the vehicle to be used; shall be liable on summary conviction to a fine not exceeding £50.'

¹ As substituted by s 6 (1) of the Road Traffic (Amendment) Act 1967

a The argument which is put before us today by counsel for the appellant is that on the facts found by the justices it may well have been open to them to convict the appellant of causing or permitting the vehicle to be used in this defective condition, but, says counsel for the appellant, it was not open to the justices to convict him of using the vehicle.

b There is a great deal of authority in recent years on points similar to the one with which we are now concerned; the offence of using is an absolute offence, whereas the offence of causing or permitting requires knowledge on the part of the accused. It is often more difficult to convict, therefore, of causing and permitting than it is of using, but it is quite clear that the prosecution must lay their information under the correct constituent of the section, and if in fact this was only causing or permitting and not using, the correct answer is that the information should be dismissed.

c I feel it possible to start in regard to authority on this point with *Windle v Dunning and Son Ltd*². This was a case in which quarry owners had entered into a contract with haulage contractors to supply vehicles and drivers for the purpose of hauling the stone from the quarry and on an occasion three of these vehicles were found on the road with excessive loads, and the quarry owners were charged with using these vehicles in contravention of the appropriate regulations. Lord Parker CJ, having read s 64 (2), went on in these terms³:

d 'In my judgment, as was said by the Lord Justice-General (LORD CLYDE) in giving judgment in *MacLeod v. Penman*, *Hamilton v. Blair and Meechan*, *Hawthorn v. Knight*⁴, "The presence in the section of the alternatives of causing or permitting the use must limit the scope of what is 'using'. Normally 'using' is applicable to the actual driver." [Then Lord Parker goes on:] I entirely agree with that, and in my judgment, "using" when used in connexion with causing and e permitting has a restricted meaning. It certainly covers the driver; it may also cover the driver's employer if he, the driver, is about his master's business, but beyond that I find it very difficult to conceive that any other person could be said to be using the vehicle as opposed to causing it to be used.'

f Applying that judgment to the present circumstances would lead to the conclusion that the appellant had been wrongly charged, because there is no suggestion that Mr Gaule, who was driving the vehicle, was his servant, and Lord Parker CJ's classification of those who are to be treated as using would exclude, it seems, the appellant.

g The other more recent authority which I find helpful, which is again a decision of this court, is the case of *Carmichael & Sons Ltd v Cottle*⁵. This was a case in which a vehicle had been let out on hire for self-drive hire, and the vehicle was found after a period of the hiring to be defective in regard to its tyres. The question arose whether the owners of the vehicle who let it out on hire could be described as using it in that condition, when in fact the driver of the vehicle was of course the hirer. Lord Parker CJ said this⁶:

h 'It has long been held that, when the offence is not merely an offence of user but can be an offence of causing or permitting the user, a restricted meaning should be given to "use".'

He refers then to *Windle v Dunning and Son Ltd*², and repeats what he said in the earlier case by way of reference to the Lord Justice-General's judgment in *MacLeod v Penman*⁷. He deals with an argument not previously raised, namely that even if the

j 2 [1968] 2 All ER 46, [1968] 1 WLR 552

3 [1968] 2 All ER at 48, [1968] 1 WLR at 556

4 1962 JC 31 at 46, 1962 SLT 69 at 75

5 [1971] RTR 11

6 [1971] RTR at 14

7 1962 JC 31

owners of the vehicle in that case could not be regarded as its users, they could nevertheless be convicted of aiding and abetting the user. He says⁸:

'Mr Barnes for the prosecution fully recognises that; but he says that, in this case, unlike *MacLeod v Penman*⁹ and *Windle v Dunning and Son Ltd*¹⁰, there is room as it were for the application of the general principle in relation to aiders and abettors. He says here that, on the facts found by the justices, it is permissible to treat the defendants as accessories before the fact. It may be, and I find it unnecessary to decide it, that the answer to that is that, when the words used are "using or causing or permitting", there is no room for the application of the principle in regard to aiders and abettors. The statute in other words itself provides the alternatives, and, if a person is to be charged as an aider and abettor or an accessory, he should be so charged, and under these provisions should be specifically charged with causing or permitting the user.'

Then he goes on to deal with the necessity for the prosecution making it clear in the information what is the case they propose to make against the defendant.

Ashworth J, agreeing with the judgment¹¹, said that he would like for his part—

'to express my own agreement with what had fallen from Lord Parker CJ about the nature of the charge which should be brought when the prosecution seek to render someone liable not as himself being the user of the vehicle but as someone who is an aider and abettor and, to use a familiar phrase, has counselled and procured the misuse of the vehicle, but I agree entirely with what Lord Parker CJ has said.'

I have not found this a particularly easy case because I find it difficult to accept that if a man can use a vehicle through the hands of his servant, he cannot be said to use it at the hands of someone who at his specific request drives it on a journey at the express orders and with the full knowledge of the owner. No doubt the line must be drawn somewhere, and Lord Parker CJ's judgments to which I have referred show a tendency to restrict the capacity of persons using in cases where the alternatives of permitting or causing to be used are provided.

I have thought for some time that it might be right for us to say in the present case that there is yet another category of user for present purposes, not merely the actual driver or his employer, but someone who by specific and immediate direction causes a vehicle to be driven in the manner in which it was driven in this case. But in the end I have come to the conclusion that it would not be right in view of the authorities to strive to extend the meaning of 'use' for the present purposes, and that only confusion may follow in subsequent cases if we endeavour so to do.

I have therefore come to the conclusion that this is a case on the wrong side of the line as far as the prosecution are concerned, and that although the appellant would clearly have been guilty of a charge of permitting the use, he was not a user within the authorities and therefore his conviction of using the vehicle on charges 3 to 10 inclusive is one which ought to be set aside. It may be that different considerations would apply to the first two charges if considered in isolation because there the section creating the offence does not contain the alternative of 'causing or permitting' but this was not explored in the court below and I would not feel it right to make a distinction in this court, in view of the fact that the possibility of distinction was not canvassed by the fact-finding tribunal. I think that the only right way of disposing of this matter is to allow the appeal and quash all convictions.

8 [1971] RTR 11 at 14

9 1962 JC 31

10 [1968] 2 All ER 46, [1968] 1 WLR 552

11 [1971] RTR 11 at 15

a ASHWORTH J. I agree.

g GRIFFITHS J. I also agree.

Appeal allowed.

b Solicitors: Jeffrey Gordon & Co agents for Silverbeck & Co, Liverpool (for the appellant); Cree, Godfrey & Wood, agents for R H Nicholson, Liverpool (for the respondent).

Jacqueline Charles Barrister.

Jemmison v Priddle

c QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND GRIFFITHS JJ

8th DECEMBER 1971

d *Game – Licence – Exceptions and exemptions from need to hold licence – Deer – Taking or killing deer on enclosed lands by direction or permission of owner or occupier – Enclosed lands – Farmland – Accused shooting deer on farm with owner's permission – Deer shot on owner's land crossing boundary and dying on neighbouring land where accused had no permission to shoot – Whether farmland 'enclosed lands' – Whether killing of deer on owner's land – Game Licences Act 1860, ss 4, 5.*

e *Magistrates – Information – Duplicity – Taking or killing game without a licence – Information alleging killing of two deer in one charge – Shots fired within seconds from same geographical location – Shots separate acts – Whether shots constituting single activity – Whether information bad for duplicity – Game Licences Act 1860, s 4.*

f The appellant, who did not hold a game licence, was shooting deer on B's farm with B's permission. A friend who was with him put up two deer from a covert, and the appellant fired three shots. One shot missed. The second hit and killed one of the deer when it had already left B's land and was on the neighbouring land of P, where the appellant had no permission to shoot. The third shot hit the other deer on B's land. The deer then ran on to P's land where it died. An information was preferred against the appellant charging that he 'unlawfully did take and kill and pursue certain Game, to wit, two red deer' without a licence contrary to s 4^a of the Game Licences Act 1860. He was duly convicted, the justices holding that he had no defence under s 5^b of the 1860 Act since B's farm was not 'enclosed lands' within the meaning of that section. They took the view that 'enclosed lands' meant land in the nature of a deer park, where deer were kept and where the landowner from time to time might require deer to be killed. On appeal the appellant contended (a) that the information was bad for duplicity in that it alleged two offences, i.e. the killing of each of the two deer; alternatively, (b) that the justices were wrong in holding that B's farm was not enclosed land, and (c) that even if the appellant was guilty of killing the first deer on P's land, he was not guilty in respect of the other which was shot on B's land.

g **Held** – (i) The information was not bad for duplicity; a charge was only bad for duplicity when it alleged facts constituting two different activities; it was legitimate to charge in a single charge one activity even though that activity might involve

j a Section 4, so far as material, provides: 'Every person, before he shall in Great Britain take, kill, or pursue, . . . any game . . . or any deer, shall take out a proper licence to kill game under this Act . . . and if any person shall do any such act as herein-before mentioned in Great Britain without having duly taken out and having in force such licence as aforesaid, he shall forfeit the sum of twenty pounds.'

b Section 5, so far as material, is set out at p 542 b, post

more than one act; although the firing of each shot could be regarded as a separate act, they had occurred within a very few seconds and all in the same geographical location and therefore could be fairly described as components of a single activity, i.e. shooting red deer without a game licence; accordingly it was proper to join them in a single charge (see p 544 d and e, post); dictum of Lord Parker CJ in *Ware v Fox* [1967] 1 All ER at 102 applied.

(ii) B's farmland was 'enclosed lands' within the meaning of s 5 of the 1860 Act; the contrast was between enclosed lands, such as land used for farming and enclosed by normal agricultural hedges, and moorland where there were no enclosures and where the deer could run free (see p 543 a and b, post).

(iii) As the appellant had no permission to kill the deer shot on P's land, he was guilty of the offence charged in respect of that killing; as, however, the second deer had been shot on B's land, the killing had taken place on land where the appellant had the permission of the owner or occupier to hunt even though the deer only dropped when it had passed on to P's land; accordingly, by virtue of s 5 of the 1860 Act, no offence had been committed in respect of that killing (see p 543 c and d, post).

(iv) As the justices had treated the matter as a single offence, the conviction was justified and the appeal would be dismissed (see p 544 f, post).

Notes

For offences in connection with game licences, see 18 Halsbury's Laws (3rd Edn) 123, 124, 152-155, paras 255, 311-313, and for cases on the subject, see 25 Digest (Repl) 409, 410, 393-397.

For informations charging more than one offence, see 25 Halsbury's Laws (3rd Edn) 187, 188, para 339, and for cases on the subject, see 25 Digest (Repl) 410, 397, and 33 ibid 199-201, 407-423.

For the Game Licences Act 1860, ss 4 and 5, see 14 Halsbury's Statutes (3rd Edn) 476.

Cases referred to in judgment

R v Ballysingh (1953) 37 Cr App Rep 28, 14 Digest (Repl) 249, 2153.

Ware v Fox [1967] 1 All ER 100, [1967] 1 WLR 379, 131 JP 113, Digest (Cont Vol C) 670, 243bd.

Cases and authority also cited

Blade v Higgs (1863) 9 HL 633.

Dolby v Halmshaw [1936] 3 All ER 229, [1937] 1 KB 196.

Sherras v De Rutzen [1895] 1 QB 918.

Archbold's Criminal Pleading, Evidence and Practice, 37th Edn, para 122.

Case stated

This was an appeal by way of case stated by justices for the county of Devon, acting in and for the petty sessional division of South Molton in respect of their adjudication as a magistrates' court sitting at South Molton on 12th May 1971.

On 28th April 1971 an information was preferred by the respondent, Gordon William Priddle, against the appellant, Raymond Ronald Jemmison, charging that he, on 6th February 1971 at Lower Sheepsbyre Farm, Chulmleigh, in the county of Devon unlawfully did take and kill and pursue certain game, to wit two red deer without having duly taken out and having in force such a licence as was and is required by s 4 of the Game Licences Act 1860.

The justices heard the information on 12th May 1971 when the appellant was represented by a solicitor and pleaded not guilty. The respondent was represented by a solicitor, who called witnesses to give evidence and read, in accordance with s 9 of the Criminal Justice Act 1967, the statement of a veterinary surgeon. The appellant then gave evidence. The justices convicted and fined him.

The justices found as a fact that the appellant with a friend, Mr Clements, asked permission to shoot deer on the farm of Mr Burke. The appellant waited with a

a 12-bore shotgun while the other two drove deer out of a wood past him. He shot at two of the running deer. One hind crossed the stream boundary on to the farm of Mr Pincombe, where it turned and looked back. The appellant claimed to recognise this as the sign of a wounded deer and fired a further ball across Mr Pincombe's land. The veterinary surgeon's evidence showed that this hind was shot in the neck and would have died instantly. He described no other wounds.

b The appellant stated that another hind crossed the stream and dropped in its tracks on Mr Pincombe's land. The veterinary surgeon described severe shoulder injuries compatible with this animal having been shot with a single ball cartridge on Mr Burke's land. Both animals fell many yards inside Mr Pincombe's boundaries and the justices were satisfied that one of them was shot on Mr Pincombe's land. Mr Pincombe had given no one permission to shoot on his land and would not allow the appellant and his friends to remove the two deer carcasses. The appellant claimed c that he and his friend, Mr Clements, had permission from farmers to shoot over upwards of a thousand acres of Exmoor, but he realised that he was a trespasser when he entered Mr Pincombe's farm.

The justices' conclusions took account of the fact that the shooting of deer basically requires a game licence and that deer are mentioned in the Game Licences Act 1860 d in a separate exception from snipe and other game. They considered that the phrase 'deer in enclosed lands' in s 5 of the Game Licences Act 1860 must relate to deer in a special category and that the exception permitting an owner of such lands to shoot deer without a licence applied to specially kept and bred herds; it contemplated special methods of enclosure adopted for the containment of animals on private land, so that the landowner was empowered by the Act to control the population of deer e within the enclosed lands. The justices felt that the exception could not be widened to cover an owner of enclosed farmland. Fences were for the enclosure of domestic cattle and do not establish boundaries conferring ownership of wild deer on those who merely enclosed land to fence in their own cattle. For these reasons the justices concluded that wild deer did not belong to the landowner as did those which were reared and cared for in semi-domesticated deer herds. The justices further con- f sidered the question of permission that was given by Mr Burke to the appellant so that the latter could claim the benefit of the exception in s 5 of the 1860 Act and s 98 of the Agriculture Act 1947, as amended, and s 10 of the Deer Act 1963 concerning depredation of crops by deer. The evidence that they accepted led them to believe that one deer was certainly killed instantly on another farmer's land where the appellant could not claim 'permission' to shoot. The justices concluded that, even g if their view that 'enclosed lands' in the exception related to deer parks of reared animals, was erroneous, nevertheless the owner of one farm (if that was 'enclosed lands') could not confer shooting rights by reason of 'enclosure' on the appellant enabling him to fire over the boundaries so as to kill deer on another farm, nor could he confer any right he claimed under the Agriculture Act 1947^c, as amended, to shoot depredating deer without a game licence to another person who was shooting deer h for sport. Further no evidence was led by the appellant that Mr Burke had suffered any depredation by deer. The fact that the later Agriculture Act^c gave special exemption to farmers to shoot depredating deer would seem to lend support to the justices' conclusion that such permission is not conferred under the Game Licences Act 1860. These being their conclusions, they convicted the appellant.

Nigel Inglis-Jones for the appellant.

j I B S Edwards for the respondent.

LORD WIDGERY CJ. This is an appeal by case stated from justices for the county of Devon sitting at South Molton who on 12th May 1971 convicted the appellant, Raymond Ronald Jemmison, on an information alleging the following offence:

c I.e., ss 98 and 100; see 1 Halsbury's Statutes (3rd Edn) 211-214

'That he on the 6th February, 1971, at Lower Sheepsbyre Farm, Chulmleigh in the County of Devon unlawfully did take and kill and pursue certain Game, to wit, two red deer without having duly taken out and having in force such a Licence as was and is required by the Game Licences Act, 1860.'

To look at the legislation to begin with, the Game Licences Act 1860 requires the taking out of a licence for anyone who seeks to take and kill game in Great Britain and prescribes a penalty for neglect. But s 5 of the same Act contains a number of exceptions and exemptions, the exceptions dealing with the circumstances of the activity and the exemptions dealing with certain personalities who are exempted from the operation of the Act. Under the exceptions one finds in exception 5: 'The taking and killing of deer in any enclosed lands by the owner or occupier of such lands, or by his direction or permission.' For the present purpose the offence charged was committed by the appellant unless, in the circumstances of the offence or the alleged offence, s 5 applied to exempt him. The case stated is not, I am bound to say, quite as clear as it might be. It is not the first time today that this court has been faced with a case stated which does not clearly set out the facts proved. One cannot overstress the importance of clear findings of fact as the basis of an appeal by case stated. However, it seems to me that one can take as the basic circumstances which the justices must have found in this case the following. On the day in question the appellant with a friend was shooting deer; he had obtained permission to shoot on the farm of a Mr Burke, and to the farm of Mr Burke he and his friend repaired. The friend put up two deer from a covert and the appellant waited with his 12-bore shotgun, as it is described in the case, to shoot them when they appeared. Two running deer appeared and the appellant fired three shots; one shot missed and is wholly unaccounted for, one shot hit a hind when it had left the land of Mr Burke and was already on the neighbouring land of a Mr Pincombe. This first hind was hit and killed when it was on Mr Pincombe's land, it having run there from the land of Mr Burke. In regard to the second hind, this was killed by the third shot fired by the appellant. This fell on Mr Pincombe's land having run there from the land of Mr Burke, but there was apparently, according to the justices, some evidence of a veterinary surgeon to the effect that this second hind was hit when it was on Mr Burke's land and nevertheless ran on in a wounded state until it fell on Mr Pincombe's land. It is unsatisfactory that the justices do not say whether they accepted that veterinary evidence or not. I think in the circumstances that this court ought to assume that the justices found that as a fact, and thus produced a picture in which both animals fell on Mr Pincombe's land, whereas one was hit on Mr Burke's land and subsequently moved on to Mr Pincombe's land.

The relevance, of course, of the difference between the one land ownership and the other is that the appellant had permission to shoot on Mr Burke's land, he had no permission to shoot on Mr Pincombe's land, and as I have already pointed out in exception 5, one of the requirements of the exception is that the killing of deer should be by the owner or occupier of such land or by his direction or permission.

I should proceed to say something of the justices' own view. They had to consider whether the land on which all this happened consisted of enclosed lands within the meaning of exception 5. If the land did not consist of enclosed land, then the exception could not apply, and the offence was undoubtedly committed. Having given the matter careful attention, the justices took the view that enclosed lands in this context were lands in the nature of a deer park, lands in the nature of an enclosure where deer were kept and where the landowner might require power to kill deer from time to time in order to maintain the herd and to cull out those animals which were weakly or sick. The justices, as I read their case, eventually came to the conclusion that these lands were not enclosed lands because they were perfectly ordinary Devonshire farmland and were not in any sense a deer park or place where deer were artificially accumulated and kept.

a The first point taken by counsel for the appellant today is that the justices were wrong in the meaning they gave to the phrase 'enclosed land'. All I can say on this point is that I agree with counsel for the appellant's argument, an argument which is not seriously disputed by counsel for the respondent. I think in this context the contrast is between enclosed lands, such as lands used for farming and enclosed by normal agricultural hedges, and moorland where there are no enclosures and where the deer can run free. In my judgment all land with which we are concerned here, b whether it be the land of Mr Burke or of Mr Pincombe, being ordinary Devonshire farmland was enclosed land for present purposes. Thus counsel for the appellant makes his first point.

c The second question of course is to decide whether these two deer were killed on land where the appellant had the permission of the owner to kill them. So far as the deer which was shot on Mr Pincombe's land was concerned, the appellant clearly had no permission from the owner of that land to kill the deer; in fact Mr Pincombe was extremely angry about it one gathers, and refused to allow the carcase to be removed. On the other hand, if it be right that the second deer was hit on Mr Burke's land and moved on to Mr Pincombe's land before it dropped, then in my judgment the shooting of the second deer would have been a killing within the meaning of the exception on land where the appellant had the permission of the d owner or occupier to hunt. Accordingly, taking the matters raised so far, the position would be that the appellant would be guilty in respect of the first deer but not guilty in respect of the second; in respect of the second the killing would have been within his legal rights, although he had no game licence under the Act.

e That brings us, however, to the third and last point taken by counsel for the appellant, and indeed perhaps the point which has given the court the most trouble, because now at the eleventh hour counsel for the appellant submits that the information was in any event bad for duplicity. He maintains that although no word of this was said in the court below, and therefore no opportunity was given to the prosecution to amend this information if it wished, he submits nevertheless that in this court, it being a matter going to jurisdiction, he is entitled to raise it, and that it is conclusive f of the appeal in his favour. With some reluctance on my part I feel bound to accept that it is open to counsel for the appellant to raise this matter in this court notwithstanding the history of the case. One therefore has to consider the correctness of the submission which he seeks to make. His argument briefly is that the information relates to two red deer, that the killing of each of those deer was a potential offence in the absence of the appellant having a game licence, so he says you have an information bad for duplicity because it contains within itself an allegation of two separate g offences. The principles which determine the circumstances in which an information will or will not be bad for duplicity are not clearly laid down. There are various landmarks, as it were, in the subject for guidance, but there is a substantial area in between where the court must in my judgment retain a measure of discretion. I take as one landmark *R v Ballysingh*¹, and it suffices to read the headnote:

h 'Where, in a case of shoplifting, the evidence for the prosecution shows that a number of articles have been taken from different parts of a large stores, the proper course is to make each taking the subject of a separate count for larceny.'

i Thus if the accused is alleged to have gone to one department and picked up a handful of tomatoes, or whatever it may be, it is perfectly legitimate to charge that as a single offence. If the accused spends a substantial time going round the floors picking up a separate article here and another article there, on the authority of *R v Ballysingh*¹ those individual articles ought to be charged separately. One asks oneself why? What is the principle which distinguishes between these two cases, and one finds that the explanation is given in somewhat inappropriate language, namely that the test

is whether the acts were all one transaction. That is a phrase hallowed by time but not, in my judgment, of particular assistance in dealing with a particular problem. I find some more assistance from somewhat different language used by Lord Parker CJ in *Ware v Fox*². It is not necessary to deal with the facts of the case; it suffices to say that there, there was a charge under s 5 of the Dangerous Drugs Act 1965 in which an allegation was made that premises were being used for the purpose of smoking cannabis resin or for the purpose of dealing in cannabis resin, and a considerable argument developed whether that count was bad for duplicity or not. In dealing with this Lord Parker CJ said³:

'I find it easiest to approach the matter by considering what would have been the position if this information had been laid under para. (a) [of s 5 of the Dangerous Drugs Act 1965]. If laid under para. (a), it would, as it seems to me, allege a user for two completely different activities, one for the purpose of smoking and the other for the purpose of dealing. Prima facie, therefore, it is alleging two separate offences. It is quite different from the sort of case which alleges one activity achieved in one of two different respects.'

I think perhaps that phraseology from Lord Parker CJ is more helpful to me than the phraseology often found in the textbooks, and I think that what it means is this, that it is legitimate to charge in a single charge one activity even though that activity may involve more than one act. One looks at this case and asks oneself what was the activity with which this man was being charged? It was the activity of shooting red deer without a game licence, and although as a nice debating point it might well be contended that each shot was a separate act, indeed each killing was a separate offence, I find that all these matters, occurring as they must have done within a very few seconds of time and all in the same geographical location, are fairly to be described as components of a single activity, and that made it proper for the prosecution in this instance to join them in a single charge. I would find, therefore, that the information was not bad for duplicity, and I would find that the conviction was justified, at all events in regard to the deer which on any view of the matter was hit after it had reached Mr Pincombe's land.

ASHWORTH J. I agree.

GRIFFITHS J. I also agree.

Appeal dismissed.

Solicitors: *Field, Fisher & Co*, agents for *J Furse, Sanders & Frith*, South Molton (for the appellant); *Sharpe, Pritchard & Co*, agents for *N B Jennings*, Exeter (for the respondent).

N P Metcalfe Esq Barrister.

² [1967] 1 All ER 100, [1967] 1 WLR 379

³ [1967] 1 All ER at 102, [1967] 1 WLR at 381

R v HM Inspector of Taxes, ex parte Clarke

COURT OF APPEAL, CIVIL DIVISION

SALMON, BUCKLEY AND ORR LJJ

25th, 26th, 27th OCTOBER 1971

Income tax – Appeal – Case stated – Determination of appeal by commissioners – Declaration of dissatisfaction immediately after determination – Immediately – Crown declaring dissatisfaction and requiring case to be stated for opinion of the High Court – Commissioners' determination communicated by post – Delay of 13 days before Crown declaring dissatisfaction – Alternative assessments – Commissioners upholding one assessment and discharging alternative assessment at Crown's invitation – Taxpayer expressing dissatisfaction and requiring case to be stated in respect of first assessment – Whether Crown precluded by reason of invitation from expressing dissatisfaction with discharge of alternative assessment – Whether dissatisfaction declared immediately – Whether failure to declare dissatisfaction immediately precluding commissioners from stating case – Income Tax Act 1952, s 64 (1), (2).

At the conclusion of the hearing of an appeal against alternative assessments to income tax under Case I of Sch D and to short-term capital gains tax under Case VII on a profit made by the taxpayer, the General Commissioners indicated (with the concurrence of both parties) that they would consider the matter and put their decision into writing. As the decision would deal with several complex points of law the Crown's representative at the hearing, M, asked the commissioners to send the written decision to him at Somerset House in London and reminded the clerk to the commissioners by telephone during the following month. On 9th March 1970 the commissioners made their decision, by which they affirmed the assessment to income tax under Case I and, as they had been invited by M to do in such an eventuality, discharged the Case VII assessment. The commissioners stated however that, if not assessable under Case I, the profit would have been properly chargeable to capital gains tax under Case VII. Owing to an oversight in the office of the clerk to the commissioners the decision was sent, not to M, but to the office of the inspector of taxes at Sudbury, arriving on the following day. A newly appointed inspector, who had had nothing to do with the case and did not appreciate that it might be necessary to take urgent action on an appeal which the Crown had won, did not forward the decision to Somerset House until 20th March. M received it on 23rd March. Realising the importance of keeping open the decision on the Case VII assessment in the event of an appeal by the taxpayer against the Case I assessment, M wrote to the clerk to the commissioners on the same day stating that, although the commissioners' discharge of the Case VII assessment was inevitable in view of the confirmation of the Case I assessment and it might therefore seem illogical at first sight for the Crown to express dissatisfaction, he was doing so as a precaution solely to safeguard the Crown's position in the High Court in the event of the taxpayer asking the commissioners to state a case. He pointed out that it did not mean that the Crown necessarily contemplated asking the commissioners to state a case. The taxpayer had in fact already expressed dissatisfaction with the decision under s 64 (1)^a of the Income Tax Act 1952 and had requested the commissioners to state a case under s 64 (2)^a. On 2nd April M asked the commissioners to state a case for the opinion of the High Court on the Case VII assessment. The taxpayer applied for an order directed to the commissioners prohibiting them from stating a case on the ground that they had no power to do so since the Crown had failed to give notice of dissatisfaction 'immediately' as required by s 64 (1) of the 1952 Act. It was further contended by the taxpayer that the Crown was in any event precluded from expressing dissatisfaction with the commissioners' discharge of the Case VII assessment since they had acquiesced in its discharge.

^a Section 64, so far as material, is set out at p 549 e, post

Held – An order prohibiting the commissioners from stating a case for the opinion of the High Court on the Case VII assessment would not be granted for the following reasons—

(i) the Crown had expressed their dissatisfaction with the determination of the commissioners as being erroneous in point of law ‘immediately after the determination’ of the appeal in accordance with s 64 (1); the requirement that dissatisfaction should be expressed ‘immediately’ meant that it should be expressed with all reasonable speed according to the circumstances of the case; the Crown had, in the circumstances, expressed dissatisfaction with all reasonable speed in view of the fact (a) that where a decision was given through the post there was no obligation to communicate the dissatisfaction to the other party who could not, therefore, be affected by any delay, (b) that the only reason for the delay in informing the commissioners was the oversight on the part of their office in failing to send the decision to M at Somerset House as requested, and (c) that M had written to the clerk to the commissioners expressing the Crown’s dissatisfaction on the day that the commissioners’ decision reached him (see p 550 g and j, p 551 b to d and h, p 554 j and p 555 g and h, post); dictum of Fletcher Moulton LJ in *Re Coleman’s Depositories Ltd and Life and Health Assurance Association* [1904-07] All ER Rep at 387 applied.

(ii) even if the Crown’s dissatisfaction could not be said to have been expressed immediately, the requirement of immediacy was directory and not mandatory since it was of no discernible material importance to the subject-matter with which s 64 of the 1952 Act was concerned; the fact that the notice of dissatisfaction had not been served immediately did not therefore deprive a party of his right to have a case stated for the High Court, nor did it put the party at the mercy of the commissioners so that it was in their discretion whether to state a case or not (see p 553 d and h, p 554 a and j and p 556 b, post); dictum of Lord Penzance in *Howard v Bodington* (1877) 2 PD at 210, 211 applied;

(iii) the Crown were not precluded from challenging the commissioners’ decision on the Case VII assessment by reason of the fact that, in the light of the confirmation of the Case I assessment, they had acquiesced in its discharge; the two assessments were alternative to each other and it would be absurd if the Crown had to go before the court to hear an appeal by way of case stated against the Case I assessment without being able to appeal against the discharge of the alternative assessment under Case VII (see p 554 e f and j and p 555 c to e, post).

Decision of the Queen’s Bench Divisional Court [1971] 3 All ER 394 affirmed on other grounds.

Notes

For appeals by way of case stated against determinations of the General or Special Commissioners of Income Tax, see 20 Halsbury’s Laws (3rd Edn) 44, 690, 691, paras 61, 1362.

For the Income Tax Act 1952, s 64, see 31 Halsbury’s Statutes (2nd Edn) 66.

As from 6th April 1970, s 64 of the Income Tax Act 1952 has been replaced by s 56 of the Taxes Management Act 1970.

Cases referred to in judgments

Andrew v Taylor (1965) 42 Tax Cas 557, 28 (1) Digest (Reissue) 117, 341.

Barker v Palmer (1881) 8 QBD 9, 51 LJQB 110, 45 LT 480, 13 Digest (Repl) 425, 508.

Coleman’s Depositories Ltd and Life and Health Assurance Association, Re [1907] 2 KB 798, [1904-07] All ER Rep 383, 76 LJKB 865, 97 LT 420, 30 Digest (Repl) 213, 555.

Grainger v Singer [1927] 2 KB 505, 96 LJKB 917, 137 LT 629, 11 Tax Cas 704, 28 (1) Digest (Reissue) 569, 2102.

Howard v Bodington (1877) 2 PD 203, 42 JP 6, 44 Digest (Repl) 304, 1340.

Inland Revenue Comrs v Park Investments Ltd [1966] 2 All ER 785, [1966] Ch 701, [1966] 3 WLR 65, 43 Tax Cas 215, 28 (1) Digest (Reissue) 399, 1463.

- a *Liverpool Borough Bank v Turner* (1860) 1 John & H 159, 29 LJCh 827, 3 LT 84; *affd* 2 De GF & J 502, 30 LJCh 379, 5 Digest (Repl) 832, 7023.
R v *Edmonton Income Tax Comrs, ex parte Thompson* [1929] 1 KB 220, 98 LJKB 201, 140 LT 380, 14 Tax Cas 313, 28 (1) Digest (Reissue) 569, 2100.
R v *Pontypool Gaming Licensing Committee, ex parte Risca Cinemas Ltd* [1970] 3 All ER 241, [1970] 1 WLR 1299, Digest (Cont Vol C) 397, 352Ab.
- b *Taylor v Taylor* (1875) 1 Ch 426, 45 LJCh 373; *affd* (1876) 3 Ch 145, 44 Digest (Repl) 317, 1484.

Appeal

The taxpayer, Horace Linsell Clarke, appealed against an order of the Queen's Bench Divisional Court (Lord Widgery CJ, Ashworth and Willis JJ) made on 11th May 1971 and reported at [1971] 3 All ER 394, dismissing the taxpayer's motion for an order of prohibition directed to the General Commissioners of Income Tax for the Division of Freshwell prohibiting them from stating and signing a case under s 64 (2) of the Income Tax Act 1952 at the request of the inspector of taxes for the district of Sudbury on 2nd April 1970. The request followed the commissioners' decision on 9th March 1970 to discharge an assessment on the taxpayer under Case VII of Sch D of the 1952 Act for 1964-65. The facts are set out in the judgment of Salmon LJ.

- d M D Jones for the taxpayer.
P W Medd for the Crown.

SALMON LJ. In January 1967 an assessment was made on the present appellant, Mr Clarke ('the taxpayer'), in the sum of some £23,000, under Case VII of Sch D in respect of a short-term capital gain arising as a result of the acquisition and subsequent disposal of Muchmore's Farm, Great Saling, in Essex. Between January 1967 and January 1969 it appeared that the taxpayer might be going to say that the profit or gain (if any) was not a short-term capital profit or gain, but was a gain attributable to his trade. It is quite plain from s 10 (1) of the Finance Act 1962 that short-term gains can be chargeable under Case VII only if they are not gains which accrue as profits of a trade. Accordingly in January 1969 another assessment (which in effect was an alternative assessment) was made for a similar sum in respect of the same transaction, but it was made under Case I of Sch D as being a profit or gain in respect of a transaction which was an adventure in the nature of trade.

The taxpayer appealed against both these assessments. The appeals came on for hearing before the General Commissioners of Income Tax for Freshwell in January 1970 and the hearing appears to have occupied six whole days. At that hearing the inspector who had made the assessments was represented by Mr MacKeith, a member of the Bar who is employed in the office of the Solicitor of Inland Revenue. He made it plain to the commissioners that they could not affirm both assessments; that if they affirmed the assessment under Case I they would have to discharge the assessment under Case VII. At the hearing the taxpayer had the advantage of being represented by Mr Marcus Jones and the points taken on his behalf were these: first of all, it was said that he was not engaged in trading in land; then that in any event he had not made a short-term capital gain and indeed that there was no gain of any kind to be taxed; and a number of complex points of law were argued in support of those latter contentions. At the conclusion of the hearing the General Commissioners indicated that they would consider the matter and put their decision into writing and this, according to the affidavit of the taxpayer's solicitor, was done with the concurrence of both parties to the appeal.

Mr MacKeith at the conclusion of the hearing asked the clerk to the commissioners to send the written decision to him at Somerset House in London. It must have been apparent to Mr MacKeith that the decision would deal with a number of complex points of law and that it was important that he should see it at the earliest opportunity so as to be able to advise his client what to do and to take the necessary steps on behalf

of his client. When he made that request to the clerk to the General Commissioners he obviously had the ostensible authority of his client to ask that the decision of the commissioners should be sent to him (Mr MacKeith) who would receive it on behalf of his client and deal with it for him. Moreover, in the following month of February he telephoned Mr Jenkins, the clerk to the commissioners, and asked him when the decision might be expected and at the same time reminded him that the decision was to be sent to him (Mr MacKeith) at Somerset House. There is no suggestion at all that Mr Jenkins demurred to that request and, of course, there was no reason why he should have done so. a
b

The General Commissioners reached their decision on 9th March, and a copy was duly sent to the taxpayer, but unfortunately, through some slip or oversight in the office of the clerk to the General Commissioners, the decision was not sent to Mr MacKeith at Somerset House, but was sent direct to the inspector of taxes' office at Sudbury. As chance would have it, on that very day, so we are told, Mr Rivett, who had been attending to this matter as inspector and who had given evidence at the hearing before the commissioners, having previously handed all the papers in the appeal over to Mr MacKeith to deal with, ceased to operate at the office in Sudbury. His place was taken by Mr Follett, an inspector of taxes, who is the nominal respondent, but he in fact, according to the uncontradicted evidence, had had nothing to do with the appeal. When the decision reached him on 10th March, not being a lawyer, he did not appreciate that there was any urgent action to be taken, so he did not send off the decision to Mr MacKeith at the office of the Solicitor of Inland Revenue until 20th March. It reached Mr MacKeith on 23rd March. c
d

Pausing there, the decision (which I do not propose to read) was to the effect that the taxpayer's repurchase and subsequent sale in 1964 of Muchmore's Farm was an adventure in the nature of trade. I should say the fiscal year in question, in respect of which the assessments were made, was 1964-65. The decision also stated that the profits of the adventure amounting to some £23,000 were properly chargeable to tax under Case I of Sch D, and therefore the assessment under that case was affirmed. It followed that the assessment under Case VII of Sch D was discharged. Then the decision goes on to state: 'If the said repurchase and sale of Muchmore's Farm had not been an adventure in the nature of trade the profit would have been properly chargeable to tax under Case VII of Schedule "D" ' in the sum of some £23,000—the exact figure is stated. The decision then goes on to deal with a number of points which had been raised by counsel for the taxpayer at the appeal; the decision bristles with determinations in respect of points of law. e
f

As soon as this decision reached Mr MacKeith on 23rd March, he reacted with exemplary promptitude, because it occurred to him as a lawyer—and I do not believe it would occur to anyone except a lawyer—that, if by any chance the taxpayer asked for a case stated in respect of the decision on the assessment under Case I and succeeded in persuading the High Court that there was no material on which the commissioners could have come to the conclusion that he had been trading in land, then it would have followed that the Case I assessment would have been discharged, and unless he (Mr MacKeith) took prompt steps, the decision which had been reached in respect of the Case VII assessment would stand and the taxpayer, who might owe very large sums by way of tax and surtax in respect of the adventure, would be in the clear. It was obvious to Mr MacKeith that it was necessary to preserve the position of the inspector so that when the matter came before the High Court it might be argued on behalf of the inspector—and I cannot for the moment see very much answer to the argument—that if the taxpayer was not trading in land and therefore could not be assessed to a profit under Case I and had in fact made a profit or gain out of the transaction in question, he had properly been assessed in respect of that profit or gain under Case VII. g
h
i

On 23rd March Mr MacKeith wrote a letter to the clerk to the General Commissioners and the penultimate paragraph of that letter reads:

a 'Although the Commissioners' discharge of the 1967 Case VII assessment was inevitable in view of the confirmation of the 1969 Case I assessment and it may therefore seem illogical at first sight for the Crown to express dissatisfaction I am doing so as a precaution solely to safeguard the Crown's position in the High Court in the event of [the taxpayer] asking your Commissioners to state a case. It does *not* mean that, as at present advised, we contemplate asking the Commissioners to state a case.'

b He feared that the taxpayer might ask for a case to be stated in respect of the assessment under Case I, and his fears were justified, because the taxpayer, having on 13th March expressed dissatisfaction with the findings of the commissioners in respect of the assessment under Case I, a few days later requested the commissioners to state a case. I think that it is a fair inference that this came to the notice of Mr MacKeith and, accordingly, on 2nd April 1970, he asked the commissioners to state a case for the opinion of the High Court in respect of the assessment under Case VII which they had discharged. That was done obviously to protect the position of the Crown should the taxpayer succeed by way of his case stated on the assessment under Case I.

c The taxpayer then applied, by leave, to the Divisional Court to prohibit the commissioners from stating and signing a case in respect of the decision of the commissioners relating to the Case VII assessment. The Divisional Court¹ refused the application for prohibition and from that refusal the taxpayer now appeals to this court.

d In order to understand the points at issue, it is necessary to refer to s 64 of the Income Tax Act 1952, which makes provision for an appeal, either by the Crown or by the taxpayer, to the High Court by way of case stated from any decision of the commissioners. Section 64 reads:

e '(1) Immediately after the determination of an appeal by the General Commissioners, or by the Special Commissioners, the appellant or the surveyor, if dissatisfied with the determination as being erroneous in point of law, may declare his dissatisfaction to the Commissioners who heard the appeal.

f '(2) The appellant or surveyor, as the case may be, having declared his dissatisfaction, may, within twenty-one days after the determination, by notice in writing addressed to the clerk to the Commissioners, require the Commissioners to state and sign a case for the opinion of the High Court thereon . . .'

g It is to be observed that the 21 days in sub-s (2) has been enlarged to 30 days by s 23 of the Finance Act 1958 and para 5 of Sch 6 to that Act. Therefore, the request for a case stated made by Mr MacKeith on behalf of the inspector on 2nd April was well within the 30 days from the date of the determination which was 9th March.

h The main points taken on behalf of the taxpayer are, first of all, that the expression of dissatisfaction contained in Mr MacKeith's letter of 23rd March was not made 'immediately' after the determination; and, secondly, that since it was not made immediately after the determination, there was no power in the commissioners to state a case inasmuch as the requirement in s 64 that the expression of dissatisfaction should be made immediately after the determination was a mandatory provision and that the right of the taxpayer or of the Crown, as the case may be, to appeal to the High Court by way of case stated depended on their having expressed dissatisfaction with the determination immediately after the determination had been made.

i So two points arise for decision, the first being this: was the expression of dissatisfaction made 'immediately' after the determination within the meaning of that word in s 64 (1)? The second point is: if it was not made immediately, does that take away the right to appeal by way of case stated, which is the only method of appealing against the decision of the commissioners?

Dealing with the first point, there is no direct authority as to the meaning of the

word 'immediately' in s 64 (1). There is one case, *Re Coleman's Depositories Ltd and Life and Health Assurance Association*², in which Fletcher Moulton LJ laid down the principles to be applied in considering the word 'immediately'. It is true that the case he was considering concerned an obligation under a contract of insurance to give 'immediate notice' of a happening, but the Divisional Court³ took the view that the passage in the judgment of Fletcher Moulton LJ which I am about to read stated a principle which was entirely applicable in construing the meaning of the word 'immediately' in s 64 (1). Moreover, counsel for the taxpayer, during the course of this appeal, in the plainest terms conceded (and in my view rightly conceded) that this was the correct principle to apply. What Fletcher Moulton LJ said was this⁴:

'The Courts have not always considered that they are bound to interpret provisions of this kind with unreasonable strictness, and although the word "immediate" is no doubt a strong epithet, I think that it might be fairly construed as meaning with all reasonable speed considering the circumstances of the case.'

The Divisional Court³ came to the conclusion, applying that principle, that nevertheless, since there had been a delay of 13 days between the time when the decision of the commissioners reached the office of the inspector of taxes and the time when notice of dissatisfaction was given, that notice had not been given with all reasonable speed considering the circumstances of the case. The Divisional Court³ does not, however, state any reasons for reaching that conclusion. I am afraid that, for my part, I cannot accept the view of the Divisional Court³ on this point. I should perhaps add that by a counter-notice counsel for the Crown has sought to uphold the refusal of prohibition by the Divisional Court³ on the ground that they should have come to the conclusion that, in the circumstances of the case, the notice of dissatisfaction was given with all reasonable speed.

The circumstances of the case, which I think are crucial on this point, are as follows. The first one I am mentioning is also germane to the second point that arises in the case, namely, whether the provision that the notice shall be given immediately is mandatory or directory only. It is very difficult to see why Parliament provided that there should be an immediate expression of dissatisfaction after the date of the determination by the commissioners. This is a provision that has been re-enacted in Income Tax Act after Income Tax Act and its origins go back beyond 90 years. We do not know what conditions were prevailing then which may have made that provision appear desirable. One thing, however, is quite plain, that, particularly when the decision is communicated through the post, the requirement that a party considering an appeal should immediately express his dissatisfaction by letter to the commissioners cannot be of the slightest help to the other party. It is not suggested that there is any obligation on the party considering an appeal to communicate his dissatisfaction with the decision to the other party. The only possible reason for this provision in the statute must, I think, be out of consideration for the commissioners. How it helps them I am not quite clear. It is suggested that if they get this notice of dissatisfaction they will not destroy papers which they might otherwise have destroyed; and it may be so, I know not. I should have thought that in this day and age, at any rate, it is extremely unlikely that the commissioners would destroy any papers or assume that there is going to be no appeal until the expiration of the 30 days during which time the party who is dissatisfied has an opportunity of requiring a case to be stated. However that may be, whether the dissatisfaction is expressed to the commissioners immediately, or indeed at all, does not seem to me to affect the other party in any way.

Bearing that in mind, I attach very considerable importance to what occurred

² [1907] 2 KB 798, [1904-07] All ER Rep 383

³ [1971] 3 All ER 394, [1971] 3 WLR 425

⁴ [1907] 2 KB at 807, [1904-07] All ER Rep at 387

a immediately after the conclusion of the hearing. Here was the solicitor to the inspector asking the clerk to the commissioners to send the decision to him, because he no doubt anticipated that it would be bristling with legal points, and reminding the clerk to the commissioners on the telephone a month later that the decision was to be sent to him. If that decision had been sent by the clerk to the commissioners to the solicitor on 9th March the irresistible inference is that he would have been just as alive on 10th March as he was on 23rd March to the desirability of writing back by return of post and expressing dissatisfaction. Accordingly, but for the slip made in the office of the clerk—and it is easy to understand how such a slip can be made—the decision would have reached the Solicitor of Inland Revenue on 10th March and there would have been an expression of dissatisfaction by return of post. As it was, he did express his dissatisfaction by return of post, as I have said, on 23rd March when the decision reached him. The only reason why the inspector, Mr Follett, took no immediate action when the decision reached him on 10th March was because he, not being a lawyer, quite naturally thought ‘Well, we have won, there is nothing to do, I will send it on to the solicitor in due course’. It is certainly provided in the statute that the commissioners shall be informed of dissatisfaction with their decision immediately after it is made. In the present case the only reason why they were not informed until 23rd March was because they had forgotten to send the decision on to the solicitor as they had been requested to do. In my judgment the fair conclusion in all the circumstances is that the communication made on 23rd March by the Solicitor of Inland Revenue was made with all reasonable speed. I therefore come to the conclusion on this part of the case that the point taken in the cross-notice succeeds.

I ought perhaps in this connection to have mentioned that at one stage it was suggested that *Grainger v Singer*⁵ was an authority the other way. Rightly understood, I do not think it is anything of the kind, because in that case an inspector had asked for a case to be stated, the case was signed by the commissioners and sent by them to the tax office from which the demand for a case had been made; the case reached the tax office on a certain date and there was a statutory requirement that the inspector should transmit the case to the High Court within seven days after it had been received. The only point decided in that case, as I understand it, was that the sending of the case to the tax office was a good service on the inspector, because the tax office was the proper place to which to address it; the tax office was his agent to receive it. That case was different from the present in that the only point that arose there was: ‘Did the case reach the inspector or his agent on such-and-such a date and did the inspector transmit it within seven days of receipt to the High Court?’ If the case was not transmitted to the High Court within seven days then the statutory provision was not complied with. If in the present case the law was that dissatisfaction must be expressed by the inspector within x days of the determination of the commissioners reaching him and he did not express dissatisfaction within that time there would be a breach of the statute; but in this case the statutory requirement, applying Fletcher Moulton LJ’s principle, was not that the dissatisfaction should be expressed within any specified time but with all reasonable speed considering the circumstances of the case. For the reasons I have given it seems to me that the very special circumstances here lead to the conclusion that the notice of dissatisfaction was despatched with all reasonable speed.

It follows that, taking that view, it may not be strictly necessary to decide the point whether the provision that the notice shall be given immediately is directory or mandatory. But in case I am wrong in the view I take about the notice of dissatisfaction having been despatched with all reasonable speed and since the point whether the provision is mandatory or directory could be of considerable general importance, I think it right that I should as briefly as I can express my view about it.

The question whether a statutory provision is imperative and mandatory in the

modern sense of that word or merely directory has arisen again and again in the courts. The principles on which that question should be decided are well established. The difficulty arises, as always, in applying them to the particular statutory provision under consideration. The principle is laid down—and it has been stated and re-stated in many other cases—very happily by Lord Penzance in *Howard v Bodington*⁶:

‘There may be many provisions in Acts of Parliament which, although they are not strictly obeyed, yet do not appear to the Court to be of that material importance to the subject-matter to which they refer, as that the legislature could have intended that the non-observance of them should be followed by a total failure of the whole proceedings. On the other hand, there are some provisions in respect of which the Court would take an opposite view, and would feel that they are matters which must be strictly obeyed, otherwise the whole proceedings that subsequently follow must come to an end. Now the question is, to which category does the provision in question in this case belong?’

Then Lord Penzance goes on to quote⁷ an extract from the speech of Lord Campbell LC in *Liverpool Borough Bank v Turner*⁸, in which Lord Campbell says:

‘No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.’

Counsel for the taxpayer has called our attention to a number of cases, e.g. *R v Pontypool Gaming Licensing Committee*⁹, *Barker v Palmer*¹⁰ and *R v Edmonton Income Tax Comrs*¹¹. These are all cases in which a statutory provision was held by the courts to be mandatory. With no disrespect to counsel’s arguments, I do not propose to review those cases, because the statutory provisions there being considered were not the same as the statutory provisions now before us, and in each of those cases there were excellent reasons for the court coming to the conclusion that the provision in question was mandatory. Indeed, in *Howard v Bodington*¹² the court came to the conclusion that in the circumstances of that case the statutory provision was mandatory. There are a number of cases, however, that could have been cited the other way, in which statutory provisions have been held to be directory, but they would be of equally little help. We have to consider the statutory provisions contained in s 64 (1).

The Divisional Court¹³ came to the clear and unanimous conclusion that the provision that the expression of dissatisfaction should be made immediately after the determination was directory only. I entirely agree, if I may respectfully say so, with the decision of the Divisional Court¹³ on that point. The first matter which appeals to me as far as this point is concerned is the first circumstance which I mentioned (and which I will not repeat) when I was dealing with the construction of the word ‘immediately’. If one must, as Lord Penzance said¹², consider the material importance of this provision to the subject-matter to which it refers as one of the tests whether the legislature could have intended its non-observance to be followed by a total failure of the whole proceedings, I would say that this provision as to the requirement of

⁶ (1877) 2 PD 203 at 210, 211

⁷ (1877) 2 PD at 211

⁸ (1860) 30 LJ Ch 379 at 380, 381

⁹ [1970] 3 All ER 241, [1970] 1 WLR 1299

¹⁰ (1881) 8 QBD 9

¹¹ [1929] 1 KB 220, 14 Tax Cas 313

¹² (1877) 2 PD at 210, 211

¹³ [1971] 3 All ER 394, [1971] 3 WLR 425

a immediacy is of no discernible material importance to the subject-matter with which s 64 is concerned. No one has been able to advance any reason for thinking that any importance could attach to it from the point of view of the proposed respondent to the anticipated appeal and it is unnecessary to speculate about any possible importance this provision could have so far as the General Commissioners are concerned. I would add this: it is perhaps difficult to think why it should be necessary to express b dissatisfaction at all before giving notice requiring a case to be stated. As I have already indicated, I find it insuperably difficult to think of any valid reason why this should be done immediately. I do not, however, intend to cast any doubt on the necessity to give a notice in writing and to give it within 30 days after the determination requiring the commissioners to state and sign a case for the opinion of the High Court. That I think is a mandatory provision and I am prepared to assume that it c is also necessary for a declaration of dissatisfaction to have been made before that notice asking for a case to be stated is served, but I am not deciding the point. Subsection (1) of s 64 requires (a) a notice of dissatisfaction to be served and (b) that it shall be served immediately after the determination. I cannot think that what I have classified as (b), i.e. the requirement that it should be served immediately, is other than directory.

d Now if that provision is directory only, the fact that the notice of dissatisfaction is not served immediately cannot take away the right of appeal by way of case stated. This decision is equally important for the subject as it is for the Crown. The subject, by failing to comply with a directory provision in the statute cannot be deprived of his right to come to the High Court by way of case stated; nor can the Crown. This, I think, is of very great importance, because, as I have always understood the law, and indeed as it has been stated in *Howard v Bodington*¹⁴ and many other cases, although e non-compliance with a provision which is merely directory may make the party in default liable to a penalty, if the statute says so, it cannot vitiate anything that follows. Compliance with a directory provision cannot be a condition precedent to a party's rights. If non-compliance with a provision were to take away rights, the provision would necessarily be mandatory. So even if I am wrong in the view I have expressed, f namely, that in the very special circumstances of this case the notice of dissatisfaction was immediate, the result of this appeal would still be the same.

I must, however, deal with another point which may be of considerable public importance. In the Divisional Court Ashworth J, dealing with the requirement to give immediate notice of dissatisfaction, said¹⁵:

g 'Accordingly from that point of view it seems to me that this is a matter which is essentially a matter as between the dissatisfied party and the commissioners; it is not mandatory in the sense that it is a requirement such as was visualised in the passage quoted from *Howard v Bodington*¹⁶. This is a matter which affects the two parties to whom I have referred, and approaching the matter in that way I can see no difficulty in saying that the commissioners are at least entitled to say, so long as they get their application for the case stated within 30 days, h they can dispense with the notice of dissatisfaction being immediate.'

If Ashworth J intended (which I very much doubt) to lay down in that passage that a failure by either party, the taxpayer or the Crown, to comply with a merely directory provision of s 64 put the Crown or the taxpayer (as the case may be) at the mercy of the commissioners so that it was in their discretion whether they would state a case, I entirely disagree with that view. I very much doubt, however, whether Ashworth J meant to express it and I have even more doubt whether Lord Widgery CJ meant to express it in the last few words of his judgment¹⁷ which counsel for

14 (1877) 2 PD 203

15 [1971] 3 All ER at 400, [1971] 3 WLR at 433

16 (1877) 2 PD at 210, 211

17 [1971] 3 All ER at 399, [1971] 3 WLR at 432

the taxpayer seeks to read in that way. Section 64 confers a right on the subject and on the Crown to appeal and failure to comply with a merely directory provision in s 64 cannot in my judgment take that right away. It is not a matter for the discretion of the commissioners. If the appeal to the commissioners raises any point of law—and it is very difficult to think of an appeal to the commissioners which would not do so—providing that the taxpayer or the Crown (as the case may be) complies with the mandatory provisions of s 64, the commissioners are bound to state a case.

Another matter with which I shall have to deal very shortly is the subsidiary point of counsel for the taxpayer that the letter of 23rd March did not express dissatisfaction with the commissioners' decision as being erroneous in point of law, because the letter does not use the specific phrase 'erroneous in point of law'. There is not a word in the judgments in the Divisional Court¹⁸ to suggest that that point was taken there. The recollection of counsel for the Crown is that it was not; the recollection of counsel for the taxpayer is that it was taken but faintly taken. If the recollection of counsel for the taxpayer is correct, I can only account for the absence of any mention of this point in the judgments in the Divisional Court¹⁸ as being due to the fact that the point was such an obviously bad one that it was not worth mentioning. It is an obviously bad point, because if a solicitor for the Inland Revenue writes to another solicitor who is clerk to the commissioners a letter in the terms that I have read it is quite obvious that the letter means, and was intended to mean and understood as meaning, that dissatisfaction was being expressed on the ground that the decision was erroneous in point of law.

The only other point which counsel for the taxpayer took, if I understood him properly, came to this, that the Crown were now precluded from challenging the decision of the commissioners on the assessment under Case VII in any circumstances. It is quite obvious, as I have already said, that the two assessments were alternative to each other. It would be absurd if the Crown were put into the position of having to go before the court to hear an appeal by way of case stated against allowing the assessment under Case I and were unable, if that appeal succeeded, to say 'Now we are appealing against the commissioners' decision discharging the assessment under Case VII'. No sort of authority has been referred to which supports this contention of counsel for the taxpayer. We were referred to *Andrew v Taylor*¹⁹, which seems to me to have absolutely nothing to do with the present point. That was a case in which a dispute had arisen between the Crown and the taxpayer whether a business had ceased in 1957 or 1961. Before the commissioners, the Crown's case was that the business had ceased in 1961 and the taxpayer said it had ceased in 1957. When the matter came before the judge by way of case stated the Crown was seeking to say that the business had not only run on from 1957 to 1961 but it had continued thereafter. This court decided that, as the Crown before the commissioners had pinned their flag to the mast that the business had concluded in 1961, they were precluded thereafter from contending against the taxpayer in the High Court that the business had continued after 1961. But here there are two alternative assessments and two appeals. I cannot for my part understand how *Andrew v Taylor*¹⁹ is relevant to the present case.

For these reasons I would dismiss the appeal.

BUCKLEY LJ. I agree and I do not wish to add anything except this, that, if I remember correctly, Salmon LJ used language apt to suggest that Mr Follett replaced Mr Rivett as inspector of taxes at Sudbury on or about 9th March 1971. As I understand the facts as they were explained to us by counsel, in fact that replacement took place on or about the date when the hearing began before the commissioners. I

¹⁸ [1971] 3 All ER 394, [1971] 3 WLR 425

¹⁹ (1965) 42 Tax Cas 557

a only mention it, first in the interests of complete accuracy (assuming that I am accurate) and, secondly, to say that I think it makes no difference at all to the case, for the evidence makes clear that, although Mr Follett was the nominal respondent to the proceedings before the commissioners, which indicates that he must have become the inspector by the time the hearing began, in fact he had nothing to do with the appeals and the conduct of the matter was entirely in the hands of Mr MacKeith, and no doubt that was the reason, or one of the reasons, why Mr MacKeith asked that the determination should be sent to him and not to the inspector's office. As b I say, I think that the point does not at all affect the decision of this case and I agree with the judgment which Salmon LJ has given.

ORR LJ. I agree. Logically the first argument for the taxpayer in this appeal has been one which was not pursued to any extent, if indeed it was developed at all, c before the Divisional Court²⁰, namely, that it was not open to the Crown to declare dissatisfaction as to the discharge of the Case VII assessment because (so it is said) they had themselves solicited that discharge. The argument is that they solicited it inferentially by inviting the commissioners to confirm the Case I assessment, of which it would be a necessary consequence that the Case VII assessment should be discharged. d This argument, if it is right, would be highly advantageous to taxpayers in that, if two assessments A and B are raised which are alternative in the sense that if the one is right the other must be wrong, and the commissioners uphold A and discharge B, the Crown would not be able to appeal against the discharge of B and therefore, if on appeal it were held A was wrong, there would be no means of restoring B, with the result that where, as the commissioners have found rightly or wrongly in this very case, tax is due under one or the other, it would be lost to the Revenue. I was e unable to find in either of the authorities cited by counsel for the taxpayer with reference to this argument anything that could support it. *Inland Revenue Comrs v Park Investments Ltd*¹ was a case where the taxpayer could lawfully be charged on either of two bases and it was held that the Crown were entitled to choose on what basis they would assess, but that has nothing whatever, in my judgment, to do with a case such as the present in which, if one assessment has been rightly made, it must f necessarily follow that the other is wrong. Equally I can find in *Andrew v Taylor*² nothing which would support the proposition which counsel for the taxpayer advanced. That was a case in which in truth a party to litigation had sought to blow hot and cold.

With regard to the two matters which were determined by the Divisional Court²⁰, there is little that I would add to the judgments of Salmon and Buckley LJJ. As g regards the first question, whether the expression of dissatisfaction was made immediately after the determination of the appeal, I entirely agree with the view taken by the Divisional Court²⁰ that they should approach this matter on the basis of the test applied by Fletcher Moulton LJ in *Coleman's case*³, namely, that the word 'immediate' might be fairly construed as meaning with all reasonable speed considering the circumstances of the case. But in my judgment, in the circumstances of this case, which h were in the respects referred to by Salmon LJ very unusual, the right conclusion, applying that test, is that the expression of dissatisfaction was made 'immediately' for the purposes of s 64 (1).

i With regard to the second matter, whether the requirement that dissatisfaction should be expressed immediately is directory or mandatory, I am fully satisfied, for the reasons given in the Divisional Court²⁰ and by Salmon and Buckley LJJ in this court, that it falls to be construed as a directory provision. I would add that on this point I have derived some assistance from the argument advanced by counsel for the

²⁰ [1971] 3 All ER 394, [1971] 3 WLR 425

¹ [1966] 2 All ER 785, [1966] Ch 701

² (1965) 42 Tax Cas 557

³ [1907] 2 KB 798 at 807, [1904-07] All ER Rep 383 at 387

Crown as to the change in wording between s 59 of the Tax Management Act 1880 and the consolidating Income Tax Act 1918. The wording in the latter Act is the same as that now contained in s 64 of the Income Tax Act 1952 and I think that this is a case in which it is permissible to treat the wording adopted in 1918 as being an interpretation with reference to an ambiguity contained in the Act of 1880. I agree therefore with the Divisional Court⁴ that this was a directory and not an imperative provision, but I would add that, if it was intended (and I too am not sure that it was) by Ashworth J to suggest that where a notice of dissatisfaction has not been expressed immediately it would be open to the commissioners to refuse to state a case, I should find myself unable to agree with that view because it appears to me to be inconsistent with the preservation of the right of appeal, which seems to me to follow necessarily from the requirement to which I have referred being directory and not imperative. As to that I agree fully with the reasoning of Salmon LJ.

I also would dismiss this appeal.

Appeal dismissed.

Leave to appeal to the House of Lords refused.

Solicitors: *Eland Hare Patersons*, agents for *Holmes & Hills*, Braintree (for the taxpayer); *Solicitor of Inland Revenue*.

F A Amies Esq Barrister.

Race Relations Board v Charter and others

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, MEGAW AND STEPHENSON LJJ

30th NOVEMBER, 1st, 14th DECEMBER 1971

Race relations – Discrimination – Unlawful discrimination – Provision of goods, facilities and services – Discrimination by person concerned with provision of goods etc to a section of the public – Club – Members' club – Club providing facilities for refreshment and recreation to members and visitors – Club rejecting application for membership on ground of applicant's colour, race etc – Conservative club – Quality distinguishing members from public at large essentially impersonal one of being Conservatives – Members of club constituting 'a section of the public' – Refusal of application for membership on ground of colour, race etc constituting unlawful discrimination against person seeking to use club's facilities – Race Relations Act 1968, s 2.

C was the chairman of a members' club known as the East Ham South Conservative Club. The objects of the club were to maintain and advance Conservative principles. The club was affiliated to similar Conservative clubs all over the country. In accordance with the club's rules any male Conservative not being under the age of 18 years was eligible for admission to membership. The members of the club consisted wholly or mainly of members of the East Ham Conservative Association and any member of that association who applied for membership of the club and was otherwise eligible under the club's rules was admitted. The club provided facilities and services, including facilities for entertainment, recreation or refreshment to members and visitors at the club's premises. In April 1969 S, an Indian, applied for membership of the club. S had been an active member of the East Ham Conservative Association since 1966 and was eligible for membership in accordance with the club's rules. His application was proposed and seconded. After some delay the club's selection committee met to consider S's application. At the meeting C indicated in reply to a question from a member of the committee that he regarded

- a S's colour as relevant. When the application was put to the vote, it was rejected by C's casting vote as chairman. Following this S, made a complaint to the Race Relations Board alleging that the club had discriminated against him by reason of his colour. The board used their best endeavours to secure a settlement. Not succeeding, they commenced proceedings against the club. The question arose whether refusal of an application for election to membership of the club on the ground of colour, race or ethnic or national origins would be unlawful by virtue of s 2^a of the Race Relations Act 1968.
- b

Held – An application for election to membership of the club was a situation to which s 2 of the 1968 Act applied and accordingly a refusal to elect on the ground of colour etc would be unlawful for the following reasons—

- c (i) although the facilities provided by the club were confined to members and their visitors, the club was nonetheless concerned with the provision of facilities to a section of the public within s 2 (1) of the 1968 Act since the members of the club themselves constituted 'a section of the public' in that they were not numerically negligible and the quality which distinguished them from the public at large, i.e. that they were Conservatives, was one which was essentially impersonal; since being a Conservative was a sine qua non of membership it was immaterial that
- d members also had in common a personal quality, i.e. that of having been proposed, seconded and elected to the club (see p 560 h, p 561 d and e, p 562 h, p 564 j and p 565 b and d, post); dicta of Lord Greene MR in *Re Compton* [1945] 1 All ER at 201 and of Lord Simonds in *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] 1 All ER at 33-35 applied;

- e (ii) since the members of the club were 'a section of the public' it followed that it would be unlawful for the club to discriminate on the ground of colour etc against 'any person seeking to obtain or use' the facilities of the club; this included any person outside the club who applied for membership, for such a person was seeking to use the facilities of the club (see p 562 b c and h and p 563 j, post).

- f Per Curiam. A club which by its constitution openly restricts membership to persons of one particular race or one particular ethnic or national origin cannot lawfully refuse an application for membership solely on the ground that the applicant is not of that race or ethnic or national origin (see p 561 j, p 563 a to c and p 566 c and d, post).

Notes

For discrimination on racial grounds, see Supplement to 7 Halsbury's Laws (3rd Edn) para 1280.

- g For the Race Relations Act 1968, s 2, see Halsbury's Statutes (3rd Edn) 1968 vol, p 1541.

Cases referred to in judgments

Compton, Re, Powell v Compton [1945] 1 All ER 198, [1945] Ch 123, 114 LJCh 99, 172 LT 158, 8 Digest (Repl) 330, 123.

- h *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] 1 All ER 31, [1951] AC 297, 8 Digest (Repl) 321, 55.

R v Britton [1967] 1 All ER 486, [1967] 2 QB 51, [1967] 2 WLR 537, 131 JP 235, 51 Cr App Rep 107, Digest (Cont Vol C) 242, 7272b.

Race Relations Board v Bradmore Working Men's Social Club and Institute (March 1970) unreported.

i Interlocutory appeal

This was an appeal by the plaintiffs, the Race Relations Board ('the board'), against the judgment of his Honour Judge Herbert QC given on 6th April 1971 in the Westminster County Court in favour of the defendants, Edward Reginald Marden Charter, Horace A Parker, William Albert English (sued on their own behalf and on behalf of all other members of the East Ham South Conservative Club between 27th

- a Section 2, so far as material, is set out at p 559 f, post

April 1969 and 5th November 1969) whereby it was adjudged on preliminary issues (i) that consideration by the committee of the East Ham South Conservative Club under the rules of the club of an application for election to membership of the club was not a situation to which ss 2, 3, 4 or 5 of the Race Relations Act 1968 applied, and (ii) that a refusal on the ground of colour, race or ethnic or national origin by the committee to elect to membership of the club an applicant eligible under the rules would not be unlawful by virtue of s 2 of the 1968 Act. By their particulars of claim the board had alleged that, by reason of the committee's rejection of his application for membership of the club, Mr Amarjit Singh Shah had been wrongfully deprived of the club's facilities and services and had suffered considerable humiliation and distress, and claimed (i) damages for loss of opportunity, and (ii) a declaration that the exclusion of Mr Shah from membership was unlawful by virtue of the provisions of s 2 of the 1968 Act. The facts are set out in the judgment of Lord Denning MR.

J P Comyn QC, Anthony Lester and M H Mendelson for the board.
A P Leggatt and N Thomas for the defendants.

Cur adv vult

14th December. The following judgments were read.

LORD DENNING MR.

1 *The club*

In East Ham there is a members' club called the East Ham South Conservative Club. Its premises are at 1 Vicarage Lane, East Ham. It is a political club. Its object is to maintain and advance Conservative principles. It is closely associated with similar Conservative clubs all over the country. Any man of 18 or over is eligible for membership, provided that he is a Conservative. He has to be proposed and seconded by two members able to vouch for his respectability and fitness; and then elected by the committee. The subscription is 10s a year. Any woman of 21 or over who is a Conservative is eligible for association membership. Her subscription is 5s a year. Youngsters of 16 or 17 can be admitted to junior association membership, also at 5s. Members of other Conservative clubs are admitted as temporary honorary members, provided they produce the appropriate ticket. Members can bring visitors with them to the club.

The club is directly connected with a local political association, called the East Ham Conservative Association. Most, if not all, the members of the club are members of the East Ham Conservative Association. Any member of the Conservative Association who applies for membership of the club is admitted to membership of the club, provided that he complies with the procedure for election. The club provides the usual amenities of a club. It provides facilities and services (including facilities for entertainment, recreation and refreshment) to members and visitors at the club's premises.

2 *The application of Mr Shah*

Mr Amarjit Singh Shah was born in India. He came to this country about nine years ago. He is employed in the post office as a postal and telegraph officer. He is a Conservative and joined the East Ham Conservative Association five years ago, in 1966.

On 27th April 1969 Mr Shah applied to join the club. He was proposed by Mr Charles Morley and seconded by Mr Gilbert Crocker. On 5th November 1969 the committee of the club considered Mr Shah's application. Ten members were present. One of the members of the committee asked the chairman: 'Is colour relevant?' The chairman said: 'I regard it as relevant.' Mr Shah's application was put to the vote. The votes were equal—five for and five against. The chairman gave his casting vote against the application. So, Mr Shah was rejected. The club say emphatically that this was not because of his colour.

a On 7th November 1969 the chairman wrote to Mr Shah, telling him that he would not be eligible for election to membership during the next 12 months, but he would be admitted as a visitor. On 16th December 1969 Mr Shah made a complaint to the Race Relations Board. He said that he had been discriminated against by reason of his colour. The board used their best endeavours to secure a settlement. Not succeeding, they determined to bring proceedings against the club. They issued a plaint in the Westminster County Court, in which they sought: (i) damages for loss of opportunity; (ii) a declaration that the rejection of Mr Shah was unlawful.

b On 24th March 1971 an order was made for the trial of a preliminary issue of law. The club said firmly that they had not discriminated against Mr Shah; but nevertheless they were desirous of having this point of law determined. Assuming that the committee rejected Mr Shah's application because of his colour, was their action unlawful? The judge sat with two assessors. He gave judgment for the club. He held that a refusal on the ground of colour was not unlawful. The Race Relations Board appeal to this court.

c 3 *The statutory provisions*

The Race Relations Act 1968 makes it unlawful to discriminate against a person. The material sections for present purposes are these. Section 1 (1) defines 'discriminate'. It says:

'... a person discriminates against another if on the ground of colour, race or ethnic or national origins he treats that other ... less favourably than he treats or would treat other persons ...'

e Section 2 (1) is the clause which prohibits discrimination in general. It says:

f 'It shall be unlawful for any person concerned with the provision to the public or a section of the public (whether on payment or otherwise) of any goods, facilities or services to discriminate against any person seeking to obtain or use those goods, facilities or services by refusing or deliberately omitting to provide him with any of them or to provide him with goods, services or facilities of the like quality, in the like manner and on the like terms in and on which the former normally makes them available to other members of the public.'

Section 2 (2) gives some examples of the facilities and services mentioned in s 2 (1). To some of these I will later refer. But, I must say at once that they include 'facilities for entertainment, recreation or refreshment', and 'facilities for education, instruction or training'.

g 4 *The interpretation of the statute*

h Each side says that the statute should be interpreted on the side of freedom. But we are faced here with two conflicting freedoms. The club contend for freedom for the members to elect whom they please to their own club. Mr Shah contends for freedom to join the club without being turned down by reason of the colour of his skin. Between these two freedoms, the court has to decide. It must take as its guide, and its only guide, the words of the statute, without leaning to one side or to the other.

5 *Facilities*

j One thing is quite clear. The committee of the club provide 'facilities'. They provide facilities for entertainment, recreation or refreshment. They provide these facilities inside the club. It was suggested before us that 'facilities' might include the opportunity of becoming a member. I do not accept this. It is too far-fetched.

6 *Provision to the public*

The next question is: do the committee provide those facilities 'to the public'? Clearly not. An hotel, restaurant, or a theatre provide facilities 'to the public';

because they provide them to anyone who comes in and is ready to pay the price. But this committee does not do so. They only provide them for a particular category of persons, namely, members of the club and visitors brought in by members. It was suggested that they also provided them for 'would-be' members, that is, for persons who wish to apply for membership. But, this again is too far-fetched. They only provide them for members and their visitors.

7 A section of the public

Take next 'a section of the public'. Are the members and their visitors 'a section of the public'? This is the crucial question in the case. Parliament has given us no guide, except indirectly in s 6 (2) of the Race Relations Act 1965 which shows that 'members of an association' may be a 'section of the public' and the word 'association' seems to me appropriate to include some clubs, at any rate, just as it did to Lord Parker CJ in *R v Britton*¹.

I have looked for help from other branches of the law. The nearest I can find is from the law of charities. In order for a trust to be charitable, the purpose of it must be directed to the benefit 'of the public or a section of the public'. Such is the way the test is always formulated. It is a useful analogy, because in charities you have to distinguish between a 'section of the public' and a private group; and you have also to do so in race relations. But, as with the legislature in the Race Relations Act, so also with the courts in charity cases. Everyone has fought shy of defining a 'section of the public'. In *Re Compton* Lord Greene MR said²:

'No definition of what is meant by a section of the public has, so far as I am aware, been laid down and I certainly do not propose to be the first to make the attempt to define it.'

In *Oppenheim v Tobacco Securities Trust Co Ltd* Lord MacDermott said³ that the usual way of approaching the issue was—

'to regard the facts of each case and to treat the matter very much as one of degree. No definition of what constituted a sufficient section of the public for the purpose was applied, for none existed, and the process seems to have been one of reaching a conclusion on a general survey of the circumstances and considerations regarded as relevant rather than of making a single, conclusive test.'

Nevertheless, over the years the courts have evolved a test for determining what is a 'section of the public' as distinct from a private group. It is set out, with illustrations, by Lord Greene MR in *Re Compton*⁴ and by Lord Simonds in *Oppenheim v Tobacco Securities Trust Co Ltd*⁵. If I may put the test in my own words, it is this. Look at the group of persons concerned. Make sure that there are quite a number of them (they must not be numerically negligible). See what is the quality which they have in common—the quality which distinguishes them as a group from the public at large. Then ask whether the quality is essentially impersonal or essentially personal. If it is impersonal, the group will rank as a 'section of the public'. If it is personal, it will rank as a private group, and not as a 'section of the public'.

Let me apply this test by taking illustrations in race relations. First, the illustration given by counsel for the board of a Roman Catholic school. It takes boys who are Roman Catholics and have passed the entrance examination and are accepted by the headmaster. Patrick Murphy is a Roman Catholic, and has passed the entrance

¹ [1967] 1 All ER 486 at 488, [1967] 2 QB 51 at 55

² [1945] 1 All ER 198 at 201, [1945] Ch 123 at 129

³ [1951] 1 All ER 31 at 39, [1951] AC 297 at 314

⁴ [1945] 1 All ER at 201, [1945] Ch at 129, 130

⁵ [1951] 1 All ER at 33-35, [1951] AC at 306-308

a examination; on paper, he is a first-rate candidate. When he comes up, the headmaster has a surprise. Patrick Murphy, despite his name, is found to have a black skin. Everyone would agree at once that it is unlawful for the headmaster to reject Patrick on the ground that he is black. The reason is because boys at the school are a 'section of the public'. The quality which they have in common—the thing which forms them into a group—is essentially impersonal. Their one common quality is that they are Roman Catholics who have passed the entrance examination. The additional quality—that they should be acceptable to the headmaster—is no doubt personal, but it does not alter the fact that all the boys have in common an impersonal quality which makes them a 'section of the public'.

c On the other side there is the illustration given by Stephenson LJ of a wedding reception. The bride's parents issue invitations to the friends of both sides. They invite all the staff in the bridegroom's firm; but being prejudiced, they omit one of the staff because he is black. Everyone would agree that that is not unlawful. The reason is because the wedding guests are not a 'section of the public'. The one quality which the guests have in common is essentially personal. It is their personal acceptability to the hosts. Even the staff of the firm are grouped together by a personal relationship to the employer. They are not a 'section of the public'.

d On which side of the line does the present case fall? To my mind the members of the Conservative club are a 'section of the public'. They are Conservative. That is the one quality which is common to them all. It is the *sine qua non*. It is essentially an impersonal quality. It is true that, in order to become a member of the club, a person has to be proposed and seconded, and has to be elected. That is, in a sense, a personal quality attaching to each one; but it does not alter the fact that they all have in common an impersonal quality which makes them a 'section of the public'. I see no logical distinction between the members of this club and the boys at Patrick Murphy's school, or the students of a college or university, or the members of a church. In each case the applicant has to be acceptable to an admissions committee or the like. Yet beyond doubt the members are a 'section of the public'.

f Counsel for the defendants urged that this Conservative club was a members' club as distinct from a proprietary club. But that is a distinction without a difference for this purpose. A proprietary club is usually under the control of a committee, and members are proposed and seconded and elected, just as in a members' club. The difference between them lies in the legal title to the club premises and the food and drink. In the one case it is in the proprietor. In the other case it is in the members. But that cannot make all the difference as to whether they are a 'section of the public' or not.

g I realise that this means that the members of some famous clubs in Pall Mall are also a 'section of the public'. Some of them have in common the quality of political allegiance, just as this Conservative club does. Others have in common the quality of having been to a particular university or belonging to a particular service. If an applicant with those qualifications is elected almost automatically as of course, it being an impersonal quality, I would not feel able to distinguish such a club from the present, at any rate when the members are so numerous that they cannot properly be described as a private group. They are a 'section of the public'. Such clubs cannot, as I see it, reject a man solely because of his colour or race. Nor, I trust, would they wish to do so.

j It also means that clubs which require their members to be of a particular race, or to come from a particular country—and admit them virtually automatically, if they have that qualification—are also a 'section of the public'. I do not expect that anyone not of that race, or not from that country, would wish to join them, but, if he did, they could not lawfully refuse him on the ground that he was not of that race or from that country. Such is the result of this statute.

But there are many other clubs in which an applicant is not elected automatically by any means, but is elected on his personal qualifications—his personal acceptability

to the others. The members of these other clubs would not be a 'section of the public' and would, I think, be able to reject a man for any reason or for none.

8 *Any person seeking to obtain or use*

Once the members of the club are seen to be a 'section of the public', it follows that the committee must not discriminate against 'any person seeking to obtain or use' the facilities of the club. Who is such a person? It is, I think, any person outside the club who applies for membership. He is seeking to obtain or use the facilities of the club for entertainment, recreation or refreshment. Just as when a student from outside applies for admission to a college. He is seeking to obtain the facilities of the college for education, instruction or training. It is impossible to suppose that the 'person seeking' must be already a member of the club or college—in other words, that he must be already one of the 'section of the public'—for that would nullify the Act altogether. It is passed so as to prevent those inside from excluding those outside on the forbidden grounds.

9 *The other sections*

Apart from s 2, the 1968 Act contains ss 3, 4 and 5, which deal with other situations. These are, I think, inserted to make sure that there is no discrimination in the important fields of employment, trade unions and housing. Section 4 deals expressly with certain organisations (like trade unions and professional bodies, and so forth) who admit persons to membership. It was suggested that this section was inserted because otherwise such an organisation would not be a 'section of the public' within s 2. I cannot accept this submission. It is obvious that many organisations within s 4 are also a 'section of the public' within s 2. I think s 4 was inserted simply to make sure that those particular organisations do not discriminate, whether their members were a 'section of the public' or not. It also serves as an introduction to s 16 of and Sch 2 to the Act. It is right to say that this point was hardly mentioned by counsel for the defendants. So I do not stay longer on it.

10 *Conclusion*

I cannot agree with the judge. In my opinion the answers to the preliminary issues are these: (i) an application for election to membership of the club is a situation to which s 2 of the Act applies; (ii) a refusal to elect on the ground of colour, race or ethnic or national origin would be unlawful by virtue of s 2 of the Act.

I do not expect that this ruling will give rise to difficulties. After all, every candidate will still have to be proposed and seconded, and be found generally acceptable to the committee. The only thing is that, if he is otherwise acceptable, they must not reject him simply because of his race or colour or ethnic or national origin. I would allow the appeal accordingly; but I would reiterate that the club deny that they refused to elect Mr Shah on the ground of his colour. That is a matter which must go for trial.

MEGAW LJ. I agree with the judgment delivered by Lord Denning MR except that I fear I do not share his optimism when he says that he does not expect this ruling will give rise to difficulties.

I have, from the outset of the argument, been unable to see what distinction could validly be drawn, for the purposes of s 2 (1) of the Race Relations Act 1968, between the East Ham South Conservative Club on the one hand, and clubs such as Lord Denning MR has referred to as 'famous clubs in Pall Mall' on the other hand. For the purposes of s 2 (1) no distinction can be drawn on the basis that one club has as its object the maintenance of political principles of one sort or another, while another club is concerned with social or sporting or cultural activities.

It is not because of any implication in respect of such clubs that I have hesitated before deciding that s 2 (1) of the Act has the meaning and effect which Lord Denning MR has expressed. However, for a different reason, I have hesitated long before

a reaching the conclusion that Parliament intended by s 2 (1) to provide that members of a club or society or voluntary association should be treated, at least in many cases, as being 'a section of the public' for the purposes of this subsection. For once that is accepted, I can see no valid ground for saying that s 2 (1) does not apply to a club or society in England, Wales or Scotland, whether its object is to provide sporting or social or cultural or any other kind of facilities for its members, if the club or society by its constitution seeks to confine its membership to persons of one particular race or of one particular ethnic or national origin. I believe that many such clubs and societies exist in England, Wales and Scotland; I believe that many of them, at least, would be generally regarded as serving a useful and desirable purpose in the community and that their enforced disappearance would be regarded in many quarters, rightly or wrongly, as being in itself a matter of racial discrimination. Yet s 2 (1) of the Act, if the interpretation which I believe has to be given to it is correct, appears to lead inevitably to the perhaps startling, and it may be unintended, result that the committees of these clubs would be acting unlawfully if they gave effect to the club's constitution in its provision for confining membership to a particular race or nationality or 'ethnic origin'.

d If that was not, indeed, the intention of Parliament, it is to be hoped that urgent consideration may be given to amending the Act so as to avoid that unintended result and so as to limit the subsection to those types of case to which it was truly intended to apply.

STEPHENSON LJ. The preliminary issues ordered to be tried in this case are issues of importance not only to Mr Shah, the Race Relations Board and the East Ham South Conservative Club.

e If consideration by the committee of this club under its rules of an application for election to membership of it is a situation to which ss 2, 3, 4 or 5 of the Race Relations Act 1968 applies, the Act applies to applications for membership of many other clubs. If a refusal on the ground of colour, race or ethnic or national origins by the committee of this club to elect to membership of it an applicant eligible under f r 4 of its rules would be unlawful by virtue of s 2 of the Act, so would be a refusal on those grounds to elect applicants eligible under the rules of many other clubs. Hard as counsel, particularly junior counsel for the board, tried to confine this case to a small field, it was always breaking out, and once over the boundaries of the area defined by the facts which we have to assume there was no stopping it or at least no certain stopping place short of far wider limits.

g It was rightly not contended by counsel for the board that ss 3, 4 or 5 of the Act applied to the situation. It is not disputed by counsel for the club (as I will call the defendants who are the chairman, honorary secretary and honorary treasurer of the club and are sued on their own behalf and on behalf of all other members of the club between 27th April 1969 and 5th November 1969), that the applicant Mr Shah was eligible under r 4 of its rules, as a male conservative not being under the age of 18 years. The questions we have to decide are therefore these: (1) Were the members of the East Ham South Conservative Club persons concerned with the provision of goods, facilities and services to the public or a section of the public? (2) Was Mr Shah h a person seeking to obtain or use those goods, facilities or services?

i If the answer to the first question is 'Yes', the answer to the second must likewise be 'Yes'. Both issues would therefore receive affirmative answers because (i) s 2 would apply to the committee's consideration of Mr Shah's application, and (ii) its refusal to elect him on one of the forbidden grounds would be unlawful by virtue of s 2. If the answer to the first question is, on the contrary 'No', both issues would receive negative answers. The first question is therefore all important and the true answer to it decisive.

This club is a bona fide members' club and there can be no doubt that it in fact provides to its members and their guests the ordinary 'amenities' of a club. I take

that word from r 21 of the club's rules to include such 'goods' as food and drink, which its rules and byelaws call refreshments (r 70, byelaw 2), the 'services' of what its rules call employees of the club (rr 5, 59 and 70) and its byelaws 'servants' (byelaw 5), and such 'facilities' (if I can use the term without begging any relevant question) as premises furnished with chairs and tables and supplied with books, pamphlets and newspapers (byelaws 7 and 8). Some of these things may come under more than one head, but they are all included in the trinity of 'goods, facilities and services', which, to my thinking, are comprehended in what r 21 calls 'the amenities of the club'.

I do not think it natural to regard the opportunity to be considered for membership of the club or to be elected a member of it as one of those 'facilities' which s 2 interposes between 'goods' and 'services'. Counsel for the board argued that it obviously was one of those facilities. I agree with Lord Denning MR that he is wrong. I note that such an allegation found no place in the particulars of the board's claim as originally pleaded, para 5 of which alleged:

'At all material times the Club provided and provides facilities and services (including facilities for entertainment, recreation or refreshment) to members and visitors at the Club's premises . . .'

Paragraph 6 went on to allege:

' . . . members of the Club . . . and/or visitors to the Club were a section of the public to whom the Defendants were persons concerned with the provision of facilities or services within the meaning of Section 2 of the Race Relations Act 1968 . . .'

It was only in response to a request under para 6 for further and better particulars of those facilities and services that the board introduced 'the facility of being considered and/or accepted for membership of the club'. It was the facilities and services provided for club members and visitors, not for candidates, which Mr Shah was alleged to be seeking (para 12) and of which he claimed to have been wrongfully deprived (para 14). And when the board claimed 'damages for loss of opportunity' it was doing what the Act itself required (see ss 19 (1) (b) and 22 (1) (b)) and rightly recognising, as the Act did, a distinction between the facilities provided and the opportunity to obtain and use them. Section 2 has, in my judgment, nothing to do with facilities to obtain facilities. First thoughts were best, and I agree with the county court judge that this point fails.

It is a point which admits of little argument but it is of considerable importance, because if it were right and the club was providing a facility within the section in giving candidates for membership the opportunity of becoming members, the board's argument that the club was providing it for the public or a section of the public would be, in my view, irrefutable. Whereas the strength of the club's case is that it was concerned only with providing facilities to members of the club and their guests and not to the public or any section of it; elected members of the club privately providing facilities for each other and for no one else except visitors admitted to the club on the introduction of members under r 23. Mr Shah is undoubtedly a member of the public. I should have thought it equally beyond doubt that adult male Conservatives eligible to membership under r 4 are a section of the public. But if the only facilities which the club is concerned with providing are not provided to anyone outside the charmed circle of members (and their visitors) but only to those within it, are the club's members, committee or officers persons concerned with providing for the public or a section of the public at all?

On this more difficult point I have come to the conclusion, in agreement with Lord Denning MR and Megaw LJ, that the club's argument, which could claim the support of common sense and accordingly prevailed with the judge and his assessors, is wrong and our judgment must be for the board in allowing this appeal.

a It is true that this club is private in the sense that all members' clubs are private (see 5 Halsbury's Laws (3rd Edn) p 252, para 586). The public has no right to enter its premises and obtain or use its facilities. Only its elected members and those they introduce can do that. In this a club resembles a private householder who provides refreshment and recreation for his family and guests and differs from a shop or a hotel which caters for the public at large or at least for that section of the public which seeks to enter it. But the 1968 Act is not confined, as was the Race Relations Act 1965, to places of public resort. The question is not whether the club premises are a public place or whether the club committee is concerned with some form of public or quasi-public activity in providing facilities, but whether the members and visitors to whom they provide them are a section of the public.

b To this question the agreed facts about this particular club and its membership give an affirmative answer. The persons for whom this club caters (if that word can be used without misleading) are, it is agreed, accurately set out in para 3 of the particulars of claim. Lord Denning MR has set them out at the beginning of his judgment. I respectfully agree with him, using such help as can be got from the law of charities (and s 9 of the 1968 Act allowing charitable instruments to discriminate shows that Parliament did consider that law in this connection) that these persons do constitute a section of the public, although they may enjoy the club's facilities in private. I do not think it possible to draw any distinction between sections and subsections which consist of a considerable number of persons, and I would regard the members of this club as no less a section, although a smaller section, than members of the Conservative Party.

c That is not to say that, on the one hand, every club, however restricted its membership or its activities, is concerned with providing for a section of the public. Nor does it mean that, on the other hand—

'in the conduct of their private affairs a genuine club is in the position of a private householder who may ban from his house any person for any reason that he likes, and the Act does not dictate how we shall conduct our private lives',

d as Judge Nicklin said obiter in *Race Relations Board v Bradmore Working Men's Social Club and Institute*⁶, decided in the Birmingham county court.

e I agree that the Act does not dictate how we shall conduct our private lives. But the Act does dictate how we shall conduct our lives insofar as we are concerned with the provision of goods, facilities and services to the public or a section of it and make them available to members of the public. If that is our concern, we must not discriminate and cannot turn from our houses any person on any one of the forbidden grounds if he seeks to obtain or use what we are concerned with providing. But the householder who provides his guests with a meal, or the parent who invites family and friends to a reception, is not, in my judgment, dictated to by the Act, for the simple reason, additional to that given by Lord Denning MR, that those whom he asks are not seeking to obtain or use what he provides. The guests bidden to supper in the parable did not seek to obtain or use their host's food and drink, still less did those who on his instructions were compelled to come in from the highways and hedges. Even if those who came at his first invitation or later under that compulsion were the public or a section of the public (and it would be difficult to argue that the latter had any essentially personal quality in common) they were not seeking but sought. That is one reason why a private householder may still lawfully turn a person from his house on grounds of race or colour or national or ethnic origins. And that may be a reason for holding some clubs able to do the same, but not this club. Some clubs may be so constituted that admission is by invitation only; a would-be member cannot apply without being asked. Counsel for the club sought to extend this escape route to this club—and other clubs—whose constitution required a proposer and seconder

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for the election of a member by the committee with or without a ballot (rr 3 and 6). That, said counsel for the club, as I understood his argument, means that it is the proposer and seconder who offer the candidate the club's facilities and by accepting them he is not seeking to obtain those facilities. a

But this is too artificial an understanding of such elective machinery. The test of the first move must not be pressed too hard. A club like this may encourage persons to apply for membership or be considered as inviting applications simply by putting its name up outside its premises, but in the ordinary way and not merely as a matter of form, the application comes first before the proposing and seconding, as the wording of r 6 shows ('an applicant for membership must be proposed and seconded'), and the whole process really starts with a person seeking to obtain or use the club's facilities by the machinery laid down in the club rules. I cannot see any escape from the Act either for this club or for 'Pall Mall clubs' by this route. b

I also agree with Lord Denning MR and Megaw LJ that a club or society or association does not escape from the Act's ban on discrimination by openly limiting its membership to persons of a particular race or colour or national or ethnic origin. Discrimination, which would be unlawful if carried out secretly and without express authority conferred by the rules or constitution of a club or association, cannot be lawful if openly required by its rules or constitution. Authorised or irregular, it is equally obnoxious to the statute. It makes no difference to the application of the Act whether a particular race qualifies or disqualifies the would-be member. Whether or not Parliament intended to take integration so far as to make it illegal for a Pakistani club to refuse membership to an Indian or an Englishman, that must, in my view, be the effect of s 2. As Lord Simonds said, the courts are not so much concerned with what the legislature aims at as with what it fairly and squarely hits. If the plain words of s 2 require most, if not all, clubs to write into their rules a rule prohibiting discrimination as defined by s 1, we may be startled but I agree with counsel for the board that we must not shrink from giving these words that effect. c

On the other arguments addressed to us, I agree with what Lord Denning MR has said about s 6 (2) of the 1965 Act and the gloss put on it by Lord Parker CJ in *R v Britton*⁷. The additional ground raised in the club's cross-notice, that s 4 of the 1968 Act would be otiose if s 2 applied to clubs, was not much relied on in argument and has not convinced me. It would have simplified our task if members' clubs had found a place in an express provision like s 4 (2), but I agree that one reason for s 4 (and s 3 too) may be found in the special provisions of s 16 of and Sch 2 and Part II of Sch 3 to the Act. d

I agree for these reasons, which are with one addition substantially those given by Lord Denning MR, that on the facts which we have to assume this appeal succeeds. e

Appeal allowed. Leave to appeal to the House of Lords granted. f

Solicitors: *Lawford & Co* (for the board); *Vizard's* (for the defendants). g

L J Kovats Esq Barrister. h

⁷ [1967] 1 All ER 486, [1967] 2 QB 51

Caldwell v Sumpters (a firm) and another

COURT OF APPEAL, CIVIL DIVISION

SALMON AND STAMP LJJ

17th, 20th DECEMBER 1971

Solicitor – Lien – Title deeds – Preservation of lien after voluntary parting with possession of deeds – Deeds originally deposited with solicitors instructed by vendor to act in sale of property – Vendor changing solicitors – New solicitors asking original solicitors for deeds – Original solicitors' charges unpaid – Original solicitors handing over deeds subject to reservation that deeds held to their order pending payment of the outstanding charges – New solicitors refusing to accept reservation – Whether unilateral reservation sufficient to preserve original solicitors' lien.

The plaintiff instructed the defendants, a firm of solicitors, to act for her in respect of the sale of a house which she owned in Brighton. She deposited the title deeds with the defendants for that purpose. The sale was delayed owing to difficulties in obtaining vacant possession due to the refusal of the tenants occupying the house to move out. After the defendants had, on the plaintiff's instructions, given undertakings (i) to a firm of solicitors in Brighton that the costs which they incurred in taking proceedings to evict the tenants would be paid and (ii) to the plaintiff's bank that her indebtedness to them would be discharged out of the proceeds of sale, the plaintiff instructed M & Co, another firm of solicitors, to conduct the sale of the house in place of the defendants. M & Co pressed the defendants on the plaintiff's behalf for the title deeds but the defendants claimed a solicitor's lien on them. Eventually, after the plaintiff had issued a writ claiming, inter alia, the deeds, the deeds were sent to the plaintiff's solicitors with a covering note stating that the deeds were being sent 'on the understanding that you will hold them to our order, pending the payment of our fees and your Undertaking to honour those Undertakings which we have given on behalf of [the plaintiff], on her instructions, and the payment of fees, etc., of other professional firms who have acted on [the plaintiff's] instructions and have not yet been paid by her.' M & Co replied promptly saying that they were unable in the circumstances to accede to the defendants' request. The defendants threatened to bring proceedings against them to obtain the return of the deeds, but agreed to desist from such action on condition that the plaintiff's solicitors agreed to retain £1,250 out of the proceeds of sale and not part with it without notice to the defendants. When, after the sale had been completed, the defendants learned from M & Co that they were proposing to release the £1,250 to the plaintiff, they moved for an order restraining (i) M & Co from releasing the £1,250 and (ii) the plaintiff from causing or allowing that sum to be released. The question arose whether the words of reservation in the defendants' letter to M & Co were sufficient to preserve the defendants' lien, so as to prevent M & Co releasing the £1,250 until the trial of the action.

Held – (i) A solicitors' lien on documents of title was not lost by the parting with physical possession of those documents if the circumstances showed that the lien was being expressly or impliedly reserved; the defendants' letter and the surrounding circumstances showed that they were not intending to abandon their lien nor part with legal possession of the documents when they forwarded the title deeds to M & Co; they were offering them to their fellow solicitors to hold as the defendants' agents while they prepared the draft contract of sale; the documents could be retained by M & Co on the terms stipulated in the defendants' letter or returned or made available to the defendants to come and take them back. It followed that, since M & Co held the title deeds as the defendants' agents, their possession was

the possession of the defendants and the lien was not defeated; M & Co were accordingly required to retain the £1,250 pending the outcome of the trial (see p 570 d and g to j, p 571 c d and g and p 572 a and f, post).

Watson v Lyon (1855) 7 De GM & G 288 applied.

Decision of Megarry J [1971] 3 All ER 892 reversed.

Case referred to in judgments

Watson v Lyon (1855) 7 De GM & G 288, 24 LJCh 754, 25 LTOS 230, 44 ER 113, 43 Digest (Repl) 299, 3139.

Notes

For the discharge of a solicitor's lien, see 36 Halsbury's Laws (3rd Edn) 179, 180, para 246, and for cases on the subject, see 43 Digest (Repl) 298, 3121-3141.

Interlocutory appeal

This was an appeal by the defendants, Sumpters, a firm of solicitors, and Albert Alfred George Randall, who was at the material time employed by that firm as a legal executive, from the decision of Megarry J dated 2nd July 1971 and reported at [1971] 3 All ER 892, that no order should be made on the defendants' motion for an order restraining (i) Margolis & Co, the firm of solicitors acting for the plaintiff, Doris Mabel Caldwell, until after the trial of the plaintiff's action against the defendants in respect of the sale of her house, 7 St Mary's Place, Brighton, or further order from paying to the plaintiff or any third party on her behalf the sum of £1,250 which was held by them and represented part of the proceeds of the sale of the house; (ii) the plaintiff until after the trial of the action or further order from causing or allowing Margolis & Co to pay the £1,250 to her or to any other person or otherwise dealing with that sum. The facts are set out in the judgment of Salmon LJ.

F M Ferris for the defendants.

A J D McCowan for the plaintiff.

SALMON LJ. Sumpters, the first defendants, were formerly the plaintiff's solicitors and were instructed by her to act, amongst other things, in connection with the proposed sale to the Brighton Corpn of her house in St Mary's Place at Brighton. For this purpose the plaintiff's title deeds to the house were deposited with Sumpters. The corporation had not entered into any binding agreement to buy the house but had indicated their willingness to buy it for £3,450, a price agreeable to the plaintiff, providing the plaintiff could give vacant possession. The difficulty was that the tenants occupying the house refused to move out of it. Accordingly Sumpters, with the plaintiff's authority, instructed Bosley & Co, a firm of solicitors practising in Brighton, to take the necessary proceedings to evict the tenants. Sumpters, on the plaintiff's instructions, gave Bosley & Co their undertaking that the costs incurred in connection with these proceedings would be paid. Sumpters, also by a letter written on 6th January 1969, on the plaintiff's instructions, gave their undertaking to her bank that on the completion of the sale of 7 St Mary's Place they would discharge the plaintiff's indebtedness to her bank out of the proceeds of the sale. On 6th January 1969 the indebtedness was some £532.

Then in the summer of 1969 the plaintiff changed her solicitors, transferring her legal business to Margolis & Co. At that time, according to Sumpters, the plaintiff owed them some £322 for costs. In October 1969 Margolis & Co had for some time been pressing Sumpters for the title deeds of 7 St Mary's Place. These were required in the first place to prepare a contract of sale to the corporation and would be required subsequently to hand over to the corporation on completion. Sumpters, however, claimed the solicitor's lien over these documents for just over £920 in respect of

a their costs and their personal liability on the undertakings to which I have referred. According to Megarry J's judgment¹ neither the lien nor its amount was disputed at the hearing before him. Sumpters expressed their willingness to hand over the title deeds to Margolis & Co providing that Margolis & Co would undertake to honour the undertakings which Sumpters had given on the plaintiff's instructions to Bosley & Co and the bank and also undertake to pay the costs due by the plaintiff to Sumpters. Margolis & Co asked Sumpters for details of these undertakings. This information does not appear to have been forthcoming. The undertakings were never given.

b On 15th January 1970 Sumpters sent the deeds to Margolis & Co under cover of a letter, the material part of which reads as follows:

c 'These deeds and documents are being sent to you on the understanding that you will hold them to our order, pending the payment of our fees and your Undertaking to honour those Undertakings which we have given on behalf of [the plaintiff], on her instructions, and the payment of fees, etc., of other professional firms who have acted on [the plaintiff's] instructions and have not yet been paid by her.'

d When those documents were sent forward by that letter it was clear that Sumpters had been and were still claiming a lien on those documents and they were sending them forward to Margolis & Co on the condition that Margolis & Co would hold the documents to their order. In the meantime, on 6th January 1970, the plaintiff had issued a specially endorsed writ claiming, amongst other things, the return of the title deeds. The date of the service of the writ is obscure. It appears, however, to have been served after 15th January although by that date Sumpters may well e have been informed that the writ had been issued.

On 20th January 1970 Margolis & Co replied to Sumpters's letter of 15th January as follows:

f 'We thank you for your letter of the 15th January and are pleased to have at last received the Deeds which you enclosed. You are no doubt aware that proceedings have been issued against you and Mr. Randall and these proceedings include matters other than delivery up of the Deeds. In the circumstances we are unable to accede to your request either to hold the Deeds to your Order or to give you our undertakings as mentioned by you . . .'

Sumpters then threatened to bring proceedings against Margolis & Co for the return of the deeds. Thereupon it was very sensibly arranged between these two firms of solicitors that in consideration of Sumpters's abandoning the proposed g proceedings Margolis & Co would retain in their hands £1,250 out of the proceeds of sale and would not part with that sum save on notice to Sumpters.

The sale was duly completed and the proceeds of the sale were received by Margolis & Co. Notice having been given by them that they proposed to release the £1,250 to the plaintiff, the present motion came on for hearing. The motion asked in these h terms for:

'An order restraining . . . Messrs. Margolis & Co. until after the trial of this action or further order from paying to the Plaintiff or any third party on her behalf the sum of £1250 now held by [Margolis & Co] and representing part of the proceeds of sale of 7 St. Mary's Place Brighton Sussex';

i and then, against the plaintiff, an order restraining her until after the trial of the action or further order from causing or allowing Margolis & Co to pay the sum of £1,250 to her or any other person or otherwise dealing with that sum. The outcome of the motion depends on whether or not Sumpters had lost their lien by sending the title deeds to Margolis & Co under cover of the letter of 15th January. If the motion

fails, Sumpters in effect lose their lien and Margolis & Co are free to pay the £1,250 to their client, the plaintiff, resident outside the jurisdiction of our courts in Minorca. If the motion succeeds, Margolis & Co must retain the £1,250 pending the trial of the action. The learned judge² held that Sumpters had lost their lien and therefore made no order on the motion. From that decision Sumpters now appeal.

This appeal turns entirely on the true meaning and legal effect of the letter of 15th January 1970 in the circumstances in which it was written. Approaching the problem even without the assistance of authority, I would find insuperable difficulty in agreeing with the decision of the learned judge² notwithstanding his elaborate and lucid judgment. Since it was not disputed below, it must be assumed for present purposes that Sumpters had a lien on the documents of title. It follows that they had the legal right to possession of these documents as against the plaintiff, in spite of the fact that the documents belonged to her. Even if Sumpters had sent the documents to the plaintiff direct under cover of a letter written in terms similar to those of 15th January, and in similar circumstances, I am by no means convinced that they would have lost their lien by parting with the physical possession of the documents. It seems to me that they retained legal possession. The letter made it plain that the documents were being sent to be held by the addressee as agents for Sumpters and to their order. The documents could be retained on the terms stipulated in the letter or returned or made available to Sumpters to come and take them back.

Although I express no concluded view on the point, I doubt whether, even if the addressee had been the plaintiff herself she could have kept the documents and repudiated the obligation to comply with the terms on which they had been offered to her. The documents, however, were not sent to the plaintiff, they were sent by Sumpters, officers of the court, to Margolis & Co, who are also officers of the court as well as the solicitors for the plaintiff. It must have been clear to Margolis & Co that Sumpters were not intending to part with their lien but were only forwarding the documents out of courtesy to enable Margolis & Co to enter into a contract with a corporation. Without having the sight of the documents, clearly it would have been impossible for any contract of sale to have been prepared. I make no criticism of Margolis & Co. I am sure that they genuinely believed that their duty to their client required them to take advantage of the mistake which they thought that Sumpters had made in parting with physical possession of the documents of title.

In my judgment, however, Sumpters had made no mistake. The letter and all the surrounding circumstances show that they did not intend to abandon their lien nor to part with legal possession of the documents. They offered them to their brother solicitors to hold as their agents on their behalf so that they might be enabled to prepare a draft contract of sale. To my mind it is plain that Margolis & Co were under a legal obligation to return the documents to Sumpters or make them available to Sumpters on Sumpters's request.

The crucial factor in this case is that Sumpters, because of their lien, had the legal right to possession of the documents. The documents were being offered on the terms of the letter of 15th January. The law does not in my view allow retention of the documents and repudiation of the terms on which they are offered. This seems to me to be clear on principle. There is little authority on the point, possibly because it is so plain. What authority there is tends to support the view I have formed. There is certainly no authority the other way. The textbooks all proclaim that a lien is not lost by parting with physical possession if the circumstances show, as in the present case, that the lien is being expressly or impliedly reserved (see Bowstead on Agency³, Halsbury's Laws of England⁴, Powell's Law of Agency⁵, Stoljar's Law of Agency⁶, Fridman's Law of Agency⁷ and Cordery on Solicitors⁸).

2 [1971] 3 All ER 892, [1971] 3 WLR 748

3 13th Edn, 1968, p 232

4 Volume 36, 3rd Edn, p 180

5 2nd Edn, 1961, p 372

6 Page 309

7 3rd Edn, 1971, p 154

8 6th Edn, 1968, p 432

a The only authority which directly bears on this point is of respectable antiquity, *Watson v Lyon*⁹. In that case the mortgagor instructed his solicitors to whom he was indebted in a bill of costs to prepare a reconveyance of part of the mortgaged property. They did so and sent the engrossment together with other engrossments to the mortgagees' solicitors for execution by the mortgagees under cover of a letter stating that they had a lien on the documents and concluding 'you will be good enough to hold them to our account'.
b The mortgagees executed the relevant engrossment and thereby it became a deed of reconveyance. Thereafter the mortgagees' solicitors agreed with the mortgagor's solicitors that the mortgagees would not part with the deed of reconveyance except in accordance with a letter to which I have referred. The question then arose whether the mortgagor's solicitors had lost their lien or whether they were entitled to an injunction to restrain the mortgagees and their solicitors from dealing with the reconveyance without their consent.
c The court decided this question in favour of the mortgagor's solicitors. Knight Bruce LJ considered it irrelevant that the engrossment had been turned by execution into a deed and thereby changed its character. He based his judgment solely on the effect of the letter and the circumstances under which the parchment had been forwarded to the mortgagees' solicitors, namely that the mortgagor's solicitors retained their lien on it and were parting with it only on the condition that the mortgagees' solicitors would hold it on their account. He did not even refer to the subsequent agreement, for which
d in any event there was probably no consideration.

Turner LJ¹⁰ dealt with two questions: (1) had the lien been lost by forwarding the parchment under the terms of the letter, and (2) had the lien been lost by the parchment having changed its character in being turned into a deed. He said¹¹:

e '... these questions depend, as it seems to me, upon the character in which this deed was held by the mortgagees and their solicitors. If a solicitor, having a lien upon a document, places it in the hands of an agent or trustee, it cannot, I think, be said that his lien is defeated, [in this he was agreeing with what had been said by Knight Bruce LJ] nor can any change in the character of the document, as I think, destroy the lien, if the agent or trustee has agreed to hold the altered document subject to the lien. In either case the document cannot rightfully pass
f into the hands of any third person. In each case the possession of the agent or trustee is the possession of the solicitor. Suppose a country solicitor to send up documents to his London agent, with directions to hold them on his account, the lien of the country solicitor must surely remain.'

g Now, the London agent would be the solicitors for the client against whom the country solicitor had a lien, yet nevertheless according to the view expressed by Turner LJ he would not be justified in handing over the document to the client but would be holding them as agent for the country solicitor whose lien would be preserved.

I therefore come to the conclusion both on principle and authority that in the present case Sumpters have not lost their lien and that Margolis & Co must retain
h the sum of £1,250 pending the outcome of this action. I would accordingly allow the appeal.

STAMP LJ. I agree. It is plain, as the learned judge¹² in the court below remarked, that a solicitor's possessory lien is lost if the solicitors part with the possession of the deeds without making any reservation. It is also plain that if the solicitor obtains the agreement of the recipient to do so he will hold the deeds on the solicitor's behalf and
i

9 (1855) 7 De GM & G 288

10 (1855) 7 De GM & G at 297, 298

11 (1855) 7 De GM & G at 298

12 [1971] 3 All ER 892 at 895, [1971] 3 WLR 748 at 752

the lien will not be lost. In my judgment it is also the law that where a solicitor having a possessory lien on his former client's papers puts them in the hands of a third party to hold them to the order of the solicitor or for the account of the solicitor, the lien is not destroyed because the possession of the transferee becomes the possession of the solicitor. In my judgment it makes no difference that the transferee is the solicitor of the owner of the papers. If this were not the law, powerful considerations of convenience and indeed, in some cases but not in this, of honest dealing, would be frustrated.

It is submitted here that the plaintiff's solicitors, receiving the documents of title as they did, were placed in an embarrassing position, having a duty to the plaintiff who denied the existence of the lien and who was or may have been unwilling that the undertakings which had been required as a condition of giving up the lien should be given. This embarrassment could however only arise if the defendant solicitors had delivered unqualified possession to the plaintiff's solicitors and this they did not do. Having received the documents 'to hold them to our order', their possession became that of the solicitors who sent them and they could either hold them to the order of the solicitors who sent them or, if the plaintiff would not have it so, send them back or say, 'Come and fetch them'.

In my judgment *Watson v Lyon*¹³ is an authority for the proposition which I have stated. The decision in that case rested, as I read it, on two propositions. The first proposition was that if a solicitor having a lien on a document places it in the hands of an agent (and it was necessarily conceded in this case that the solicitor to the other party can be an agent) instructing him to hold the document to the account or order of the former solicitor, the possessory lien is not defeated because the possession of the transferee is the possession of the transferor. The second proposition established by the case as I read it is that if the document changes its character thereafter, the lien is not defeated if the agent promises to hold the altered document subject to the lien. The question of whether, in the absence of such a promise, the lien would have attached to the altered document was not decided.

The case supposed by Turner LJ of the country solicitor sending documents to his London agent appears to me not merely to be part of the ratio decidendi of *Turner LJ* in the case but also to be remarkably like the present case.

I, too, would allow the appeal.

Appeal allowed.

Solicitors: *Shelton, Cobb & Sumpters* (for the defendants); *Margolis & Co* (for the plaintiff).

Harold J Hughes Esq Barrister.

R v Southampton City Justices, ex parte Briggs

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND GRIFFITHS JJ

17th DECEMBER 1971

Magistrates – Procedure – Summary trial for indictable offence – Consent of accused to summary trial – Withdrawal of consent – Plea of guilty – Committal to quarter sessions for sentence – Change of plea after committal – Case remitted to magistrates for disposal – Claim by accused to withdraw consent to summary trial and to elect trial by jury – Discretion of justices to grant request.

The applicant appeared before the respondent justices on three charges. Being unrepresented, he purported to elect summary trial. He pleaded guilty and was convicted on his pleas. He was then committed to quarter sessions for sentence. At quarter sessions the recorder determined that in respect of the third charge, one of theft, a plea of 'not guilty' should be entered, and that the matter should be sent back to the justices with a direction to set aside their conviction of the applicant on the third charge. On appearing again before the justices, the applicant sought to elect trial by jury on the third charge. The justices, on the advice of their clerk, decided that they had no power to consent to the applicant's election for summary trial being withdrawn. On an application for mandamus directing the justices to permit the applicant to elect to go for trial by jury on the third charge,

Held – The justices had the power to allow the applicant to withdraw his consent to summary trial; accordingly, mandamus would be granted directing them to hear the applicant's request to withdraw his plea on the third charge and to determine his request to trial by jury on that charge in their discretion (see p 575 e to g, post).

R v Craske, ex parte Comr of Police of the Metropolis [1957] 2 All ER 772 applied.

Notes

For consent to summary trial of indictable offences, see 25 Halsbury's Laws (3rd Edn) 177, para 326, and for cases on the subject, see 33 Digest (Repl) 186, 187, 347-352.

Cases referred to in judgment

R v Craske, ex parte Comr of Police of the Metropolis [1957] 2 All ER 772, [1957] 2 QB 591, [1957] 3 WLR 308, 121 JP 502, 33 Digest (Repl) 186, 350.

R v Metropolitan Stipendiary Magistrate, ex parte Zardin (14th May 1971) unreported.

R v Muford and Lothingland Justices, ex parte Harber [1971] 1 All ER 81, [1971] 2 QB 291, [1971] 2 WLR 460, 55 Cr App Rep 57.

Cases also cited

R v Marlborough Street Magistrates, ex parte Van Telford (7th December 1971) unreported.

R v Metropolitan Magistrate, ex parte Elimelech (14th May 1971) unreported.

Motions for mandamus and prohibition

This was an application by way of motion by Jeffrey Briggs (a) for an order of mandamus directed to the respondents, the Southampton City Justices, to consider and deal in accordance with the provisions of the Magistrates' Courts Act 1952 with an application by the applicant to be put to his election whether to consent or not to consent to be tried by the respondent justices on a charge of theft remitted to them on 29th October 1971 by Southampton City Quarter Sessions; and (b) for an order of

prohibition restraining the respondent justices from trying the applicant summarily on the aforesaid charge of theft. The facts are set out in the judgment of Lord Widgery CJ. a

JJ Smyth for the applicant.

The respondent justices did not appear and were not represented. b

LORD WIDGERY CJ. In these proceedings counsel moves on behalf of the applicant, Jeffrey Briggs, seeking orders of mandamus and prohibition to issue against the justices for the county of Southampton requiring them to conduct certain proceedings before them in such a manner as to permit the applicant to elect to go for trial by jury on a charge of theft, contrary to s 1 (1) of the Theft Act 1968, (or to make such election as he may be advised) and, in the event of his electing to go for trial as aforesaid, to take all proper steps for the institution of committal proceedings in consequence of such election. c

The way in which this request arises is as follows. On 11th October 1971 the applicant appeared before Southampton justices, the respondents to this motion, on three charges. He purported to plead guilty to all three charges and he was convicted on his pleas. The respondent justices then committed the applicant to the city quarter sessions for sentence. He had of course elected summary trial in respect of the charge of theft as a preliminary to his plea and conviction by the justices. On 11th November the applicant appeared before the recorder at the Southampton City Quarter Sessions pursuant to the committal for sentence which the justices had ordered. For reasons which are not entirely clear from the material before us, the recorder determined that a plea of not guilty should be entered in the case of the charge of theft with which we are concerned. d

That he had authority to do so has recently been made clear in this court in the case of *R v Mutford and Lothingland Justices, ex parte Harber*¹. In recognising the power of the recorder to direct that the matter be sent back to the justices as on a plea of not guilty Lord Parker CJ gave certain warnings as to the dangers which might follow if recorders and others sitting at quarter sessions exercised this power too liberally, but that the power exists is determined by that last mentioned case, and it was exercised by the recorder in this instance. He made an order in the matter, a copy of which we have before us, and his order was that a not guilty plea should be entered and the matter should be sent back to the justices for disposal. e

On the matter coming back before the justices some misunderstanding arose whether the future proceedings were to be proceedings on indictment or summary. In the end it was made clear on behalf of the applicant that he desired to go for trial before a jury in regard to this offence. In other words he desired to withdraw his consent to summary trial which he had given at the very beginning of these proceedings, and desired that the justices' interest in the matter should be confined to the conduct of committal proceedings. f

I say there was some misunderstanding in the matter because the solicitor appearing for the applicant had certain discussions with the clerk to the justices, and the latter took the view that there was no outstanding power of the justices to allow the applicant to alter his election in this regard. I would pay tribute to the obvious care which the clerk and his assistant took on this question, but they seemed to have been misled, in a way which I do not fully follow, by the form of the recorder's order into thinking that the recorder had ordered that this matter should be dealt with not only on a plea of not guilty but as on a consent to summary trial as well. I can see nothing in the recorder's order which dealt with the second point at all. g

However, the clerk to the justices, taking the view that the issue was determined h

a by the recorder's order, advised the justices that they had no power to allow this applicant to withdraw his consent to summary trial. We are in the position in this case of being able to say with certainty that that is what happened, because we have an affidavit from the justices' clerk making it perfectly clear that he thought that it was his duty to tender this advice, and advised the justices that they had no power to consent to the election being withdrawn.

b They had that power; nothing in the recorder's order that I can see ordered to the contrary, and independently of any special order of that kind the power of justices to allow an accused person to withdraw his consent to summary trial was recognised as long ago as 1957 in *R v Craske, ex parte Comr of Police of the Metropolis*². That decision seems to have received comparatively little publicity until earlier this year, when in an unreported case which came before this court on 14th May, *R v Metropolitan Stipendiary Magistrate, ex parte Zardin*, this court referred to the decision in *R v Craske*². In my judgment appears this phrase:

c 'It is clear from the case of *R v Craske*² . . . that in circumstances such as the present the magistrate has a discretion to allow the accused person to change his or her election if he wishes. If there was doubt, as there may have been before, about the existence of that right at all, it is resolved by *R v Craske*².'

d So the true position when the matter eventually came back to the justices was that they did have power to allow the applicant to withdraw his consent to summary trial, and if he asked, as he did, to withdraw his consent, then the justices were required to exercise their discretion whether they would allow him to do so or not. The mischief in the present case is that they did not exercise a discretion at all because they believed

e that they had no discretion to exercise.

f For my part I am satisfied they were wrong in adopting the view that they had no discretion to exercise, and I would myself order mandamus to go directing them to hear the applicant's request to withdraw his consent to summary trial, and to determine that request in their discretion. We have been pressed by counsel for the applicant to give some kind of indication or guidelines as to how such a discretion should be exercised. For my part I think it would be dangerous, and I decline to give any such direction. I think it suffices to tell the justices that, as in all their undertakings, they must endeavour to do justice, and whether or not they exercise their discretion in favour of the applicant's request will depend on how they see the broad justice of the whole situation. I would allow mandamus to go in the terms to which I have referred.

g **ASHWORTH J.** I agree.

GRIFFITHS J. I also agree.

h **LORD WIDGERY CJ.** I should add that prohibition is not really necessary in the circumstances.

Mandamus granted.

Solicitors: *Robbins, Olivey & Lake*, agents for *Robinson, Jarvis & Rolf*, Cowes (for the applicant).

j N P Metcalfe Esq Barrister.

2 [1957] 2 All ER 772, [1957] 2 QB 591

Practice Direction

CHANCERY DIVISION

Execution – Leave to issue execution – Application – Suspended order for possession – Circumstances in which application to be made by summons – Service – Proof of service – Administration of Justice Act 1970, s 36 – RSC Ord 46, rr 2, 4.

1. *Fleet Mortgage & Investment Co Ltd v Lower Maisonette 46 Eaton Place Ltd*^a makes it clear that leave to issue execution on a suspended order for possession because of a breach of the suspensory terms must not be given without allowing the defendant an opportunity of being heard.

2. It is apprehended that a suspended possession order is an order under which a person is entitled to relief subject to the fulfilment of a condition for the purposes of RSC Ord 46, r 2 (1) (d), and that Ord 46, r 4, accordingly applies. As the judgment referred to in para 1 above shows that leave to issue execution should not be given ex parte it follows that the court must direct an application for such leave to be made by summons (r 4 (1)).

3. Suspended orders are now made not infrequently in mortgagees' possession actions by virtue of s 36 of the Administration of Justice Act 1970^b and in such actions the defendant is often in default of appearance.

4. Where a defendant has appeared no special directions as to service are needed but in future a plaintiff desiring leave to issue execution on a suspended possession order when there has been a default of appearance will send a copy of the summons and of the affidavit in support of the application to each defendant in default of appearance at his last known address, so as to reach him not less than two clear days before the hearing, and will lodge with the master's clerk, at least one clear day before the hearing, the affidavit in support of the summons endorsed with a certificate by the plaintiff's solicitor in the form following or as near thereto as may be appropriate:

I certify that on the day of 19 a copy of the summons herein dated 19 together with a true copy of the within affidavit was sent by prepaid letter post addressed to the Defendant at his last known address being [insert address].

Plaintiff's solicitor.'

No further proof of service should normally be required in default cases.

5. The same principles apply and the same practice will be followed where leave to issue execution is required because six years or more have elapsed since the date of an unsuspended possession order or because there has been a change in the party liable to execution. (See RSC Ord 46, r 2.)

6. Applications for leave to issue execution because of a change of the party entitled to execution or to issue a writ of restitution may be dealt with ex parte as hitherto.

By the direction of the Vice-Chancellor.

27th January 1972

R E BALL
Chief Master

^a (1972) *The Times*, 18th January

^b Halsbury's Statutes (3rd Edn) 1970 vol, p 274

a **Script & Play Productions Ltd v Comrs for
the General Purposes of the Income Tax
for the Division of St George's, Hanover
b Square, London, and another**

**Sarne Ltd v Comrs for the General Purposes
of the Income Tax for the Division of
c St George's, Hanover Square, London,
and another**

CHANCERY DIVISION

MEGARRY J

23rd NOVEMBER 1971

d *Income tax – Penalty – Failure to furnish information to commissioners – Summary award of penalty – Award of daily penalty for continuing failure thereafter – Validity – Appeals against assessments to corporation tax – Adjournment of hearing and subsequent hearings – Precept issued requiring delivery of accounts within 90 days – Penalty summarily awarded for non-compliance with precept – Further meeting of commissioners – Non-compliance with precept continuing – Imposition of penalty calculated on daily rate since date of original*

e *penalty – Whether failure to comply with precept declared by commissioners before whom 'proceedings' had been commenced so as to justify further daily penalty – Taxes Management Act 1970, ss 51 (1), 53 (1), 98 (1), 100 (1).*

The taxpayer company was assessed to corporation tax for the year from May 1967 to April 1968 in the sum of £100. It appealed against the assessment and the appeal *f* was listed for hearing by the General Commissioners on 5th June 1969. At that hearing and subsequently there were a number of adjournments. The taxpayer company's accountants were unable to obtain instructions from a director and principal shareholder who was abroad. Later the taxpayer company was assessed to corporation tax for the year from May 1968 to April 1969 and it appealed against that assessment also. On 8th October 1970 both appeals were listed for hearing *g* but no representative of the taxpayer company or the accountants attended. At this meeting the commissioners ordered a precept to be issued under s 51 (1)^a of the Taxes Management Act 1970 for certified accounts comprising the balance sheet, profit and loss account and tax computations for the years in question to be sent to the commissioners within 90 days of the date of the precept which was 13th October 1970. At a meeting on 1st April 1971 a clerk from the accountants attended, the *h* accountants themselves having written a letter seeking an adjournment of the hearing. At that meeting the commissioners imposed a penalty of £25 on the taxpayer company under ss 53 (1)^b and 98 (1) (i)^c of the 1970 Act for failure to comply with the precept. On 10th June 1971 the cases were again listed for hearing but on that occasion also there was no appearance on behalf of the taxpayer company or the accountants. The commissioners thereupon imposed on the taxpayer company *j* a penalty of £350 under s 98 (1) (ii)^c of the 1970 Act, calculated at the rate of £5 a day since 1st April 1971. The taxpayer company appealed against the imposition of the £350 penalty.

a Section 51 (1), so far as material, is set out at p 580 b, post

b Section 53 (1) is set out at p 580 d, post

c Section 98 (1) is set out at p 580 f and g, post

Held – Since by virtue of s 98 (1) (ii) a daily penalty could only be imposed if the failure to furnish information continued after the declaration by the court or commissioners before whom ‘proceedings’ had been commenced, it followed that no daily penalty could be imposed where there had been no proceedings for a prior penalty, for it was not then possible to point to any court or commissioners who could declare the failure for the purposes of the daily penalty and thus start the necessary period running. The provisions of s 53 (1) that a penalty might be awarded summarily ‘notwithstanding that no proceedings for its recovery have been commenced’ and of s 100 (1)^d that ‘no proceedings shall be commenced . . . for the recovery of any penalty . . . except by order of the Board’, showed that the summary award of a penalty under s 53 (1) did not itself constitute ‘proceedings’ for the purposes of s 98 (1) (ii). Accordingly the commissioners had no power to impose the daily penalty totalling £350 and the appeal would be allowed (see p 581 j to p 582 b, post).

Notes

For the law relating to penalties, see 20 Halsbury’s Laws (3rd Edn) 715-720, paras 1435-1447, and for cases on the subject, see 28 (1) Digest (Reissue) 578-580, 2146-2162.

For the Taxes Management Act 1970, ss 51, 53, 98, 100, see 34 Halsbury’s Statutes (3rd Edn) 1297, 1299, 1335, 1336.

Appeals

By notice of motion dated 2nd July 1971 the taxpayer companies, Script & Play Productions Ltd and Sarne Ltd, applied for an order pursuant to ss 53 (2) and 100 (6) of the Taxes Management Act 1970 that awards dated 10th June 1971 of the Commissioners for the General Purposes of the Income Tax for the division of St George’s, Hanover Square, London, imposing penalties of £350 on each of the taxpayer companies be wholly reversed or alternatively be reduced in amount. The facts are set out in the judgment.

J E F Lindsay for the taxpayer companies.

P W Medd for the Crown.

MEGARRY J. These are two appeals by originating motion against penalties imposed under the income tax legislation. One appeal is by a company called Script & Play Productions Ltd, and the other by a company called Sarne Ltd. Counsel for the taxpayer companies and counsel for the Crown agreed that the two cases were in substance indistinguishable, and that the second case stood or fell by the first. I shall accordingly deal only with the first case. I shall refer to Script & Play Productions Ltd as ‘the company’.

The matter arises out of two assessments for corporation tax, one for £100 for the year from May 1967 to April 1968 and the second for £1,000 for the year from May 1968 to April 1969. The company appealed against the first assessment, and the appeal was listed by the General Commissioners for the St George’s, Hanover Square, Division. The hearing was for 5th June 1969, and at that hearing and subsequently there were a number of adjournments. The company’s then accountants were unable to obtain instructions from a Mr Sarne, who is the principal shareholder and a director. Mr Sarne, it seems, was abroad. Due written notice of the meeting and of all subsequent meetings was given to the company at its registered office, with a copy to the company’s accountants. Although on the first few occasions the inspector of taxes accepted the reasons given for the inability of the company to proceed with the appeals, this attitude, not surprisingly, did not continue indefinitely. On 8th October 1970 appeals against both the assessments were listed for hearing; by then the company had also appealed against the second assessment. No representative of the company or the accountants attended. At this hearing, the General Commissioners ordered a

^d Section 100 (1) is set out at p 580 j, post

a precept to be issued for certified accounts comprising the balance sheet and profit and loss accounts for the two years in question. These were to be sent, according to the precept, to the General Commissioners within 90 days from 13th October 1970.

A meeting of the General Commissioners had been arranged for 18th February 1971, which was after the 90 days had expired, but this was cancelled, due to a postal strike. At the next meeting, on 1st April 1971, a clerk from the accountants attended, b the accountants having written a letter seeking an adjournment. At that meeting the General Commissioners imposed a penalty of £25 for the failure to comply with the precept. On 10th June 1971 the cases were again listed for hearing, and this time there was no attendance on behalf of the company or the accountants. The General Commissioners thereupon imposed a penalty on the company of £350, being £5 a day from 1st April 1971.

c On 2nd July the company served an originating notice of motion seeking the reversal or reduction of the £350 penalty, the £25 penalty not being directly involved in the motion. The grounds of appeal were stated in very general terms as being—

d ‘that the said award is meet to be reversed alternatively is excessive by reason of the said Commissioners for the General Purposes having misdirected themselves as to law further or alternatively as to fact and by reason of their having exercised wrongly such discretions as were vested in them’.

Today, when the appeal came on for hearing before me, counsel on behalf of the company applied for an adjournment for 14 days. New accountants had been instructed on behalf of the company, he told me, and accounts had now been prepared for both the years in question. In the other appeal, by Sarne Ltd, I understand that e accounts for one of the two years were now ready. The same difficulty in obtaining instructions from Mr Sarne was put forward as the ground for seeking this adjournment. However, counsel for the Crown told me, on instructions, that Mr Sarne had in fact been in London on 2nd September 1971 at a meeting of the General Commissioners. Counsel for the company did not dispute that Mr Sarne had been in London then, but said that his present accountants had not been able to obtain f any instructions from Mr Sarne. The case displays a long history of repeated adjournments, and I have considerable sympathy with the present accountants, instructing solicitors and counsel for the company. But it seemed to me quite wrong to allow matters to drag on in this way, and I accordingly refused counsel for the company’s application for an adjournment.

g There was then a brief adjournment while counsel for the company ascertained whether he had any instructions to argue the substantive appeal. On it appearing that he had these instructions, he then took a point on the construction of the Taxes Management Act 1970 which is not altogether easy. It is common ground between counsel on both sides that although the Taxes Management Act 1970 has now replaced earlier legislation that was in force for at any rate part of the time in question, nothing turns on the transition from the former Acts to the present Act. Further— h more, although the Taxes Management Act 1970 is, according to the long title:

‘An Act to consolidate certain of the enactments relating to income tax, capital gains tax and corporation tax, including certain enactments relating also to other taxes’,

j it was agreed that the presumption that a mere consolidation Act does not affect the construction of the earlier Acts which it consolidates gave rise to no argument which would assist either side. Accordingly, the matter has been dealt with on the basis of the language of the Taxes Management Act 1970. The basic point taken by counsel for the company depends on the fact that no prior notice in writing or summons or other document was given to the company to warn it of any intention to consider imposing the penalty of £25. There was therefore

nothing that could be called 'proceedings' before the commissioners which entitled them to declare a failure by the company for the purpose of starting time running for the daily penalty which constituted the £350. The penalty of £25 was simply imposed by the commissioners at their meeting on 1st April, and although valid in itself, it could provide no foundation for the daily penalty. a

The relevant statutory provisions are as follows. By s 48 (1) of the Taxes Management Act 1970 "the Commissioners" means the General Commissioners or the Special Commissioners, as the case may be'. Under s 51 (1): b

'The Commissioners may at any time before the determination of an appeal give notice to the appellant or other party to the proceedings (not being an inspector or the Board) requiring him within the time specified in the notice—
(a) to deliver to them such particulars as they may require for the purpose of determining the appeal . . .'
c

There are then certain other provisions that I need not mention, because it is under this paragraph that the commissioners caused the precept to be issued. Section 53 (1) provides:

'Any penalty incurred by any person for a failure to comply with a notice under section 51 above, or incurred by any person under section 52 above, may be awarded summarily by the Commissioners notwithstanding that no proceedings for its recovery have been commenced, and accordingly section 98 (3) of this Act shall not apply to any penalty so awarded.'
d

One must turn from that section to s 98 to discover what penalties may be awarded. I may preface my quotation from s 98 by saying that in the Table to that section, s 51 of the Act appears in col 1. Section 98 provides: e

'(1) Where any person—(a) has been required, by a notice served under or for the purposes of any of the provisions specified in the first column of the Table below, to deliver any return or other document, to furnish any particulars, to produce any document, or to make anything available for inspection, and he fails to comply with the notice, or (b) fails to furnish any information, give any certificate or produce any document or record in accordance with any of the provisions specified in the second column of the Table below, he shall be liable, subject to subsection (3) below—(i) to a penalty not exceeding £50, and (ii) if the failure continues after it has been declared by the court or Commissioners before whom proceedings for the penalty have been commenced, to a further penalty not exceeding £10 for each day on which the failure so continues . . .
(3) A person shall not be liable to any penalty incurred under this section for a failure to comply with any notice, if the failure is remedied before proceedings for the recovery of the penalty are commenced.'
f
g

Counsel for the company's point turns in the main on the words in s 98 (1) (ii) which run: 'declared by the court or Commissioners before whom proceedings for the penalty have been commenced'. He says that in this case no 'proceedings' for the penalty of £25 were commenced before the General Commissioners. Accordingly, there cannot be any failure which continued after it had been declared by the General Commissioners before whom 'proceedings' were commenced, as there were in fact no such General Commissioners. He reinforces his argument by referring to s 100 of the Act. By subsection (1): h
j

'Except as otherwise provided in this section, no proceedings shall be commenced against any person for the recovery of any penalty under the Taxes Acts except by order of the Board.'

- a Subsection (4) deals with the commencement of certain proceedings for a penalty by an inspector, and then by sub-s (7):

'Proceedings under this section before any Commissioners shall be by way of information in writing, made to them, and upon summons issued by them to the defendant (or defender) to appear before them at a time and place stated in the summons, and they shall hear and determine each case in a summary way; and any penalty awarded by them in such proceedings shall for all purposes be treated as if it were tax charged in an assessment and due and payable.'

- b Section 53 (1) provides for a penalty to be awarded summarily by the commissioners 'notwithstanding that no proceedings for its recovery have been commenced'. Section 98 (1) uses the phrase:

- c 'after it has been declared by the court or Commissioners before whom proceedings for the penalty have been commenced'.

The language of each of these two provisions relating to 'proceedings' substantially matches the other. This accordingly provides some support for the argument that if there is a summary award by the commissioners of a penalty under s 53 (1), without

- d any 'proceedings' for the recovery of the penalty having been commenced, the period of the daily penalty cannot commence to run under s 98 (1), because there has been no declaration by any court or commissioners before whom anything that the Act regards as 'proceedings' for the penalty have been commenced.

- e Counsel for the Crown sought to avoid this difficulty by pointing to the fact that ss 51 to 53 formed something of a little code of their own, and that under the pattern which the legislature had adopted it was appropriate to read s 53 (1) on the footing that if the commissioners commenced to consider whether they should award any penalty summarily, then that amounted to the commencement of proceedings for the recovery of a penalty, even though it might only be a matter of a few moments before they reached their conclusion that a penalty should be imposed. On this footing one would have proceedings which, perhaps with some degree of exaggeration, might be described as instant proceedings. I find it difficult to think that the legislature intended the words in s 53 (1) to mean that the process of summarily awarding a penalty comprised not only making the award but also the commencement of proceedings therefor, particularly in view of the nature of the proceedings contemplated by s 100 (7).

- f Counsel for the Crown also pointed to the initial words of s 53 (1), 'Any penalty incurred', and said that one can then turn to s 98 to find out what those penalties were. However, when one does that one finds there that the liability to the penalty of £50 is imposed without any qualifying or additional words, whereas the provision for liability to a daily penalty is qualified by the initial 'if' phrase, relating to a failure continuing after it has been declared by the court or commissioners before whom proceedings for the penalty have been commenced. Counsel for the Crown also

- h accepted that the opening words of s 100 were somewhat against him. These run:

'Except as otherwise provided in this section, no proceedings shall be commenced against any person for the recovery of any penalty under the Taxes Acts except by order of the Board.'

- i These words add to the improbability that something which does not amount to proceedings by the board and is not provided for by the section but consists of a penalty awarded by the General Commissioners under another section, s 53 (1), could be regarded as constituting valid 'proceedings' for the purpose of a subsequent daily penalty.

The result appears to me to be that no daily penalty can be imposed where no proceedings for a prior penalty have been commenced, for it is then not possible

to point to any court or commissioners who can declare the failure for the purposes of the daily penalty and thus start the necessary period running. The words in s 53 (1), 'notwithstanding that no proceedings for its recovery have been commenced', seem to me to point in the same direction. It would have been possible for the draftsman of the Act to provide in s 98 (1) (ii) that for a failure there should be liability to a penalty not exceeding £50, and that if the failure continued after it had been 'declared by the court or Commissioners by whom the penalty has been imposed', there should be liability to a further penalty not exceeding £10 a day, and so on; or the language might have been 'declared by any court or any Commissioners'. Either set of words or their equivalent would have met a case, such as the case before me, where the initial penalty is imposed summarily under s 53 (1). Instead of the words that I have suggested, however, the draftsman has used the words 'before whom proceedings for the penalty have been commenced', and due effect must be given to the words which in fact appear in the statute.

It therefore seems to me that the point taken by counsel for the company must succeed. It is not a case in which he has suggested that his clients have any particular merits, but, of course, that is not the point. I am concerned with the construction of a penal provision, and so far as I feel any fair doubts on the construction of the statute these must be resolved in favour of those exposed to the penalty. I am not sure that the result is one that the draftsman would have intended, had the point been put to him, but I must give effect to the language that has in fact been used. Accordingly, in my judgment, in each case the appeal succeeds and the penalty must be discharged.

Appeals allowed.

Solicitors: *The Simkins Partnership* (for the taxpayer companies); *Solicitor of Inland Revenue*.

K Buckley Edwards Esq Barrister.

Ash v Ash

FAMILY DIVISION

BAGNALL J

25th, 26th NOVEMBER 1971

Divorce – Behaviour of respondent – Behaviour such that petitioner cannot reasonably be expected to live with respondent – Whether 'petitioner' meaning ordinary reasonable spouse looked at as a petitioner – Divorce Reform Act 1969, s 2 (1) (b).

Divorce – Behaviour of respondent – Behaviour such that petitioner cannot reasonably be expected to live with respondent – Reasonableness – Necessity for court to consider characteristics and behaviour of petitioner as well as of respondent – Divorce Reform Act 1969, s 2 (1) (b).

Divorce – Irretrievable breakdown of marriage – Evidence that marriage has broken down irretrievably – Assertion by petitioner that no possibility of contemplating living with respondent as his wife – Whether court bound to conclude marriage has irretrievably broken down – Divorce Reform Act 1969, s 2 (3).

On the true construction of s 2 (1) (b)^a of the Divorce Reform Act 1969 the word 'petitioner' means the particular petitioner in the case under consideration and not an ordinary reasonable spouse looked at as a petitioner (see p 585 f and g, post). The court in determining for the purposes of s 2 (1) (b) whether the particular petitioner

^a Section 2 (1), so far as material, provides: 'The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts, that is to say—... (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent ...'

a can or cannot reasonably be expected to live with the particular respondent must take into account the character, personality, disposition and behaviour of the petitioner as well as the behaviour of the respondent as alleged and established in evidence. If the petitioner and respondent are equally bad in similar respects, each can reasonably be expected to live with the other. A violent petitioner can, for example, reasonably be expected to live with a violent respondent (see p 585 h and j and p 586 a, post).

b Where a petitioner for a decree of divorce is adamant that her marriage is at an end and asserts that there is no possibility of her contemplating living with the respondent as his wife, the court is not in law bound to conclude, for the purposes of s 2 (3)^b of the 1969 Act, that the marriage has broken down irretrievably; simple assertion cannot suffice. The court must examine all the evidence placed before it, including and giving not inconsiderable weight to the assertions of the parties, and determine, quite generally, whether it can be said that, in spite of the respondent's behaviour and the petitioner's reaction to that behaviour, the marriage has not broken down irretrievably (see p 586 f and g, post).

Notes

For decree of divorce on proof that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent, see Supplement

d to 12 Halsbury's Laws (3rd Edn) para 437A, 3.

For the Divorce Reform Act 1969, s 2, see Halsbury's Statutes (3rd Edn) 1969 vol, p 1328.

Petition

This was a petition by the wife for divorce on the ground that her marriage to the husband had irretrievably broken down. The wife alleged that the husband had behaved in such a way that she could not reasonably be expected to live with him. By his answer the husband denied that the marriage had broken down irretrievably. The facts are set out in the judgment.

SIR Craig for the wife.

The husband appeared in person.

f

BAGNALL J. The petitioner and the respondent in this case, Anne-Marie Rose Ash and Brian Henry Dorland Ash, were married on 19th April 1963. They were respectively 29 and 26 years of age; the husband had previously been married, his previous marriage having been dissolved. At the time of the marriage they had been living together as man and wife for about a year and the wife was then pregnant of her first child, a boy, who was born on 20th May 1963. Subsequently a second child, a girl, was born on 28th September 1964. The matrimonial home was at all material times in Putney, London, where the wife now lives with the two children, who attend the local primary school. The husband lives generally at the home of his parents, although I think that from time to time he occupies other temporary accommodation. That state of affairs, so far as the husband is concerned, now obtains pursuant to an order of this court made on 4th May 1971 as a result of which the husband undertook not to return to the matrimonial home, except for certain limited purposes, and not to interfere with or molest the wife.

On 28th April 1971 the wife filed her petition wherein she alleged that the marriage had broken down irretrievably and, as particulars of that allegation, that the husband had behaved in such a way that the wife could not reasonably be expected to live with him. Further particularisation of that averment alleged general violence and intoxication amounting to alcoholism, with a number of specific instances of violence, either perpetrated on or threatened to the wife. By his answer, which was not

j Section 2 (3), so far as material, provides: 'If the court is satisfied on the evidence of any such fact as is mentioned in subsection (1) of this section, then, unless it is satisfied on all the evidence that the marriage has not broken down irretrievably, it shall . . . grant a decree nisi of divorce.'

professionally drawn, the husband admitted tendencies to alcohol and violence and further admitted some of the specific acts of violence and threats of violence alleged in the petition. He averred that the principal reason for his behaviour was his unemployment, to which I shall have to refer. He makes an allegation that on one occasion the wife changed the locks of the matrimonial home during his absence so that he was unable to obtain access thereto. He makes some completely vague allegations against the wife, but adds that out of regard for the wife he has no wish to submit any evidence in support of those allegations unless the court should insist. Generally he attributes the present situation, as between himself and the wife, to his health and asserts that the marriage has not broken down irretrievably. a

At the time of the marriage the husband was an administrative assistant in a charity organisation and the wife was a market research controller. At that time, and during the first three or four years of the marriage, the husband was earning the comparatively modest income of about £1,250 a year. He has considerable literary talent which he has wished, and been able, to exercise and at the end of 1966 he obtained employment with a substantial petroleum company as part of its public relations organisation. This was an arduous occupation but one which was particularly suited to his abilities. As a result of it, not only did he obtain a greater income, amounting to some £3,000 per annum, but he was introduced to the modern phenomenon of the almost unlimited expense account. This, together with the demands of his employment, led very largely to the events with which I am concerned, but it did not lead there immediately. The husband undoubtedly found his business entertaining combined, as it necessarily was, with the consumption of hard liquor very much to his taste; also he found that he had adequate resources to enable him to entertain. But the wife during these more prosperous days was, I have no doubt, content to take the benefits in entertainment and other ways which that increased prosperity brought with it. Undoubtedly, however, during this period, as indeed he admits, the husband was drinking far too much far too often. However, he continued in that way of life for two or more years when the inevitable occurred and he resigned his post, becoming then unemployed. Since that time he has sought to make a living for himself as a freelance writer but with very limited financial success. b

On the husband's unemployment the wife, as perhaps one would expect, herself took employment which brought in a modest income and, of course, involved her in spending weekdays away from her home and children and in substantial travelling. During that period, therefore, one would have expected the husband to play his part in looking after the children and in relieving the wife of such of the household tasks as he was able to perform. c

After the onset of the expense account and even more after the misfortune of unemployment, the husband's drinking habits were undoubtedly coupled with abuse of, and violence towards, the wife. I must therefore first consider the wife as a witness in support of the allegations that she has made. I say at once that she did not impress me. She had a penchant for self-dramatisation to an extraordinary degree; she was vague and confused, not only about the dates but about the years and sequence of the various incidents, and she lost no opportunity of exhibiting extreme malevolence towards the husband, not only directed towards the later years of their marriage, the years of complaint, but also going back to the early days of the marriage and to the even earlier days before the marriage when they were living together as lovers. d

The husband, who has conducted his own case with an engaging manner and considerable restraint, also gave evidence. He exhibited similar restraint in the witness box and, as was perhaps foreshadowed in his answer, he was reluctant to criticise his wife. He was, however, constrained to admit, as had also been foreshadowed in his answer, the allegations contained in the petition both general, relating to drunkenness, alcoholism and violence, and particular, relating to specific acts and threats. He expressed the view, and stated as a fact, that his addiction to drink was not only produced by the expense account to which he had access but also by the demands e

a which his work placed on him and the lack of interest in his problems and lack of understanding that was shown by the wife. It was apparent to both of them that his proclivities were becoming, if they were not already, an illness and as one example of the attitude of the wife I may perhaps cite this: they attended together a consultant psychiatrist in order to see what, if any, cure might be found for the husband's condition. This must necessarily have been one of the most important events in their short married life, but the wife had no recollection of the result of it when she was asked about it in the witness box. However, having regard to the admissions made by the husband both formally in the pleadings and on oath in the witness box I must find that the wife has established fully all the allegations contained in para 8 of her petition, that paragraph containing the particulars of the behaviour of the husband of which the wife complains; and I find as facts the matters there averred.

c The husband puts his defence to the petition in two ways. First, he says that notwithstanding the facts that he has admitted and that I have found, nevertheless it should not be held that he has behaved in such a way that the wife cannot reasonably be expected to live with him. Secondly, if that be wrong, he says that under the Divorce Reform Act 1969, s 2 (3), I should conclude that I am satisfied on all the evidence that the marriage has not broken down irretrievably. If he satisfies me on either of those two submissions, the prayer for dissolution in the petition must be rejected.

d I must therefore first consider the true construction of s 2 (1) (b) of the 1969 Act. That paragraph, which sets out one of the facts which have to be proved if a petitioner is to satisfy the court that the marriage has broken down irretrievably, reads as follows:

e 'that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent'.

The phrase 'cannot reasonably be expected to live with the respondent' necessarily poses an objective test, in contradistinction to the phrase 'the petitioner finds it intolerable to live with the respondent' in para (a) of the subsection. So much is common ground. The question on which I heard considerable argument was: what is the meaning of the words 'the petitioner' in para (b)? Two possible constructions were canvassed, one which counsel for the wife, for whose assistance I am indebted, first submitted was that 'the petitioner' means the ordinary, reasonable spouse, looked at as a petitioner. The alternative which counsel for the wife adopted after he had resiled from his first submission was that 'the petitioner' means the particular petitioner in the case under consideration. Faced with a choice between those two meanings, I have no hesitation in adopting the latter; that is the sense in which the words 'the petitioner' are used, so it seems to me, throughout the section and that is the sense which, apart from that, I think the words naturally bear.

g In order, therefore, to answer the question whether the petitioner can or cannot reasonably be expected to live with the respondent, in my judgment, I have to consider not only the behaviour of the respondent as alleged and established in evidence, but the character, personality, disposition and behaviour of the petitioner. The general question may be expanded thus: can this petitioner, with his or her character and personality, with his or her faults and other attributes, good and bad, and having regard to his or her behaviour during the marriage, reasonably be expected to live with this respondent? It follows that if a respondent is seeking to resist a petition on the first ground on which the husband in this case relies, he must in his answer plead and in his evidence establish the characteristics, faults, attributes, personality and behaviour on the part of the petitioner on which he relies. Then, if I may give a few examples, it seems to me that a violent petitioner can reasonably be expected to live with a violent respondent; a petitioner who is addicted to drink can reasonably be expected to live with a respondent similarly addicted; a taciturn and

morose spouse can reasonably be expected to live with a taciturn and morose partner; a flirtatious husband can reasonably be expected to live with a wife who is equally susceptible to the attractions of the opposite sex; and if each is equally bad, at any rate in similar respects, each can reasonably be expected to live with the other. This conclusion seems to me to be consonant with what have been said to be the objects of the 1969 legislation, which are not, in my view, simply to make divorce easier but, to quote from one source¹:

‘... (i) To buttress, rather than to undermine the stability of marriage; and (ii) When, regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation.’

I must therefore seek to apply that construction of the Act to the facts of this case. As I have indicated, it can be said of this petitioner that she was prepared to take advantage of the good and to enjoy prosperity, but has not been able to tolerate the disadvantages of the bad and of adversity. In general it seems to me this also is a consideration to be taken into account when answering the question whether a petitioner can reasonably be expected to live with a respondent. However, apart from my clear impression that the wife showed a lack of understanding of the problems of the husband, I have reached the conclusion that she has not shown herself to be of such a character and personality and her behaviour has not been such that I can conclude that she can reasonably be expected to live with the husband. I therefore hold that the wife has satisfied the court of the fact in relation to this marriage set out in s 2 (1) (b) of the Divorce Reform Act 1969.

I turn therefore to the husband's second submission and ask myself the question: am I satisfied on all the evidence that the marriage has not broken down irretrievably? The husband says, and undoubtedly believes, that what is involved is a temporary difficulty attributable partly to his health and partly to his unemployment, and that if the marriage has broken down, nevertheless it has not broken down irretrievably. The wife is adamant that the marriage is at an end and states with force and conviction, both through her counsel and in the witness box, that there is no possibility of her contemplating living with the husband as his wife. As a matter of law, I do not think that this is sufficient, because if both parties are agreed that the marriage has not broken down irretrievably, then the question cannot arise for determination. The only circumstances in which the court will have to decide under s 2 (3) of the 1969 Act whether the marriage has broken down irretrievably must be when one of the spouses is asserting the affirmative of that proposition and the other is asserting the negative. Simple assertion either way, it seems to me, cannot suffice. What I have to do is to examine the whole of the evidence placed before me, including and giving not inconsiderable weight to the assertions of the parties, and make up my mind, quite generally, whether it can be said that in spite of the behaviour of the husband, and the reaction to that behaviour of the wife, the marriage has not broken down irretrievably. In my opinion, in performing that general exercise on a survey of the evidence, only a general answer is appropriate and no useful purpose would be served by seeking to place quantitative weight on one consideration or another. Performing the best survey that I can of the evidence, and having regard to the personalities of the parties as displayed in the witness box, I have concluded that I cannot be satisfied on all the evidence that the marriage has not broken down irretrievably and accordingly I must pronounce a decree nisi.

Decree nisi.

Solicitors: *Philip Conway, Thomas & Co* (for the wife).

Alice Bloomfield Barrister.

¹ Law Commission Report: Reform of the Grounds of Divorce. The Field of Choice, para 15 (Cmdnd 3123)

Pheasant v Pheasant

FAMILY DIVISION

ORMROD J

29th, 30th NOVEMBER, 1st, 2nd, 10th DECEMBER 1971

- b** *Divorce – Behaviour of respondent – Behaviour such that petitioner cannot reasonably be expected to live with respondent – Reasonableness – Test to be applied – Breach of obligation – Whether reasonable to expect petitioner to put up with behaviour of respondent – Necessity for court to consider characteristics and behaviour of petitioner as well as of respondent – Divorce Reform Act 1969, s 2 (1) (b).*

- c** *Divorce – Irretrievable breakdown of marriage – Proof – Date by which marriage had irretrievably broken down – Date of petition or date of hearing.*

The husband left the wife and petitioned for divorce under s 2 (1) (b)^a of the Divorce Reform Act 1969. He alleged that she had not been able to give him the spontaneous, demonstrative affection which his nature demanded and for which he craved and that, in consequence, it was impossible for him to live with the wife any longer; accordingly he could not reasonably be expected to live with her and, therefore, the marriage had irretrievably broken down. The husband did not attempt to establish anything which could be regarded as a serious criticism of the wife's conduct or behaviour. In evidence the wife stated that she would welcome the husband's return and did not believe that the marriage had irretrievably broken down.

- e** **Held** – The husband was not entitled to a decree nisi for the following reasons—

(i) the test to be applied under s 2 (1) (b) was similar to that which was formerly used in relation to constructive desertion, although the problem was to be approached more from the point of view of a breach of obligation than in terms of the idea of the matrimonial offence; the issue to be considered was whether it was reasonable to expect the petitioner to put up with the behaviour of this respondent bearing in mind the characters of each, trying to be fair to both, and expecting neither heroic virtue nor selfless abnegation from either of them (see p 591 c and d, post);

- f** (ii) there was nothing in the wife's behaviour which could be regarded as a breach on her part of any of the obligations of the married state or as effectively contributing to the break-up of the marriage (see p 591 e, post).

- g** Per Ormrod J. In order to obtain a decree of divorce it is not essential for the petitioner to prove that the marriage had irretrievably broken down when the petition was filed; it is sufficient that it has irretrievably broken down at the date of the hearing of the suit (see p 589 b, post).

Notes

- h** For proof that the respondent to a petition for divorce has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent, see Supplement to 12 Halsbury's Laws (3rd Edn) para 437A, 3.

For the Divorce Reform Act 1969, s 2, see Halsbury's Statutes (3rd Edn), 1969 vol, p 1328.

Cases referred to in judgment

- j** *Ash v Ash*, p 582 ante, [1972] 2 WLR 347.

- a** Section 2 (1), so far as material, provides: 'The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts, that is to say—... (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent ...'

Goodrich v Goodrich [1971] 2 All ER 1340, [1971] 1 WLR 1142.

Lissack v Lissack [1950] 2 All ER 233, [1951] P 1, 114 JP 393, 27 Digest (Repl) 311, 2587.

Cases also cited

Gollins v Gollins [1963] 2 All ER 966, [1964] AC 644.

Squire v Squire [1948] 2 All ER 51, [1949] P 51.

Petition

The husband petitioned for a decree of divorce under s 2 (1) (b) of the Divorce Reform Act 1969. By her answer the wife denied that she had behaved in such a way that the husband could not reasonably be expected to live with her and prayed, *inter alia*, that the husband's petition be dismissed. The facts are set out in the judgment.

C Trotter for the husband.

Adrianne Uziell-Hamilton for the wife.

Cur adv vult

10th December. **ORMROD J** read the following judgment. In this case, the husband, John Pheasant, is petitioning for divorce from his wife, Iris Audrey Pheasant. In accordance with the Divorce Reform Act 1969, s 1, the ground on which the petition is based is that the marriage has irretrievably broken down. But the husband is also obliged to comply with s 2 (1), which requires him to establish at least one of the five 'facts' specified therein. He has set out to prove the 'fact' set out in sub-para (b), namely, 'that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent'. None of the remaining 'facts' is applicable in any way to this case. The husband was unable to establish, indeed in fairness to him it should be made clear that he did not attempt to establish, anything which could be regarded as a serious criticism of the wife's conduct or behaviour. His case, quite simply is that she has not been able to give him the spontaneous, demonstrative affection which he says that his nature demands and for which he craves. In these circumstances he says that it is impossible for him to live with the wife any longer, that in consequence he cannot reasonably be expected to live with her, and that therefore the marriage has irretrievably broken down. The wife by her answer has put in issue the specific facts (insofar as there are any) alleged in the petition and has said in evidence that she would welcome his return and does not believe that the marriage has irretrievably broken down. Her evidence and his admissions strongly suggest that the breakdown had not become irretrievable on 27th May 1971, the date on which the petition was filed; in the witness box she asserted that she thought it quite possible that he would still change his mind.

So brief a summary cannot, of course, do full justice to the husband's case but it brings out the two points of law with which I must deal, namely, the proper construction of s 2 (1) (b) and the date on which irretrievability must be established.

It will be convenient to dispose of the second point first. At first sight the wording of s 1 suggests that the husband must establish irretrievable breakdown at the date when the proceedings are begun. The section reads as follows:

'After the commencement of this Act the sole ground on which a petition for divorce may be presented to the court by either party to a marriage shall be that the marriage has broken down irretrievably.'

But the Act contains in s 3 a number of important provisions relating to reconciliation which make it plain that the policy of the legislature is to encourage reconciliation as far as may be practicable. Section 3 (2) is particularly important because it gives

a the court power to adjourn the proceedings at any stage to enable attempts at reconciliation to be made. But if the petitioner were to be required to prove 'irretrievability' at the date of the filing of the petition this subsection would be of little value, and moreover, petitioners would be discouraged by their legal advisers from making or accepting any overtures for reconciliation while the proceedings were pending. Such a result would clearly be contrary to the policy of the Act. At best it would
b result in the farce of asking for leave to file a second petition bearing the date of the hearing of the suit. In my judgment, therefore, in spite of the wording of s 1, it is sufficient if the petitioner establishes that the breakdown has become irretrievable by the date of the hearing.

c Turning to the first and important point, s 2 (1) (b) must be considered in the light of the Act as a whole. Counsel for the husband has submitted that this Act with its companion, the Matrimonial Proceedings and Property Act 1970, has introduced an entirely new conceptual basis for divorce and matrimonial proceedings generally, and has, in consequence, swept away the old law completely, so completely that the court must be on its guard that it does not inadvertently permit some of the old rules and attitudes to creep back. He says that the court in considering
d whether a decree of dissolution should be pronounced, is concerned only to consider whether the breakdown in the marriage is irretrievable and, in the words quoted by Bagnall J in *Ash v Ash*¹, 'to enable the empty legal shell to be destroyed with the maximum of fairness, and the minimum bitterness, distress and humiliation'. There is a great deal of force in this submission but it must not be overstated for Parliament has not yet completely assimilated the law relating to marriage with the law of partnership. There are important differences both in the provisions for dissolution and for dealing with the financial and property issues arising from the dissolution.
e While every effort has been made in s 5 of the 1970 Act to displace conduct of the parties from its hitherto pre-eminent position, it is still a factor, and a factor which is likely to continue to influence decisions until the attitudes of the public and their advisers and of those who administer the law change.

f The Divorce Reform Act 1969 itself in s 2 (1) imposes on the court a species of restriction almost, if not absolutely, unique, which in itself demonstrates that the main submission of counsel for the husband requires modification. Having established by s 1, that the only ground on which a marriage may be dissolved is 'that the marriage has broken down irretrievably', the Act goes on to provide in s 2 (1) that the court 'shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts'. Thereafter
g the well-known five 'facts' are defined. The question of irretrievable breakdown has not, therefore, been left at large for the court to determine, no doubt because it was realised that, except in the clearest cases, this is not a justiciable issue. Without guidelines the court has no means of judging what one person, let alone two, may decide to do in the future in relation to their marriage if there is any doubt about it. Section 2 (1) is designed to provide the guidelines and this it does by defining the
h five essential 'facts' or situations from which alone the court may infer that the breakdown is irretrievable. These five facts fall into two groups. Three of them rest on separation for periods of years but in the remaining two separation is not an essential element. Sub-paragraphs (c) and (d) demand two years' separation coupled with either desertion or consent to the dissolution of the marriage; sub-para (e) demands five years' separation, simpliciter. On any view these are stringent
i tests of the irretrievable character of the breakdown, and proof of these 'facts' must inevitably raise a very strong inference of irretrievable breakdown. Sub-paragraphs (a) and (b) are presumably intended to provide for those spouses who need relief before they have been separated for a period of years. Separation is, undoubtedly, the best evidence of breakdown, and the passing of time the most reliable indication

that it is irretrievable. Where these are absent other criteria have to be devised which should be as reliable as possible in the circumstances. In sub-para (a) the criterion is adultery coupled with the assertion that the petitioner finds it intolerable to live with the respondent. This provides a reasonably secure basis for the inference that the breakdown is irretrievable. Each of these four sub-paras establishes tests which are essentially objective in character although the element of intolerability in sub-para (a) is recognised to be inescapably subjective (*Goodrich v Goodrich*²). On the other hand a petitioner is unlikely to present or proceed with a petition under this sub-paragraph if, from his or her point of view, the matrimonial relationship has not come finally to an end. Sub-paragraph (b) is quite different. It obviously requires the court to make a value judgment about the behaviour of the respondent and its effect on the petitioner. The wording is ambiguous in several respects. It could be argued that 'expected' is used in an anticipatory sense, meaning that the court should consider the conduct of the respondent and decide whether there is a reasonable prospect of the petitioner continuing to live with or return to the respondent. This construction would be consistent with the emphasis in the Act on irretrievability but it would require the court to make a decision at large about the future intentions and actions of the parties. It would also make the other four tests superfluous.

Counsel for the husband has not contended for this construction and concedes that the word 'expected' is used in its other sense, which approximates to 'required'. He submits that the matter should be approached very largely, if not entirely, from the point of view of the husband, and that the court should consider, in effect, whether it is reasonable to require the husband to go on living with the wife, having regard to her behaviour, giving that word its widest meaning and including both acts and omissions. This is sometimes called the subjective, in contrast to the objective, approach, but so stated the antithesis is, in my opinion, misleading. In matrimonial cases there are two subjects to be considered, and, moreover, two subjects whose personalities are constantly interacting with one another throughout their relationship.

In my judgment, this construction is untenable for several reasons. It places the primary emphasis on the petitioner and his personal idiosyncracies, whereas the sub-paragraph clearly places the primary emphasis on the behaviour of the respondent. A respondent whose behaviour is beyond reproach by any standards other than the petitioner's would be liable to be divorced without any possibility of resistance except to rely on s 2 (1) and try to show that the marriage has not finally broken down. Counsel for the husband faces this and says that under the modern law the court is concerned only to destroy empty shells. Had this been the intention of the Act, sub-para (b) need only have provided that a decree could be granted if the court is satisfied that the petitioner finds life with the respondent unbearable. Once again the other four sub-paragraphs would be surplusage and the court would be faced with an untriable issue. The experience of this particular trial, which proceeded on the assumption of counsel for the husband, should have convinced any doubters of the utter impracticability of such an enquiry. In the end it became reduced to a series of almost hysterical assertions by the husband and calm rebuttals by the wife. So far from saving 'bitterness, distress and humiliation' it produced a degree of humiliation in the husband which is unique in my experience.

There is another and, in my judgment, conclusive point. Sub-paragraph (b) must have a sensible relationship with sub-para (c). In the latter, the word 'desertion' appears. According to the ordinary rules of construction this word, which had an established legal meaning at the date when the 1969 Act was passed, must be assumed to have the same meaning in this Act unless a contrary intention can be gathered from the statute itself. I can find no such indication. Desertion means in law separation without consent and without just cause. In a suit based on sub-para (c) a respondent therefore might, although it is not very likely, set up just

a cause by way of answer. To this extent, at least, the old law has been imported into the new, notwithstanding the change in the conceptual basis of divorce.

In the present case the husband, having left the wife, is undoubtedly in desertion unless he can establish just cause. On the evidence which he has given he could not begin to make out a case under the old law, and, even if the meaning of just cause is to be modified in the new law, he could only succeed if the concept of desertion has ceased to have any meaning. If counsel for the husband's submission is right the absurd result would be reached that a petitioner, unquestionably in desertion, would still be able to say that he could not reasonably be expected to live with his wife.

b All these considerations point to only one conclusion, namely, that the test to be applied under sub-para (b) is closely similar to, but not necessarily identical with, that which was formerly used in relation to constructive desertion. I would not wish to see carried over into the new law all the technicalities which accumulated round the idea of constructive desertion but rather to use the broader approach indicated by Pearce J in *Lissack v Lissack*³ and consider whether it is reasonable to expect this petitioner to put up with the behaviour of this respondent bearing in mind the characters and the difficulties of each of them, trying to be fair to both of them, and expecting neither heroic virtue nor selfless abnegation from either. It would be consistent with the spirit of the new legislation if this problem were now to be approached more from the point of view of breach of obligation than in terms of the now out-moded idea of the matrimonial offence. It must also be borne in mind that the husband is still free to make his own decision whether to live with the wife or otherwise. The court is only concerned with the next stage, i.e. whether he is entitled to have his marriage dissolved.

c Applying this test to the facts of the present case I have no hesitation in holding that there is nothing in the wife's behaviour which could be regarded as a breach on her part of any of the obligations of the married state or as effectively contributing to the break-up of the marriage. This, in my opinion, has been caused, if his evidence be true, by a change in the personality of the husband and the development in him of some psychoneurotic condition which has made him totally egocentric and obsessed with grievances. I do not intend, in the husband's own interests, to summarise the evidence in this case. I have no wish to add to his humiliations by exposing them to a wider audience and no useful purpose will be served in doing so. Suffice it to say that where their evidence differs I prefer the evidence of the wife. I am satisfied that she has shown him all the affection which she can and that she is sincere in saying that she would welcome him back. I do not think there is anything in the differences which arose between them in relation to the adopted son, who was born to her in her former marriage, which was in any way unusual. Most parents must have experienced similar difficulties in dealing with their teenage and now adult children. Similarly, the evidence in relation to the adoption, which did not take place until the son was 17 years old, shows how far both he and his mother were prepared to go to alleviate the husband's anxieties. I am by no means sure that she is not right in her suspicions that there may be another woman in the background. If this is not the case, then I agree with the husband's mother that he is in an unstable emotional condition as a result of which he seems quite unable at present to adopt a rational approach to his matrimonial difficulties; or to take advice or consult those who might help him. I hope that even at this late stage and having had the traumatic experience of exposing his unhappiness in court he will reconsider his attitude towards his wife and adopted son, and perhaps, at least try to see whether a psychiatrist or marriage guidance counsellor can help him to understand his own difficulties.

Finally, had it been necessary to consider s 2 (3) I would have hesitated, on the unusual facts of this case, to hold that this marriage has, in fact, irretrievably broken down. a

Petition dismissed.

Solicitors: Ronald A Prior (for the husband); Oliver O Fisher & Co (for the wife). b

Alice Bloomfield Barrister.

Lusternik v Lusternik (legal personal representative of Jacob (otherwise Jakubas) Lusternik (deceased)) c

COURT OF APPEAL, CIVIL DIVISION
DAVIES, KARMINSKI AND CAIRNS LJJ
10th, 11th NOVEMBER 1971 d

Divorce – Financial provision – Deceased former spouse – Maintenance for surviving former spouse out of deceased's estate – Failure of deceased to make reasonable provision for former spouse – Value of estate at death and at date of award – Relevance of change in value in assessing award – Backdating of award – Proceedings extending over four years – Not necessary that award should be backdated to date of applicant's summons – Avoidance of backdating to such an extent that effect to add substantial lump sum order to award – Matrimonial Causes Act 1965, s 26. e

In April 1947 the applicant married the deceased, who had one daughter, the respondent. The applicant obtained a decree absolute of divorce from the deceased on the grounds of cruelty in August 1951. There were no children of the marriage. In November 1951 the applicant obtained an order for maintenance at the rate of £6 a week less tax, probably less than she would have been awarded but for untrue information given by the deceased at the time. She continued to have business and social relations with him, however, and was paid the maintenance and received some not very substantial additional benefit from him. In December 1960 the deceased made a will giving his shares in a company to the applicant for life and directing that she should become a director. He revoked that provision however by a codicil made six weeks before his death. The deceased died in December 1964, aged 81. He left a legacy of £500 to the applicant, who was then aged 59. He left a further legacy of £500 and a residuary legacy to the respondent, his executrix. In 1967 (an extension of time having been granted) the applicant applied for an order for additional financial provision out of the estate under s 26^a of the Matrimonial Causes Act 1965. The net value of the estate, after deduction of all expenses, debts, liabilities, estate duty and the two legacies, was about £10,000. The estate consisted almost entirely of shares in two property companies, one with an assets valuation of £25,000, of which the estate owned 49 per cent and the respondent 51 per cent in her own right, and the second with an assets valuation of £8,500 of which the estate owned 51 per cent. The shares had produced little or nothing in the way of dividends. The respondent was self-supporting. At the time of her application the applicant was earning £12 a week as a waitress but since 1968 she had been unable to work owing to ill health. At the date of her appeal on the application she was 65 years of age and receiving retirement pension and supplementary allowance totalling £9 12s a f
g
h
j

^a Section 26, so far as material, is set out at p 595 b to j post

a week. Her rent was £3 17s per week including light and heat, but she sometimes sublet a furnished room for £3 10s a week (including light and heat). A medical report said she would enjoy better health if in a healthier district. The applicant said that her existing flat was unbearable because of traffic noise and the misbehaviour of other tenants in the block. She wanted a flat at Brighton costing £12.50 a week. The trial judge made an order for payment to the applicant of £6 per week backdated to February 1970, i.e. a year before the matter first came before the court, but enforcement of the arrears was postponed for six months. On appeal the applicant contended that the award should be at the rate of not less than £12 a week and should be backdated to the death of the deceased.

Held – The order made by the judge should be varied to the extent of substituting £8 for £6 per week on the following basis—

(i) although in deciding whether the deceased had made reasonable provision for the survivor the value of the estate at the date of death was the criterion, in considering what sum to award the survivor it was proper to take into account, as a relevant matter under s 26 (4) (d) of the 1965 Act, the value of the net estate not only at the date of death but also at the date when the award was made, for it would be wrong for the court to blind itself to the fact that, if such were the case, the sum available in the estate was far greater or far less than at the date of death (see p 597 f to h and p 598 g, post); *Dun v Dun* [1959] 2 All ER 134 considered;

(ii) as a matter of fairness between the applicant and the respondent, the only parties concerned, it was reasonable that the applicant should have more than a figure representing the income of half the estate and it was reasonable that she should have rather more than was awarded her as maintenance in 1951 (see p 598 a and g, post);

(iii) there was no rule that *prima facie* an award to a survivor should be backdated to the date of death, the matter being one for the discretion of the court; an order should not be backdated to a date earlier than that of the applicant's summons in the absence of very special circumstances; nor would it be appropriate to backdate it to that date where proceedings had extended over some four years, for the court should guard against backdating to such an extent as in effect to add a lump sum order which was substantial in relation to the estate (see p 598 b to d and g, post); *Askew v Askew* [1961] 2 All ER 60 approved;

(iv) while backdating for two or two and a half years would have been appropriate if there had been no provision for the applicant in the will, taking into account her legacy of £500 the shorter period of a year as determined by the judge was proper; it would not be fair to the respondent to increase the total of £480 arrears calculated on that basis and allowance should be made for the interim payments already made (see p 598 e and g, post).

Notes

For maintenance from the estate of a deceased former spouse, see Supplement to 16 Halsbury's Laws (3rd Edn) para 930A, and for cases on the subject, see Digest (Cont Vol C) 459, 5729fa-fb.

For the Matrimonial Causes Act 1965, s 26, see 17 Halsbury's Statutes (3rd Edn) 197.

Cases referred to in judgment

Askew v Askew [1961] 2 All ER 60, [1961] 1 WLR 725, Digest (Cont Vol A) 787, 5729b.
Dun v Dun [1959] 2 All ER 134, [1959] AC 272, [1959] 2 WLR 554, Digest (Cont Vol A) 573, *2628b.

Appeal

The applicant, Mona Lusternik, appealed against an order made by Hollings J in chambers on 28th May 1971, ordering that she should receive £6 a week maintenance

net out of the estate of her deceased former husband and that the order should be backdated to 22nd February 1970 but that the accrued arrears should not be enforced for a period of six months. She sought an order that such larger sum as might be just should be substituted for the £6 and that the order should be backdated to 19th December 1964, the date of the deceased's death. The grounds of appeal were: (i) that in all the circumstances of the case bearing in mind the deceased's capital at the time of his death, his revocation of the earlier grant to the applicant by codicil just before his death, his conduct towards the applicant between the divorce and his death, the applicant's circumstances and the findings and recommendations in the reports of Mr Registrar Tickle dated 17th December 1970 and 11th May 1971 the judge should have awarded at least £12 a week less tax; and (ii) that the judge should have backdated the order he made to the date of death, 19th December 1964, and was wrong to say on the evidence before him that had he done so that would have resulted in an imprudent realisation of the assets of the estate. The facts are set out in the judgment of Cairns LJ.

D P F Wheatley for the applicant.

Sheila Cameron for the respondent.

CAIRNS LJ delivered the first judgment at the invitation of Davies LJ. This is an appeal against a judgment of Hollings J given on 28th May 1971 in proceedings under s 26 of the Matrimonial Causes Act 1965. The appeal is brought by leave of the learned judge. Section 26 is the section which enables a woman whose marriage has been dissolved and whose husband has died to apply for financial provision from his estate. Here the applicant succeeded in getting an order for such provision but she is not satisfied with the amount or the terms and appeals for a more favourable order.

The history of the matter, quite briefly, is as follows. On 26th April 1947 the applicant was married to a man who had been previously married and had one daughter. The marriage between the applicant and that man was dissolved on the applicant's petition on the ground of cruelty, the decree being made absolute on 9th August 1951. There were no children of that marriage. In November 1951 an order was made in favour of the applicant for maintenance at the rate of £6 a week less tax. Such maintenance was paid up to the death of the former husband, which took place on 19th December 1964, when he was 81 and the applicant was 59 years of age. By his will he left her a legacy of £500, which has been paid. The executrix, who proved the will, was the daughter of the deceased husband, and she is also the residuary legatee under the will and the respondent in these proceedings. The applicant was out of time in making her application but the time was extended, without opposition from the respondent, by Sir Jocelyn Simon P.

The application first came before Mr Registrar Tickle, who made a report on 17th December 1970, recommending that periodical payments should be made by the respondent to the applicant at the rate of £7 10s a week, the order to be backdated for a year. After that the respondent produced some fresh documents and the matter came before Sir Jocelyn Simon P, who remitted it to the registrar with directions for the applicant to answer a questionnaire and to attend for cross-examination. There was a further hearing before the registrar when the applicant was cross-examined at considerable length. In a second report made on 11th May 1971, the registrar adhered to his previous recommendations except that he recommended that the order should be backdated to a year before Sir Jocelyn Simon P was first seised of the matter: that would mean that it would be backdated to 22nd February 1970.

After that the matter was restored before Hollings J at the direction of Sir Jocelyn Simon P. He considered the two reports of the registrar; he heard arguments of counsel; on 28th May 1971 he made the order which is now appealed against and

a which followed the recommendations of the registrar except that the learned judge substituted £6 a week for the recommended £7 10s; and he directed that the accrued arrears should not be enforced for six months from the date of his order. Now, by a notice of appeal, the applicant contends that the award should be at the rate of not less than £12 a week and should be backdated to the death of the former husband (to whom I will refer hereafter as 'the deceased').

b The provisions of s 26 of the 1965 Act are as follows:

c '(1) Where after 31st December 1958 a person dies domiciled in England and is survived by a former spouse of his or hers (hereafter in this section referred to as "the survivor") who has not remarried, the survivor may [and then I read the section as subsequently amended] apply to the court for an order under this section on the ground that the deceased has not made reasonable provision for the survivor's maintenance after the deceased's death. An application under this section shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation in regard to the estate of the deceased is first taken out.

d '(2) If on an application under this section the court is satisfied—(a) that it would have been reasonable for the deceased to make provision for the survivor's maintenance; and (b) that the deceased has made no provision, or has not made reasonable provision, for the survivor's maintenance, the court may order that such reasonable provision for the survivor's maintenance as the court thinks fit shall be made out of the net estate of the deceased, subject to such conditions or restrictions (if any) as the court may impose.

e '(3) Where the court makes an order under this section requiring provision to be made for the maintenance of the survivor, the order shall require that provision to be made by way of periodical payments terminating not later than the survivor's death and, if the survivor remarries, not later than the remarriage. [Then there is a provision for making in certain circumstances a lump sum payment, which admittedly is not applicable in this case.]

f '(4) On an application under this section the court shall have regard—(a) to the past, present or future capital of the survivor and to any income of the survivor from any source; (b) to the survivor's conduct in relation to the deceased and otherwise; (c) to any application made or deemed to be made by the survivor during the lifetime of the deceased—(i) where the survivor is a former wife of the deceased, for such an order as is mentioned in section 16 (1) of this Act . . .'

g That is the relevant section, and is the section providing for maintenance to be paid by a husband to a wife after a divorce decree has been made absolute. Then, leaving out one paragraph which is irrelevant, the subsection goes on:

h ' . . . and to the order (if any) made on any such application [that in this case is, of course, an order for maintenance at the rate of £6 a week; and the rest of that paragraph is not relevant;] (d) to any other matter or thing which, in the circumstances of the case, the court may consider relevant or material in relation to the survivor, to persons interested in the estate of the deceased, or otherwise.

i '(5) In determining whether, and in what way, and as from what date, provision for maintenance ought to be made by an order under this section, the court shall have regard to the nature of the property representing the net estate of the deceased and shall not order any such provision to be made as would necessitate a realisation that would be imprudent having regard to the interests of the dependants of the deceased, of the survivor, and of the persons who apart from the order would be entitled to that property.'

Then sub-s (6) contains certain definitions, of which the material one is the definition of 'net estate', which is defined by a rather complicated process of cross-reference, and when the cross-reference is made one finds that 'net estate' means¹:

'all the property of which a deceased person had power to dispose by his will (otherwise than by virtue of a special power of appointment) less the amount of his funeral, testamentary and administration expenses, debts and liabilities and estate duty payable out of his estate on his death'.

Apart from the matters already recited, the main facts taken into account by the learned judge in making his order were these. The value of the net estate, according to the definition which I have just read, at the time of the death of the deceased was £11,608. Besides the legacy to the applicant there was another legacy outstanding of £500, so that the capital available without disturbing these legacies was just about £10,000. The principal assets—almost the sole assets—were shares in two companies, one called J L & D K Properties Ltd and the other called Corta Ltd. They were both property companies. The estate of the deceased holds 49 per cent of the shares in J L & D K Properties Ltd and the respondent now holds the other 51 per cent of those shares personally in her own right. In Corta Ltd, the estate has 51 per cent of the shares. On an assets valuation as estimated by the directors of the company, J L & D K Properties Ltd is now worth about £25,000 and the Corta company about £8,500. The shares of the companies are not saleable on the market, although in fact it was found possible to raise more than £3,000 from the assets of J L & D K Properties Ltd in order to pay part of the estate duty and administration expenses. There is still outstanding to be paid out of the estate £4,800 in respect of the remainder of the estate duty, certain debts, and the outstanding legacy of £500. The shares in these two companies have produced little or nothing in the way of dividend.

The deceased made a will on 13th December 1960, and by it he gave the income of his shares in Corta Ltd to the applicant for life and directed that she should become a director of that company. This provision, however, was revoked by a codicil made about six weeks before his death.

Hollings J was satisfied that at the time of the hearing the applicant's position was a sad one, as described in two paragraphs, one in each of the reports of the registrar, which I will read. The first of these reads as follows:

'At the time of his death the Deceased was aged 81; his former wife was then 59. In 1967 when she issued her originating summons she was working as a waitress earning £12 per week but since 1968 she has been unable to work on the grounds of ill-health. She is now 65 years of age and receives basic Retirement Pension of £4. 1. 0 per week and a Supplementary Allowance of £5. 11. 0, a total gross income of £9. 12. 0 per week. Her rent is £3. 17. 4 per week but from time to time she sublets a furnished room for £3. 10. 0 per week (inclusive of light and heat). A medical report . . . shows that she is suffering from [a certain ailment] and would enjoy better health if she could move to a healthier district than the area in which she now lives.'

The other paragraph is the last paragraph of the second report, and the material part of it is as follows:

'Her present accommodation was stated by her to be unbearable because of the noise from passing motor traffic and the alleged mis-behaviour of other tenants in the block of flats. She wants a flat at Brighton, which she tells me would cost about £12.50 per week to rent.'

Now, although the marriage lasted only four years, from 1947 to 1951, the applicant

¹ As defined in s 5 (1) of the Inheritance (Family Provision) Act 1938, as amended

a and the deceased continued to have business and social associations with each other
right up to the date of his death. She did receive some financial benefit from him
b beyond the £6 a week maintenance, but the amount thereof was not really very
substantial. Owing to untrue information which had been given by the deceased in
1951, at the time of the maintenance application, about his relations with Corta
Ltd, the maintenance order was probably less than it would have been if he had
c been completely frank. The respondent is a lady who is self-supporting, and no
question arises of comparative hardship as between her and the applicant. It is,
however, necessary that her interests as residuary legatee should be respected.

The learned judge reached these conclusions. At the date of the death of the
deceased the applicant was no better off than during his lifetime and could reason-
ably expect continued provision by his will; there was no evidence of any change in
the respective means of the two of them leading to the change effected by the codicil
executed shortly before the death. The judge was satisfied that it would have been
reasonable for the deceased to make some further provision for the applicant by his
will, and he thought that it would be reasonable to order that she should receive £6
a week from the estate, and that the order should be backdated to the extent recom-
d mended by the registrar. The judge was satisfied that the respondent could bring
about the realisation of sufficient of the assets of the two companies to comply with
such an order. But, bearing in mind the provisions of s 26 (5), he thought that immedi-
ate payment of the arrears should not be required and he therefore directed that
enforcement thereof should be postponed for six months.

This court has heard most helpful arguments from counsel on both sides. With
e regard to the weekly sum awarded, counsel for the applicant pointed out that the
amount awarded by the learned judge was no more than was awarded for main-
tenance in 1951 at a time when the applicant had some earning capacity and when
the court was misled to some extent as to the financial position of the deceased.
On the other side, counsel for the respondent contended that the amount of the net
estate was such that it would be unfair to the respondent to award more than £6 a
week to the applicant.

f In considering what sum it is reasonable to award, I am of opinion that it is relevant
to take into account not only the value of the net estate at the date of death but also
its value at the date when the award is made. *Dun v Dun*² is authority for the proposi-
tion that in deciding whether the deceased had made reasonable provision for the
survivor it is the value at the date of the death that is the criterion. That is a Privy
Council decision under a New South Wales Act, but I have no doubt that the same
rule should be applied in relation to s 26 of the 1965 Act. When it comes, however,
g to deciding how much it is reasonable to award to the survivor, it seems to me that
it would be quite wrong for the court to blind itself to the fact—if it be a fact—that
the sum available in the estate is either far greater or far less than the value of the
estate at the date of death. I should consider this a relevant matter within s 26
(4) (d). At one stage I thought that this might make a considerable difference in
judging how much should be awarded here; but counsel for the respondent has
persuaded me that this is not so. Taking the only estimate of the 1971 values of the
assets of the companies that was before the court, bearing in mind that the interest
of the estate in each company is approximately 50 per cent, and taking account of
the costs that would be incurred and the tax liability that would arise on realisation
of the assets of the companies, I do not think it can be said that the capital that could
be made available is in excess of about £10,000. Counsel for the respondent suggests
that an award of £6 a week, representing approximately 6 per cent on half the total
capital, is as much as could fairly be awarded to the applicant. Whether this was the
way in which Hollings J arrived at his figure I do not know, because he has given
no indication of how he did.

In my view it is reasonable that the applicant, as a matter of fairness between her and the respondent—and they are the only two people concerned—should have rather more than a figure representing the income of half the estate. I also think that, for the reasons advanced by counsel for the applicant it is reasonable that she should have rather more than was awarded to her as maintenance in 1951. Accordingly, I would allow the appeal to the extent of increasing the weekly payment from £6 a week to £8 a week.

As to the backdating, I do not accept the contention of counsel for the applicant that there is any rule that *prima facie* the payment should be backdated to the death. This was certainly not laid down as a rule in the case he cited, *Askew v Askew*³. There, Marshall J held that it was a matter of discretion in each case; and indeed I think that is the necessary result of the wording of the Act. When an applicant has not brought proceedings until several years after probate was granted, I should not, in the absence of very special circumstances, consider it right to backdate the order to a date earlier than that of the originating summons. And again where, as here, the proceedings have extended over some four years from the date of the originating summons to that of the order, I should not consider it right to backdate the order to the date of the summons unless it were shown that there had been some deliberate obstruction by the respondent in the course of the proceedings. One should, I think, guard against backdating the order for periodical payments to such an extent as in effect to add to it a lump sum order substantial in relation to the size of the estate. In this case, if there had been no provision at all for the applicant in the will, I should have been disposed to backdate the order for two years or perhaps two and a half years. But, taking account of her legacy of £500, I think that the registrar and the judge were right here in choosing a shorter period. By my reckoning, the arrears, calculated (now) at £8 a week and making allowance for the interim payments which were ordered and which I understand were made between February and May 1971, will be about £480, payable within a week or two, and I do not think it would be fair to the respondent to increase that sum.

I have arrived at this conclusion without the application of s 26 (5). I have not, therefore, had to consider whether the evidence was such as to show that to backdate the order further would involve 'imprudent realisation'. For the reasons I have given, I would allow the appeal, only to the extent of substituting £8 a week for £6 a week.

DAVIES LJ. I entirely agree, and cannot add anything to what Cairns LJ has said.

KARMINSKI LJ. I also agree.

Appeal allowed. Order below varied to the extent of substituting payment of £8 per week (less tax) for £6 per week. Existing arrears to be paid in accordance with direction of judge below. Further arrears (to be calculated, giving respondent credit in respect of payments made without subtracting tax) to be paid by 31st December 1971.

Solicitors: How, Davey & Lewis (for the applicant); Cox & Cardale (for the respondent).

F A Amies Esq Barrister.

3 [1961] 2 All ER 60, [1961] 1 WLR 725

R v Hartley

COURT OF APPEAL, CRIMINAL DIVISION

SACHS, ROSKILL LJ AND ACKNER J

18th NOVEMBER 1971

b *Bankruptcy – Offences – Undischarged bankrupt obtaining credit – Obtaining credit to extent of £10 or upwards – Bankrupt obtaining credit on different occasions for sums under £10 – Total sum of credits obtained over £10 – Whether aggregation of smaller sums allowable – Bankruptcy Act 1914, s 155 (a).*

c *Bankruptcy – Offences – Undischarged bankrupt obtaining credit – Obtaining credit to extent of £10 or upwards – Indictment – Form – Particulars of offence – Accuracy regarding amount of credit obtained and time of alleged commission of offence.*

The appellant opened an account at a bank without disclosing the fact that he was an undischarged bankrupt. Between May and October 1969 his overdraft at the bank gradually mounted until on 27th October it stood at £451. The majority of the cheques issued by the appellant and met by the bank during that period were for sums under £10. The last withdrawal was made about 10th October. The appellant also took a furnished room without disclosing to the landlords that he was an undischarged bankrupt, and paid a deposit of £10 in respect of certain electricity, telephone and dilapidation charges for which he was potentially liable. He fell into substantial arrears with the rent of eight guineas a week, and was given notice to quit. On 30th January 1970 when the notice took effect he was £64 in arrears with the rent. On 18th March he paid £50 to the landlords. When he vacated the room on 25th March, his liabilities amounted to £14 for arrears of rent and £76 for mesne profits. He was charged with two offences under s 155 (a)^a of the Bankruptcy Act 1914: count 1 alleged that on or about 27th October 1969 he obtained credit to the extent of £451 from the bank without disclosing that he was an undischarged bankrupt, and count 2 alleged that on or about 27th March 1970 he likewise obtained credit to the extent of £81 from his landlords. He was convicted. On appeal he contended, inter alia, (i) that several separate obtainings of credit could not be aggregated so as to amount to one obtaining of credit for the purpose of an offence under s 155 (a) of the 1914 Act, so that on both counts 1 and 2 there should have been no aggregation; (ii) that since the last of the cheques had been drawn on 10th October when the amount of the overdraft was slightly less than £451, the references to 'on or about 27th October', and '£451' in count 1 of the indictment were inaccurate and fatal; (iii) that mesne profits could not be the subject of an obtaining by credit, and (iv) that, excluding mesne profits, his indebtedness on or about 27th March was less than £10 since the £10 deposit paid to the landlords should have been taken into account.

h **Held** – The appeal would be dismissed for the following reasons—

(i) in order to support a charge under s 155 (a) of the Act, it was not necessary that the credit given to a person who failed to disclose his bankruptcy should have been in excess of £10 on each occasion when credit was obtained, provided that the total credit obtained by that person was in excess of £10; the offence was committed once the figure of £10 was reached, albeit by aggregating a series of smaller sums; the offence was an absolute one and any subsequent payments reducing the indebtedness might go in mitigation but could not provide a defence (see p 602 f to h post); principle stated in Archbold's Criminal Pleading, Evidence and Practice, 37th Edn, 1969, at para 3684 approved;

(ii) where the words 'on or about the date' were used in an indictment then,

^a Section 155, so far as material, is set out at p 602 b, post

provided that the offence was shown to have been committed within some period that had a reasonable approximation to the date mentioned in the indictment, the fact that the date was not correctly stated did not preclude a verdict of guilty (see p 603 b and c, post);

(iii) although it was desirable that in a count on an indictment the full amount of the credit obtained should be stated with accuracy, as the offence under s 155 (a) was of obtaining credit to an extent of £10 or more, a count which put the indebtedness at a greater sum than that actually obtained did not preclude a verdict of guilty (see p 602 j to p 603 a, post);

(iv) without taking into account mesne profits, the appellant's indebtedness on or about 27th March was in excess of £10 since the £10 deposit went against electricity, telephone and maintenance and not against rent (see p 603 d, post).

Quaere. Whether mesne profits can form a valid item in an account when the charge is one of obtaining credit under s 155 (a) of the 1914 Act (see p 603 e and f, post).

Observations on the form of indictment in charges under s 155 (a) (see p 603 f and g, post).

Notes

For obtaining credit when an undischarged bankrupt, see 2 Halsbury's Laws (3rd Edn) 630, 631, para 1252 (17), and for cases on the subject, see 5 Digest (Repl) 1129, 1130, 9098-9107.

For references to place, time, etc, in indictments, see 10 Halsbury's Laws (3rd Edn) 387, 388, para 702, and for a case on the subject, see 14 Digest (Repl) 246, 2118.

For the Bankruptcy Act 1914, s 155, see 3 Halsbury's Statutes (3rd Edn) 154.

Cases referred to in judgment

R v Juby (1886) 55 LT 788, 51 JP 310, 16 Cox CC 160, 5 Digest (Repl) 1129, 9099.

R v Salter [1968] 2 All ER 951, [1968] 2 QB 793, [1968] 3 WLR 39, 52 Cr App Rep 549, Digest (Cont Vol C) 51, 9115b.

R v Smith (1915) 11 Cr App Rep 81, 5 Digest (Repl) 1130, 9105.

Cases also cited

Allard v Regem (1949) 94 Can Crim Cas 74.

Fisher v Raven [1963] 2 All ER 389, [1964] AC 210.

R v Peters (1886) 16 Cox CC 636.

Appeal

This was an appeal by Philip Gamble Hartley against his conviction on 9th March 1971 at Inner London Quarter Sessions before the deputy chairman (his Honour Judge Llewellyn) and a jury on two counts of obtaining credit as an undischarged bankrupt contrary to s 155 (a) of the Bankruptcy Act 1914. On count 1 the appellant was charged with obtaining credit while being bankrupt, in that on or about 27th October 1969 in the Inner London Area of Greater London, being an undischarged bankrupt, he obtained credit to the extent of £451 13s 9d from Lloyds Bank Ltd without informing the bank that he was then an undischarged bankrupt. On count 2 the appellant was charged with obtaining credit on or about 27th March 1970 to the extent of £81 5s 4d from Artillery Mansions Ltd in a like manner. The facts are set out in the judgment of the court.

John Mullick for the appellant.

Jean Southworth for the Crown.

SACHS LJ delivered the judgment of the court. On 9th March 1971 at Inner London Quarter Sessions before a deputy chairman the appellant was convicted of being a bankrupt obtaining credit in excess of £10 on two counts. He was thereupon

a sentenced to 12 months' imprisonment on each count concurrent. In addition so much of two suspended sentences as totalled six months' imprisonment was ordered to take effect consecutively. The result was that as from 9th March 1971 the order of the court was that he was to undergo 18 months' imprisonment in all. The appellant now appeals against conviction by leave of the single judge, his application for leave to appeal against sentence having lapsed.

b The appellant is a man of some 60 years of age, of obviously good intelligence, and someone who has been a member of the Stock Exchange for some seven years, 1954 to 1961. There is no dispute but that the appellant was adjudged bankrupt in January 1963 and that he had never obtained a discharge from the bankruptcy. There was also no dispute as regards either count but that the appellant at no time disclosed to the persons involved that he was such an undischarged bankrupt. The first of these two counts related to an obtaining of credit from Lloyds Bank Ltd c which was alleged to be a credit to the extent of £451 and to have been obtained on or about 27th October 1969. That sum was the total amount of the overdraft at the bank as it stood in their accounts on the stated date; it had gradually been built up between May 1969 (shortly after he opened the account) and 27th October. The bulk of the cheques issued by the appellant and met by the bank were for sums d under £10, although some exceeded £10. As regards that count, the appellant at trial put forward a defence which was negatived by the jury and which has not been pursued in this court. That defence was to the effect that Lloyds Bank Ltd had agreed that they were to look for payment of any overdraft not to the appellant but to his employers, the Lafarge Cement Co Ltd. No document of any sort was produced from Lafarge Cement Co Ltd and there is no need to refer to that defence again.

e Next it is convenient to refer to the second count and its constituent parts. That count was laid—

‘ . . . being an undischarged bankrupt you obtained credit to the extent of £81. 5s. 4d. . . . without informing . . . Artillery Mansions Limited that you were then an undischarged bankrupt.’

f The facts which gave rise to this count were that the appellant obtained from Artillery Mansions Ltd a tenancy of a furnished room at eight guineas a week, undertaking also to pay for electricity and telephone charges, and to be responsible for certain dilapidations. In respect of the potential liabilities for electricity telephone and dilapidations he paid a deposit of £10. That tenancy commenced on 4th April 1969, but by October 1969 the appellant had fallen into substantial arrears. On 31st g December 1969 he was served with a formal notice to quit on 30th January 1970 and eventually vacated the room on 25th March 1970. As from 30th January 1970 his liability in respect of that room was thus for mesne profits and not for rent. The arrears of rent by 30th January 1970 were such that on 12th March, leaving out any question of mesne profits and giving all appropriate credits, he was in arrears to the extent of £63 17s 4d. About 18th March he paid a sum of £50; so on the date h referred to in the indictment, 27th March, his liability was for £13 17s 4d, again leaving out the question of mesne profits, which by then amounted to £76 4s.

Those being in essence the facts, it is convenient now to turn to the grounds of appeal. As regards the Lloyds Bank count, two points were taken: first, that having regard to the terms of s 155 (a) of the Bankruptcy Act 1914 it was wrong of the learned deputy chairman to direct the jury to take into account the aggregate of the sums i for which the cheques were drawn, and that the proper course was to look at each cheque separately. In other words, his contention was that there can be no aggregation. His second point was that the indictment bore the wrong date in the particulars—the reference to ‘on or about the 27th October’ was said to be inaccurate and fatal. For that purpose counsel for the appellant referred to the details of the account and endeavoured to show that the last of the relevant cheques drawn had been presented

somewhere in the region of 10th October and that on that date the sum of the overdraft was slightly less than the £451 mentioned in the indictment. a

As regards the second count, the contentions for the appellant were these: first, that mesne profits cannot be the subject of an obtaining by credit; secondly, that here again there could be no aggregation; and, thirdly, as in the case of the first count, if one looked at the date of 27th March and excluded mesne profits, the indebtedness on that particular date was less than £10. At this stage it is convenient to note that s 155 provides: b

'Where an undischarged bankrupt—(a) either alone or jointly with any other person obtains credit to the extent of ten pounds or upwards from any person without informing that person that he is an undischarged bankrupt; . . . he shall be guilty of a misdemeanour.'

Taking first the aggregation point, it was contended on behalf of the appellant, as already indicated, that one can only look at the amount of credit obtained on the particular day that a relevant amount comes into the account. It was his contention that, for instance, if an undischarged bankrupt having managed to open an account at a London store went into that store on Monday and obtained credit for £9 for some articles, Tuesday for another £9 for another article and so on on Wednesday, Thursday and Friday, that although on the fifth day the account at that store amounted to £45, that would be no offence under s 155 (a). Of course, if that were to be the law and if that was the correct interpretation of s 155 (a), it would provide very limited protection to the store owner, and it would contravene the general intent of that series of sections and subsections of the Bankruptcy Act 1914, the purpose of which was fully examined by this court in *R v Salter*¹. c

Moreover, as is even more striking, if that contention were accurate, it would run wholly against what has been said over many decades in Archbold's Criminal Pleading, Evidence and Practice, the editions of which have consistently contained statements as in the current edition²: d

'It is not necessary, in order to support a charge under this section, that the goods in respect of which credit is obtained should all be supplied or ordered at the same time, provided that the total amount of credit is £10 or upwards, as appears from *R. v. Juby*³ . . .'

A similar statement has for decades appeared in Williams on Bankruptcy⁴. It so happens that no authority stating this proposition in those precise terms has been cited to this court. It is accordingly convenient that it should be here and now stated that the above passage in Archbold correctly states the law, its interpretation of *R v Juby*³ being well founded. e

Having regard to the various points taken by counsel for the appellant it is perhaps as well to set out certain elementary principles for which really no authority is needed. First, that if a person charged has by words or conduct secured that credit be given to him to the extent of £10 or more he has obtained that credit. The offence is of a category described as absolute. Secondly, that when the relevant credit extends to £10 that is the moment at which the offence is committed, albeit it may be by aggregating a series of smaller sums. Thirdly, that when once the figure of £10 is reached the offence is complete and any subsequent payments reducing the indebtedness may go to mitigation but cannot provide a defence. Fourthly, is is, of course, desirable that in a count of an indictment the full amount of the credit obtained should be stated with accuracy, but nonetheless the offence f

1 [1968] 2 All ER 951, [1968] 2 QB 793

2 37th Edn, 1969, p 1192, para 3684

3 (1886) 55 LT 788, 16 Cox CC 160

4 13th Edn, 1925, p 566, cf 18th Edn, 1968, pp 565, 566 g

a is simply one of obtaining credit to an extent of £10 or more. Plainly if the relevant count puts the indebtedness at a greater sum than was actually obtained, that does not preclude the jury from giving a verdict of guilty of the offence as committed. Finally that if the words 'on or about the date' are used in an indictment then, provided that the offence is shown to have been committed within some period that has a reasonable approximation to the date mentioned in the indictment, then
b the fact that the date is not correctly stated does not preclude a valid verdict of guilty. It has been necessary to state those factors because they were all raised in argument and apply in one shape or another to this particular case. The first submission on behalf of the appellant—as to aggregation—thus plainly fails.

Next, as regards count 1, for instance, it may well be that the indictment in referring to 27th October was not completely accurate, but on the facts already stated it is sufficiently accurate to support a verdict of guilty. The same applies to the attack
c made on the amount of £451 odd. As to the count relating to the Artillery Mansions debt, a great deal of detail on accounts has been argued in this court as indeed it was at first instance, but it is not necessary to go into those details. It is sufficient to mention that the £10 deposit went against electricity, telephone and maintenance and not against rent and that the arrears stated earlier in this judgment, whether
d one refers to the £13 17s 4d, which was the amount of the indebtedness on 27th March, or to the sum of £63 17s 4d, the indebtedness on 12th March, (in each case excluding mesne profits), were enough to support the obviously proper verdict of guilty.

As regards mesne profits, counsel for the Crown with admirable discretion did not ask that these be taken into account when computing the relevant figures at trial. Equally she does not ask this court to give a ruling whether mesne profits
e can constitute a valid item in an account when the charge is obtaining of credit under s 155 (a) of the Bankruptcy Act 1914. She did, however, ask us to bear in mind *R v Smith*⁵ and to mention that with the aid of that and other authorities she submitted it might be argued on some future occasion that mesne profits could form a valid item in such an account. The court expresses no opinion on that point whatsoever.

One further matter requires mention concerning the phraseology used in the particulars of the two counts. Having heard considerable argument about their terms in relation to the facts of this case and remembering that similar facts may arise in many cases, this court considers that in general, and it emphasises the words 'in general', it would be better in a parallel case to use a phraseology for the particulars of offence which in the instant case would have resulted in count 1 reading: 'Philip
g Gamble Hartley, in the Inner London area of Greater London, being an undischarged bankrupt, obtained credit which by about the 27th October, 1969 amounted to £451 13s. 9d. from Lloyds Bank Limited without informing the said Bank that he was then an undischarged bankrupt'.

In the upshot, the present appeal lacks both law and merit and is dismissed.

h *Appeal dismissed.*

Solicitors: Registrar of Criminal Appeals (for the appellant); Solicitor, Department of Trade and Industry (for the Crown).

N P Metcalfe Esq Barrister.

R v Rimmer

COURT OF APPEAL, CRIMINAL DIVISION

LORD WIDGERY CJ, SACHS LJ AND ACKNER J

25th NOVEMBER 1971

Criminal law – Evidence – Admissibility – Trial – Plea of guilty at magistrates' court – Withdrawal of plea – Committal for trial to quarter sessions – Admissibility of original plea of guilty in evidence at subsequent trial – Discretion of judge – Factors to be considered.

On 8th March 1971 before justices the appellant pleaded guilty to theft on a charge of burglary. He elected to be dealt with summarily and was remanded until 10th March, when he asked to change his plea to one of 'not guilty'. On 31st March that request was granted. The appellant elected to be tried by jury and was committed to quarter sessions. The trial judge allowed evidence as to the appellant's original plea of guilty and his subsequent change of plea to be admitted. No evidence had however been put before the judge as to why the change of plea had been permitted by the justices. The appellant was convicted of burglary. On appeal he contended that in no circumstances could a reference be made at the trial to the fact that an accused had at an earlier stage changed his plea from guilty to not guilty for a plea of guilty which was withdrawn had no effect at all.

Held – (i) A plea of guilty in court which was withdrawn was not devoid of effect; in allowing such a plea to be withdrawn, the court was deciding that the accused ought not to be bound by his confession of fact in a way which otherwise would have resulted in an immediate conviction, but the question whether the confession made by the plea had any probative value remained open for consideration (see p 607 b to d, post).

(ii) It was a matter for the discretion of the trial judge whether evidence as to a previous plea and its withdrawal should be admitted into evidence; before exercising his discretion the trial judge had to consider whether the confession made by the plea of guilty had any probative value and whether such probative value as it had would exceed the prejudice to the accused which would be induced by the admission of such evidence (see p 607 f, post).

(iii) At the appellant's trial the evidence of his change of plea should not have been admitted because the material matters had not been appropriately investigated and the attention of the judge had not been directed to the relevant principles to be applied before exercising his discretion (see p 607 g to p 608 a, post).

(iv) Applying the proviso to s 2 (1) of the Criminal Appeal Act 1968, the appeal would however be dismissed as the evidence against the appellant, even without the reference to the change of plea, was so overwhelming that it would have resulted in conviction (see p 608 a and b, post).

Notes

For plea of guilty generally, see 10 Halsbury's Laws (3rd Edn) 408, para 742, and for cases on the subject, see 14 Digest (Repl) 284-287, 2593-2626.

For discretionary powers of a judge as to evidence, see 10 Halsbury's Laws (3rd Edn) 423, para 778, and 15 *ibid* 274, 275, para 499.

Case referred to in judgment

S (an infant) v Manchester City Recorder [1969] 3 All ER 1230, [1971] AC 481, [1970] 2 WLR 21, 134 JP 3, Digest (Cont Vol C) 655, 550Ac.

Cases and authority also cited

R v McNally [1954] 2 All ER 372, [1954] 1 WLR 933.

R v Muford and Lothingland Justices, ex parte Harber, R v East Suffolk Quarter Sessions, ex parte Harber [1971] 1 All ER 81, [1971] 2 WLR 460.

- R v Plummer* [1902] 2 KB 339, [1900-03] All ER Rep 613.
a Archbold's Criminal Pleading, Evidence and Practice, 37th Edn, para 1091.

Appeal

- This was an appeal by Patrick Rimmer against his conviction on 27th July 1971 at West Riding Quarter Sessions before the deputy chairman (H G Hall Esq) and a jury of entering a ship as a trespasser and stealing a suit, i.e. burglary, contrary to s 9 (1) (b) of the Theft Act 1968. The facts are set out in the judgment of the court.

S M Spencer for the appellant.

J M Meredith for the Crown.

- SACHS LJ** delivered the judgment of the court. This case gives rise to a point of law of general interest in somewhat unusual circumstances. On 24th February 1971 at Goole West Riding Magistrates' Court the appellant was convicted of taking a motor boat without the owner's consent, and he was sentenced to be made the subject of a probation order for three years. That conviction is not under consideration. Then on 8th March 1971 at Selby West Riding Magistrates' Court the appellant pleaded guilty to theft; the charge against him was that he had on 5th March 1971 trespassed on board a Dutch ship and stolen an overall suit belonging to a member of the crew. He then elected to be dealt with summarily and was remanded until 10th March for reports as to his suitability for borstal training. On 10th March when he appeared on remand he asked that his plea should be changed to one of not guilty in circumstances which fall to be considered later in this judgment. On 31st March he was allowed to change his plea to that of not guilty; he then elected trial by jury and was duly committed to quarter sessions. On 27th July at West Riding Quarter Sessions he was convicted of burglary and sentenced by the deputy chairman to nine months' imprisonment, and for the breach of the probation order of 24th February 1971 he was at the same time sentenced to a sentence of three months' imprisonment to run consecutively to the sentence for the offence committed on 5th March: thus the sentence of the court was 12 months' imprisonment in all. Now by leave of the single judge he appeals against conviction on the ground that at trial at quarter sessions there was improperly admitted evidence of the plea of guilty which he tendered at the magistrates' court on 8th March.

- The facts of the case were as follows. The charge which was originally before the justices and then before sessions related, as already indicated, to the theft from a Dutch ship lying in Goole Dock of a blue and red overall suit worth about £10, a suit which had been kept hanging outside the crew's cabin. It belonged to one Mr Hoch, a member of the crew who had on 5th March gone ashore in the evening and returned about 10.00 p.m. At that late hour he saw the suit still hanging in the corridor. Next morning he discovered that it had gone. So much for 5th March. On 6th March at about 1.00 p.m. the appellant was seen wearing this suit which undisputedly belonged to Mr Hoch. On 7th March the appellant went at the request of the police to Goole police station where the suit was in the custody of the police force. He was interviewed by a police sergeant about 10.40 a.m. and explained his possession of the suit by saying that the mate of the Dutch ship had given it to him when he had been aboard that ship in the afternoon of 5th March; he maintained that Mr Hoch was wrong when he said he had seen that suit at 10.00 p.m. In that state of affairs the appellant was asked if he would like the mate of the ship to be brought to the police station. At his request that was done; thereupon the mate, in the presence of the appellant, said that he had not given the latter any suit at all. At that stage the appellant made an oral confession as follows:

'Fair enough, I stole it. I went back to the ship at 10 p.m. I took it because I was cold and I had nowhere to stay.'

That oral confession was followed by a written statement, and in the course of that statement the appellant said: a

‘I was N.F.A. and at about 10 p.m. I went on board and took it to keep me warm because it was a cold night. I realise I was doing wrong and stealing . . .’

Then one comes to 8th March, the day on which the matter first came before the justices. On that day the mate and Mr Hoch attended court, and the suit was available there. On that occasion, so it appears, the appellant pleaded guilty in carefully chosen words. He pleaded not guilty to burglary but guilty to theft. Thereupon the justices having regard to his past record, remanded him for consideration whether he should be committed with a view to an order for borstal training. Thereafter the mate and Mr Hoch were in effect told that it was all right for them to sail away in their Dutch ship, and at the same time the suit was returned from the custody of the appellant to Mr Hoch himself. At that stage, accordingly, the evidence against the appellant quite literally sailed away. Then came 10th March 1971 when the appellant, who having regard to his record can hardly be said to be unacquainted with the procedure of courts, proceeded to change his plea. The matter was adjourned until 31st March, and on that occasion he was given permission to make that change; thereupon such evidence as was available, which did not include that of the mate, was heard, and he was committed for trial. b
c
d

At the trial on 27th July 1971 the mate was again not available. A time came in the course of the evidence of Police Sergeant Redhead when the jury were asked to retire, and the deputy chairman was asked to consider whether the police officer could be asked questions in relation to 8th March with a view to establishing that there had been a change of plea in circumstances which were consistent with that change having taken place because the appellant considered that there was then a better chance of acquittal, and at the same time to some extent to explain the circumstances in which the mate of the Dutch ship was not going to be called at sessions. After a discussion to which it is not necessary to refer in any detail at this stage, the learned deputy chairman directed that the evidence as to the original plea of guilty and the subsequent change should be admitted into evidence. He appears to have taken the view that this should be done on general grounds in relation to the circumstances as a whole, and in particular in relation to explaining the fact that the mate would not be giving evidence at the sessions trial. e
f

It is against that decision and the admission of subsequent evidence that the appellant sought and was granted leave to appeal. Before this court it has been submitted on his behalf in the course of, if the court may be permitted to say so, a well constructed argument by counsel for appellant, that in no circumstances can reference be made at trial to the fact that the appellant at an earlier stage pleaded guilty and later changed his plea. That is a matter which is of more consequence nowadays than it has previously been, because it is only recently that justices have been held to have a discretion to allow a plea of guilty to be changed between the moment of plea and the moment of sentence. That discretion was first stated to exist in *S (an infant) v Manchester City Recorder*¹ which was decided by the House of Lords on 21st October 1969. By virtue of that decision justices have a general discretion which can be exercised on occasions which, it was assumed at the time by Lord Upjohn, would be likely to occur only rarely; but no guidelines have been laid down as to the circumstances in which such changes shall or shall not be permitted, and it is plain that justices may at times exercise that discretion when in doubt whether facts stated to them by an accused in person are true or not. Indeed nothing that this court would state is intended to suggest that they should take anything but a liberal view of what should be done when an accused appears in person, as he did in the present case. g
h
i

¹ [1969] 3 All ER 1230, [1971] AC 481

a Today it has been submitted to this court that in law there is a distinction as regards, for instance, statements by way of voluntary confession on the way into court made by an accused, and what five minutes later, in the quieter and more solemn precincts of the court itself he may say by way of voluntary confession when in the dock. In aid of that submission, it was put to this court that the withdrawal of a plea of guilty so to speak wipes the slate entirely clean so that it can never be referred to in the course of the trial.

b In the view of this court that argument overlooks the fact that a plea of guilty has two effects: first of all it is a confession of fact; secondly it is such a confession that without further evidence the court is entitled to and indeed in all proper circumstances will so act on it that it results in a conviction. This court is not prepared to accept the submission that a plea of guilty in court, if withdrawn, has simply no effect whatsoever. In truth the request for a withdrawal affects the second constituent of the plea, in other words the court may decide that the accused ought not to be bound by his confession in a way which results in an immediate conviction, and if the court allows the withdrawal, it is that second constituent that is affected. That leaves for consideration in each case the question whether the confession made by the plea has any probative value, and whether that probative value is one that exceeds the prejudice that might be imported by referring to it. Whether it has a probative value at all, and whether that probative value exceeds the prejudice which may be thus imported, must depend on the facts of the case. The circumstances in which a withdrawal of a plea is permitted may vary infinitely. One may have a case where a plea, for instance, to a charge of handling is most properly withdrawn because the appellant did not realise that it was necessary for him to have the relevant knowledge that the goods were stolen. On the other hand, the withdrawal of a plea may result from some completely false statement of fact made by the accused himself as to what has happened between the date of the plea and the date that withdrawal is requested, something which the justices cannot and would not check on the spot. Whether in any individual case the evidence as to the previous plea and its withdrawal should be admitted into evidence is plainly a matter for the discretion of the trial judge, who must most carefully examine whether indeed the probative value does exceed the prejudice which would be induced by the admission of such evidence. In the vast majority of cases in practice the result of such an examination would be that the evidence would not be admitted. Indeed, the occasions on which it is likely to be regarded as admissible will, of their nature, be rare. In each case that question must be decided, as it was in the present case, by an examination of the relevant facts on what is often referred to as 'a trial within a trial'.

g That being the principle to be applied, it is now appropriate to return to the particular facts of this case. It is to be observed that when the submissions were made to the learned deputy chairman, there was no evidence before him of any sort as to the reasons why on 31st March the change of plea was permitted. Nor does the deputy chairman appear to have approached, or indeed been invited to approach, the question of the admission of the evidence as being a matter of discretion to be determined in the way in which has just been stated. Whether, had the correct approach been adopted then on a careful examination of the material matters in the light of the oral and written admissions made by the appellant, according to the police evidence, on 7th March, the evidence of the change of plea might have been admitted, is an issue on which this court does not feel disposed to offer observations. The fact remains that the matters were not appropriately investigated before the deputy chairman, nor was his attention directed to the relevant principles to be applied. It is, however, as well to state at once that this court would not have considered that his discretion would have been properly applied if it had related simply to the question of explaining the absence of the mate of the Dutch ship, because that absence could be and in practice was adequately explained by other means at the trial itself. In those circumstances, this court is proceeding on the basis that the evidence was not

in this particular instance properly admitted, particularly as any such admission would have to be followed by a very careful direction by the trial judge as to exactly how it was to be looked at from a jury point of view. This court however, returning to the oral statement and the very clear written statement of the appellant and to the compelling nature of the surrounding facts, has come to the conclusion that even without referring to the change of plea the evidence against the appellant was overwhelming, and would in any event have resulted in a conviction by the jury. In those circumstances, applying the proviso², the court dismisses the appeal.

Appeal dismissed.

Solicitors: *Registrar of Criminal Appeals; A V Hammond & Co, Bradford (for the Crown).*

N P Metcalfe Esq Barrister.

Practice Direction

CROWN COURT

Crown Court – Practice – Solicitor – Right of audience.

In exercise of the power conferred on him by s 12 of the Courts Act 1971 the Lord Chancellor hereby gives the following direction:

1. A solicitor may appear in, conduct, defend and address the court in—(a) criminal proceedings in the Crown Court on appeal from a magistrates' court or on committal of a person for sentence or to be dealt with, if he, or any partner of his, or any solicitor in his employment or by whom he is employed, appeared on behalf of the defendant in the magistrates' court; (b) civil proceedings in the Crown Court on appeal from a magistrates' court if he, or any partner of his, or any solicitor in his employment or by whom he is employed, appeared in the proceedings in the magistrates' court.

2. The rights of audience conferred by this direction are in addition to and not in derogation from the rights of audience conferred by the Practice Direction³ dated 7th December 1971.

3. This direction shall come into force on 1st March 1972.

HAILSHAM OF ST MARYLEBONE C

9th February 1972

² I.e. to s 2 (1) of the Criminal Appeal Act 1968

³ [1972] 1 All ER 144, [1972] 1 WLR 5

a **Bloomfield and others v Springfield Hosiery Finishing Co Ltd**

NATIONAL INDUSTRIAL RELATIONS COURT

SIR JOHN DONALDSON P AND MR H BRIGGS

b 9th, 16th DECEMBER 1971

Employment – Period of continuous employment – Strike – Disruption of continuity – Continuity not broken where employee takes part in strike – Dismissal of employee whilst on strike – Employee re-engaged and returning to work after termination of strike – Whether employee continuing to be on strike after dismissal – Whether continuity of employment broken – Contracts of Employment Act 1963, Sch 1, paras 7 (2), 11.

c On 7th July 1969 the employees went on strike. On 11th July the employees were summarily dismissed by the employers. Subsequently agreement was reached between the parties that the employees should be taken back on 21st July and they returned to work on that day. Due to a decline in the supply of work the employees were laid off between 6th October and 28th December 1970, and it was conceded that they had been or were deemed to have been dismissed for redundancy. *d* The employees gave notice under s 6 (1) of the Redundancy Payments Act 1965 of their intention to claim redundancy payments. The Industrial Tribunal dismissed the claims on the ground that the continuity of their employment had been broken by their absence from work during the period 11th–21st July 1969 and that consequently the period of employment between that break and their dismissal was less than the statutory minimum qualifying period, i.e. 104 weeks. *e* The tribunal held that the absence from work between 11th–21st July could not be deemed not to have broken the continuity of their employment by virtue of para 7 (2)^a of Sch 1 to the Contracts of Employment Act 1963 since the employees had ceased to be employed on 11th July when they were dismissed and so could not be said to have been on strike after that date. On appeal,

f **Held** – The appeal would be allowed; the employees' continuity of employment had not been broken in July 1969 and they were consequently entitled to redundancy payments; despite their summary dismissal on 11th July, the employees had continued to take part in the strike for the purposes of para 7 (2) since the expression 'persons employed' contained in the definition of 'strike' in para 11 (1)^b of Sch 1 to the 1963 Act must be extended to include persons who, but for their action in ceasing or refusing to continue to work, would be employees; the fact that an employer terminated their contracts of employment did not take employees who were on strike outside the category of 'persons employed' unless and until the employer engaged other persons on a permanent basis to do the work which the strikers had been doing, or permanently discontinued the activity in which they had been employed *g* (see p 613 e and p 614 c, post).

h Per Curiam. Similar considerations relating to continuity of employment would have applied if the employees had been absent from work by reason of a lock-out in which case they would have had to rely on para 8^c of Sch 1 to the 1963 Act to maintain the continuity of their employment (see p 614 b, post).

j **Notes**

For the continuity of a period of employment, see Supplement to 25 Halsbury's Laws (3rd Edn) para 945A, 6.

a Paragraph 7 (2) is set out at p 612 f, post

b Paragraph 11 (1), so far as material, is set out at p 613 a and b, post

c Paragraph 8 is set out at p 613 j to p 614 a, post

For the Contracts of Employment Act 1963, Sch 1, paras 7, 8, 11, see 12 Halsbury's Statutes (3rd Edn) 213, 214. a

Cases referred to in judgment

Clarke Chapman-John Thompson Ltd v Walters p 614, post.

Fitzgerald v Hall Russell & Co Ltd [1969] 3 All ER 1140, [1970] AC 984, [1969] 3 WLR 868, Digest (Cont Vol C) 691, 816Aee. b

Cases also cited

Bunt v Fishlow Products Ltd 1970 ITR 127.

Morgan v Fry [1968] 3 All ER 452, [1968] 2 QB 710, [1968] 3 WLR 506.

Appeal

This was an appeal by Arthur Bloomfield, Peter John Bagley, Ronald Archer and William Ernest Cockayne ('the employees') against a decision of the Industrial Tribunal (chairman J I E Arnold Esq) sitting at Nottingham, dated 20th April 1971, that they were not entitled to claim redundancy payments from their employers, Springfield Hosiery Finishing Co Ltd, under the Redundancy Payments Act 1965. The facts are set out in the judgment of the court. c

Alexander Irvine for the employees.

Bruce Markham David for the employers. d

Cur adv vult

16th December. **SIR JOHN DONALDSON P** read the following judgment of the court. With the consent of the parties and pursuant to the Industrial Relations Act 1971, Sch 3, para 17, this appeal has been heard by a court of two. It raises a very important point on which the employees' trade union and, it may be, other trade unions require a decision. That question is whether for purposes of the Redundancy Payments Act 1965 a strike or lock-out can continue after the strikers or locked out workmen have been dismissed. If it cannot, the period of employment before the dismissal will not count for purposes of calculating redundancy payments. In the present case the Industrial Tribunal sitting at Nottingham has decided that a strike ended when the employees were dismissed and that therefore there was a break in the continuity of their employment. As the period of employment between this break and their dismissal by reason of redundancy was less than 104 weeks, the minimum qualifying period, the tribunal held that they were not entitled to any redundancy payment. e

The facts as found by the tribunal are no longer in dispute and can be summarised as follows. In February 1968 agreement was reached between the respondent employers and the appellant employees that dilute labour, ie unskilled or semi-skilled trainees, would be permitted to work in the trim shop on skilled work. This was followed in May 1968 by a procedure agreement, which provided that there should be no stoppage of work before the full negotiating procedures had been exhausted. On 4th July 1969 the employers informed Mr Pendleton, the shop steward, that they proposed to take on an unqualified trimmer on 7th July. On that day work began as usual at 7.00 a.m. However, a hour later the unqualified trimmer reported for work and at 8.15 a.m. the men downed tools and walked out. This was, as counsel for the employees very frankly admitted, a breach not only of the agreement to accept dilute labour but also of the procedure agreement. Mr Stocker, the employers' managing director, took the view that such conduct was repudiatory and at a meeting with the men on the morning of 7th July told them that they would be summarily dismissed on 11th July unless they had gone back to work by then. They did not go back to work and on 11th July all the employees were summarily dismissed. At the time of the dismissal Mr Stocker hoped, to use his own words, 'they would come back in a proper situation or stay away altogether'. After 11th July Mr Stocker f
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a began to take on new men. Perhaps as a consequence, enthusiasm for the strike began to wane. By 17th or 18th July agreement had been reached between the employers and the employees other than Mr Bagley that they should be taken back on 21st July. A similar agreement was reached with Mr Bagley with reference to a different date, but nothing turns on this difference. Each of the employees signed a new memorandum, under the Contracts of Employment Act 1963, which expressly agreed to the employment of dilutee labour in the capacity of trainees and further provided that there should be no industrial action until the proper negotiating machinery had been exhausted. The effect of this was that the subject-matter of the previous informal agreements had become enforceable and legally binding terms of the contract of employment.

c Nothing further would have been heard of this incident but for the fact that in the latter part of 1970 the supply of work began to fall off. As a result the employees were laid off between 6th October and 28th December 1970. As they were entitled, they submitted a notification of their intention to claim a redundancy payment pursuant to the Redundancy Payments Act 1965, s 6 (1), and it is conceded that they were, or were deemed to have been, dismissed for redundancy. In giving their reasons for deciding that there was no entitlement to redundancy payments the members of the tribunal treated Mr Bagley's case as representative of the claims of all the employees. They said:

e 'We feel that the criteria for determining whether a strike exists or continues to exist cannot be wholly subjective. From the nature of things one has to be objective about it at some stage. Mr. Bagley was certainly on strike on 7th July. He may conceivably have been still on strike up to the Wednesday, 9th July, because of the 48 hours given. In our view he cannot have been on strike after Friday, 11th July, because by then he was no longer an employee. To hold otherwise would be to create an impossible position in industry as well as at law. A dismissed employee might never return, and, if he did he might not be re-engaged. In this case the [employees] were only away for 10 days and so were able to get their jobs back. Even in that time however Mr. Stocker had set on 12 new unqualified men. If they had been away for say a month all their positions might have been filled. It would be idle in those circumstances to talk of the continuance of a strike. In view of these considerations, we feel that this strike had ceased to be a reality by the end of the first week, and that therefore there is no basis on which Mr. Bagley can claim that his employment continued between 11th July and 11th August.'

g Is this conclusion correct? The Redundancy Payments Act 1965 provides that employees dismissed by reason of redundancy may become entitled to redundancy payments in certain circumstances. Their entitlement and the amount of the payment depend in part on the length of the period of continuous employment immediately preceding their dismissal. However, the code which is used for calculating the length of this period, Sch 1 to the Contracts of Employment Act 1963 (hereinafter called 'the code'), provides for the application of different criteria for determining whether employment has been continuous and for determining the length of that employment. Accordingly a week may count for purposes of continuity, but not for purposes of determining the length of the period of continuous employment. To put the matter in another way, the code is concerned simultaneously with continuity and with enumeration, but the two aspects have to be considered separately. The relevant provisions of the code are as follows:

'General provisions as to continuity of period of employment

'2. Except so far as otherwise provided by the following provisions of this Schedule, any week which does not count under paragraphs 3 to 6 of this Schedule breaks the continuity of the period of employment.

'Normal working weeks'

'3. Any week in which the employee is employed for twenty-one hours or more shall count in computing a period of employment. a

'Employment governed by contract'

'4. Any week during the whole or part of which the employee's relations with the employer are governed by a contract of employment which normally involves employment for twenty-one hours or more weekly shall count in computing a period of employment. b

'Periods in which there is no contract of employment'

'5.—(1) If in any week the employee is, for the whole or part of the week—
(a) incapable of work in consequence of sickness or injury, or (b) absent from work on account of a temporary cessation of work, or (c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for all or any purposes, that week shall, notwithstanding that it does not fall under paragraph 3 or paragraph 4 of this Schedule, count as a period of employment. . . . c

'(3) Paragraph (b) of sub-paragraph (1) of this paragraph shall not apply to a temporary cessation of work on account of a strike in which the employee takes part. d

Paragraph 7 of the code has been amended by the Redundancy Payments Act 1965, s 37, and now reads:

'Industrial disputes after Act comes into force'

'7.—(1) A week shall not count under paragraph 3, paragraph 4 or paragraph 5 of this Schedule if in that week, or any part of that week, the employee takes part in a strike. e

'(2) The continuity of an employee's period of employment is not broken by a week which does not count under this Schedule, and which begins after it comes into force, if in that week, or any part of that week, the employee takes part in a strike.

'(3) Sub-paragraph (2) applies whether or not the week would, apart from sub-paragraph (1), have counted under this Schedule. f

It will be seen that para 7 (1) is concerned solely with computing the length of the period of continuous employment and not with its continuity. For this purpose weeks in any part of which an employee was on strike do not count. Paragraph 7 (2) and (3) deals with continuity and under these sub-paras continuity is not broken by a week during any part of which the employee is taking part in a strike whether or not that week would otherwise have counted. g

Basing themselves on this paragraph, the employees submit that for purposes of continuity they are entitled to count the whole period between 7th July, when they went on strike and 21st July, when they were re-employed, or, in the case of Mr Bagley, are deemed to have been re-employed. The employers' answer to this contention is that the strike ended when the employees were dismissed, that thereafter their relations with the employers were not governed by any contract of employment, thus excluding para 4 of the code, and that there was no 'temporary cessation of work' within the meaning of para 5 (1) (b), these words having been construed in *Fitzgerald v Hall Russell & Co Ltd* per Lord Upjohn¹ as describing a situation in which the employer no longer had work available for the employee personally. In this case, they say, there was ample work available to the employees if only they were prepared to undertake it upon the employers' terms. h

A 'strike' is defined in para 11 (1) of the code as meaning— j

a 'the cessation of work by a body of persons employed acting in combination, or a concerted refusal or a refusal under a common understanding of any number of persons employed to continue to work for an employer in consequence of a dispute, done as a means of compelling their employer or any person or body of persons employed, or to aid other employees in compelling their employer or any person or body of persons employed, to accept or not to accept terms or conditions of or affecting employment'.

b Counsel for the employers submits that once the contract of employment is terminated by dismissal, the strikers cease to be 'a body of persons employed' and their action ceases to be a strike. Although this argument is superficially attractive, it is, in our judgment, wholly fallacious. It is true that under s 8 (1) of the Contracts of Employment Act 1963 it is provided that 'employee' means 'an individual who has entered into or works under a contract with an employer . . . and cognate expressions shall be construed accordingly'. However, if this definition were applied narrowly, para 5 of the code could not apply to a break in employment such as occurred in *Fitzgerald v Hall Russell & Co Ltd*², because during the break there was no contract with the employer and the workmen would not therefore have been employees. The House of Lords has held that para 5 can apply in such a situation and it follows that the word 'employee' in the code is to be given a wider meaning.

c In para 5 of the code 'employee' must mean a person who, but for and during the continuance of one of the specified circumstances (sickness, temporary cessation of work, etc) would be an employee. Similarly in our judgment 'persons employed' in the definition of a strike must be read as extending to include persons who, but for their action in ceasing or refusing to continue to work, would be employees. The fact that the employer terminates their contracts of employment does not take them outside this category, unless and until he engages other persons on a permanent basis to do the work which the strikers had been doing or he permanently discontinues the activity in which they were employed. Similarly the fact that the striker takes other temporary employment pending the settlement of the dispute, does not prevent him claiming that he is taking part in a strike.

d In fact in the present case none of the employees took other employment and, as we have said, all were re-employed. In our judgment the employees were taking part in a strike from 7th until 21st July 1970, unless their return to work was in some way delayed in order to achieve a phased resumption of work. In the latter case the period of delay would be covered by para 5 (1) (b) of the code as being, for the reasons given in a judgment of another division of this court in *Clarke Chapman-John Thompson Ltd v Walters*³, an absence from work on account of a temporary cessation of work within the meaning of that paragraph. In relation to the issue of continuity, it matters not which paragraph applies and on the facts of this case it is unlikely to affect the amount of the redundancy payment to which the employees are entitled, although in theory it could.

e Two of the employees' former colleagues, Mr Pendleton and Mr Jarvis, were never re-employed. We do not have to decide exactly when they ceased to be on strike, but in principle this occurred either when they took other employment without an intention of returning as soon as possible to employment by the employers or when the employers engaged other replacement employees on a permanent basis, whichever occurred first.

f Some argument was directed to the question whether or not the employees could successfully contend that they were absent from work by reason of a lock-out and rely on para 8 of the code which provides:

'The continuity of the period of employment is not broken by a week which

2 [1969] 3 All ER 1140, [1970] AC 984

3 Page 614, post

begins after this Schedule comes into force and which does not count under this Schedule, if in that week or any part of that week the employee is absent from work because of a lock-out by the employer.' a

It is a commonplace that one man's strike is another man's lock-out and it will, we think, suffice to say that similar considerations apply to the definition of 'lock-out' as to the definition of 'strike'. The only effect of dismissal as part of a lock-out is that para 4 of the code ceases to apply and the locked out workman must rely on para 8 to maintain his continuity of employment for purposes of the Redundancy Payments Act 1965. b

For the reasons which we have given, the appeal will be allowed and the case remitted to the Industrial Tribunal for assessment of the amount of the employees' respective entitlements to a redundancy payment on the footing that there was no break in their employments in July 1969. c

Appeal allowed.

Solicitors: W H Thompson, Manchester (for the employees); Wells & Hind, Nottingham (for the employers).

Gordon H Scott Esq Barrister. d

Clarke Chapman-John Thompson Ltd v Walters

NATIONAL INDUSTRIAL RELATIONS COURT

SIR JOHN BRIGHTMAN, MR R BOYFIELD AND MR H BRIGGS

2nd, 16th DECEMBER 1971 e

Employment – Period of continuous employment – Temporary cessation of work – Disruption of continuity – Employee taking part in strike – Strikers given notice of dismissal on account of failure to return to work – Strike ending – Strikers allowed to apply for re-employment – Some strikers taken on immediately – Employee not re-engaged immediately as work not available for him – Employee re-engaged after lapse of 16 days – Whether absence from work on account of dismissal or on account of temporary cessation of work – Whether temporary cessation of work on account of strike in which employee taking part – Contracts of Employment Act 1963, Sch 1, para 5 (1) (b), (3). f

W, a crane driver, began his employment with C Ltd in October 1967. In August 1969 W was, with certain fellow employees, on strike for two successive weeks (weeks 1 and 2). The strikers decided to resume work on Tuesday of the following week (week 3) but they were notified by their employers that if they did not return to work on Monday of week 3 they would automatically be dismissed. On presenting themselves for work on Tuesday of week 3, they were all told that they had been discharged but were allowed to complete application forms for re-employment. C Ltd planned a staged resumption of work after the strike. Some of W's fellow employees were re-engaged at once, but he was not re-engaged until the Thursday of week 5 (during week 4 he was not working). He remained continuously employed by C Ltd from the Thursday of week 5 until he was dismissed because of redundancy in December 1970. W then claimed redundancy payment under the Redundancy Payments Act 1965. His employers contended that he was not entitled to such payment since he had not as required by s 1 (1) of the 1965 Act been continuously employed for 104 weeks by December 1970. The continuity of his employment they submitted had been disrupted in 1969 because his absence from work during week 4 was not on account of a temporary cessation of work within the meaning of para 5 (1) (b)^a of Sch 1 to the Contracts of Employment Act 1963 but on account of the notice g

^a Paragraph 5 (1), so far as material, is set out at p 617 b, post h

a of dismissal; further even if his absence was on account of a temporary cessation of work, para 5 (1) (b) did not, by virtue of para 5 (3)^b of that schedule, apply, as the temporary cessation of work was a consequence of the strike in which W had taken part.

Held – (i) By virtue of para 5 (1) (b) of Sch 1 the continuity of W's employment with C Ltd was not broken for the following reasons—

b (a) his absence from work during week 4 was not on account of his dismissal but, within the meaning of para 5 (1) (b), on account of a temporary cessation of work for him personally to do (see p 619 c and d, post); dicta of Lord Morris of Borth-y-Gest and Lord Upjohn in *Fitzgerald v Hall Russell & Co Ltd* [1969] 3 All ER at 1144, 1145, 1150 applied;

c (b) para 5 (3) of Sch 1 could not apply because on the true construction of that paragraph the words 'temporary cessation of work on account of a strike in which the employee takes part' meant 'a temporary cessation of work on account of a strike in which the employee is currently taking part' and not 'a temporary cessation of work as a consequence of a strike in which the employee is currently taking part or has theretofore taken part' (see p 618 j, post).

(ii) Accordingly W was entitled to a redundancy payment.

d Notes

For computation of period of employment, see Supplement to 25 Halsbury's Laws (3rd Edn) para 945A, 5, and for cases on continuity of employment under the Contracts of Employment Act 1963, Sch 1, para 5, see Digest (Cont Vol C) 690-691, 816Aee, Aed, Aee.

e For the Contracts of Employment Act 1963, Sch 1, para 5, see 12 Halsbury's Statutes (3rd Edn) 213.

For the Redundancy Payments Act 1965, s 1, see *ibid* 238.

Case referred to in judgment

Fitzgerald v Hall Russell & Co Ltd [1969] 3 All ER 1140, [1970] AC 984, [1969] 3 WLR 868, Digest (Cont Vol C) 691, 816Aee.

Appeal

This was an appeal by Clarke Chapman-John Thompson Ltd ('the employers') from a decision, given on 1st June 1971, of the Industrial Tribunal (chairman E D B Powell Esq) sitting at Haverfordwest that Rex Walters ('the employee') had been continuously employed by the employers for a period of 104 weeks and was entitled to a redundancy payment under the Redundancy Payments Act 1965. The facts are set out in the judgment of the court.

Mark Waller for the employers.

Alexander Irvine for the employee.

Cur adv vult

h 16th December. **SIR JOHN BRIGHTMAN** read the following judgment of the court. This appeal raises an important point on the construction of Sch 1 to the Contracts of Employment Act 1963. Mr Walters, the respondent employee, was a crane driver for the appellants, Clarke Chapman-John Thompson Ltd ('the employers'). He was engaged in October 1967. He was dismissed for redundancy 3½ years later in December 1970. The question which arises is whether by December 1970 he had been continuously employed for the requisite period of two years so as to be entitled to a redundancy payment, having regard to the events of the five weeks ending on 23rd August, 30th August, 6th September, 13th September and 20th September 1969, to which we will refer respectively as weeks 1 to 5.

b Paragraph 5 (3) is set out at p 617 c, post

The events were these. On Thursday of week 1, 120 members of the Constructional Engineering Union, including the employee, went on strike owing to dissatisfaction with the downgrading of a storeman which they considered unjust. They continued the strike throughout week 2. During that week, the men decided to return to work on Tuesday of week 3, and the employers were so informed. There was a difference of view between the employers and their employees whether Monday of week 3 (a bank holiday) was a day on which the employees could be required to work as a result of an extra holiday given to them earlier in the year. On Thursday of week 2 the employers wrote a letter to each of the men on strike in the following terms:

'Your unconstitutional action in withdrawing your labour on Thursday, the 21st August, 1969, constitutes a repudiation of the Contracts of Employment existing between employees and the [employers]. If you have not returned to normal working by 8 a.m. on Monday, the 1st September, 1969, your act of repudiation will be accepted, and you will, therefore, automatically cease to be in the [employers'] employ.'

On Sunday in week 3 the men held a meeting and voted to stand by their decision to return to work on Tuesday. When they presented themselves for work on Tuesday, they were told that they had been discharged but would be allowed to complete application forms for employment. Some of the men were taken on at once. Others, including the employee, were taken on at a later date. During the intervening period, the employee spoke to the resident engineer's deputy three or four times and was told that he 'might be taken on in due course'. He was, in fact, re-engaged on Thursday of week 5. Thereafter his employment by the employers was continuous until he became redundant in December 1970.

The crucial week is week 4, during no part of which the employee was either on strike or working. If that week counts for continuity of employment, the employee had completed the requisite continuous period of employment by the time he became redundant in December 1970. If, however, that week disrupted the continuity of his employment, he is not entitled to a redundancy payment. The Industrial Tribunal decided that he was so entitled.

The Redundancy Payments Act 1965, s 1, read with ss 3 and 8 and Sch 1, provides that, subject to certain exceptions, where an employee has been continuously employed for 104 weeks and is dismissed by reason of redundancy, he is entitled to a redundancy payment, the amount of which is to be calculated by reference to the period during which he has been continuously employed. Under s 8 the provisions of Sch 1 to the Contracts of Employment Act 1963 are to have effect for determining whether an employee has been continuously employed for the requisite period of 104 weeks. Under para 1 of Sch 1 to the 1965 Act, the provisions of Sch 1 to the 1963 Act also have effect for calculating the length of continuous employment.

The 1963 Act uses Sch 1 to test the existence of continuous employment, on which the right of an employee to a certain statutory length of notice depends, and also to measure the duration of continuous employment on which the length of such notice depends. The scheme of the schedule is to set out the rules for determining whether a particular week counts as a week for the purpose of (a) enumerating the weeks during which such employment lasted, and (b) continuity; a week which does not count for purposes of 'enumeration' because work did not take place or was curtailed, may nevertheless be deemed to exist for 'continuity' in the sense that it is deemed not to disrupt continuity.

Paragraph 1 of Sch 1 provides that an employee's period of employment shall be computed in weeks. Under para 11 a week ends on Saturday. Paragraph 2 contains the basic principle that a week which does not count for purposes of enumeration under paras 3 to 6 disrupts continuity. Paragraph 3 provides that if a person works for at least 21 hours in a week, he is deemed to have worked for a week. Paragraph 4

a carries this principle further and provides that if employment during a week is governed by a contract of employment which normally involves 21 hours' work a week, that week so counts, although actual employment may be less than 21 hours. Paragraph 5 is headed, 'Periods in which there is no contract of employment'. It reads as follows, so far as relevant:

b '(1) If in any week the employee is, for the whole or part of the week—(a) incapable of work in consequence of sickness or injury, or (b) absent from work on account of a temporary cessation of work, or (c) . . . that week shall, notwithstanding that it does not fall under paragraph 3 or paragraph 4 of this Schedule, count as a period of employment . . .

c '(3) Paragraph (b) of sub-paragraph (1) of this paragraph shall not apply to a temporary cessation of work on account of a strike in which the employee takes part.'

If, therefore, an employee (who has no subsisting contract) is ill or is absent from work on account of a temporary cessation of work, so that he is employed for less than 21 hours and para 3 cannot operate, the week so missed or curtailed is to count for purposes of enumeration and therefore for purposes of continuity. If, however, the temporary cessation of work is on account of a strike in which the employee takes part, sub-para (1) (b) has no application. This means that if the week is missed or curtailed in the circumstances indicated, it is not (subject to a later exception) to be taken into account for the purposes of enumeration or continuity; but it is to be observed that such a strike does not, by virtue of para 5, affect paras 3 and 4; so, if in a strike-affected week the employee in fact works 21 hours, or his employment is governed by a contract which normally involves 21 hours' work, such week still counts both for enumeration and continuity, so far as para 5 is concerned.

e We come to para 7, which relates to industrial disputes occurring after the 1963 Act has come into force. It has to be read with the deletion introduced by s 37 (1) of the 1965 Act. So read, it provides as follows:

f '(1) A week shall not count under paragraph 3, paragraph 4 or paragraph 5 of this Schedule if in that week, or any part of that week, the employee takes part in a strike.

'(2) The continuity of an employee's period of employment is not broken by a week which does not count under this Schedule, and which begins after it comes into force, if in that week, or any part of that week, the employee takes part in a strike.

g '(3) Sub-paragraph (2) applies whether or not the week would, apart from sub-paragraph (1), have counted under this Schedule.'

The effect is this. If in a particular week the employee takes part in a strike, that week does not count for purposes of enumeration, even if paras 3, 4 or 5 would otherwise have applied, i.e. even if the employee worked for 21 hours in that week, or under his contract would normally have worked 21 hours, or was incapable of working part of the week owing, for example, to sickness or injury. The week in which he takes part in a strike is not however to disrupt continuity, so that the strike-affected week counts for continuity but not for enumeration.

h In the present case there is no doubt that weeks 1 and 2 count for continuity by virtue of para 7, but are excluded from counting for enumeration by virtue of para 5 (3) or para 7 (1) which are capable of overlapping. On any basis week 5 counts both for continuity and enumeration, because the employee was not on strike and he worked for 21 hours or more during that week. The week principally in question is week 4, when the employee was not on strike and was not working. Week 3 could also be in issue, according to whether or not it is correct to regard the men as on strike for failing to work on Monday; the tribunal, however, accepted that it was not necessary to clarify this point and we agree.

The tribunal decided that week 4 fell within para 5 (1) (b) or alternatively within para 7 (2). So far as para 7 (2) is concerned, we do not find ourselves in agreement with the tribunal. In our view, week 4 cannot be regarded as falling within para 7 (2), for the simple reason that it was not a week during which, or during any part of which, the employee was taking part in a strike. The circumstances were the very contrary. He was trying once again to work for his employers. The claim to a redundancy payment must be based on para 5 (1) (b) if it is to succeed. To bring himself within para 5 (1) (b), the employee must establish that he was 'absent from work on account of a temporary cessation of work' and that such cessation of work was not 'on account of a strike in which the employee takes part'.

The primary facts found by the tribunal and the inference which they drew from them were as follows:

'The [employers] employed eight crane-drivers on this site, including the [employee]. There were nine or ten cranes. Until he was re-engaged on 18 September there were fewer than eight crane-drivers employed. That is to say that the [employers]—if (as we assume) they were not merely vindictive—had no work for the [employee] as a crane-driver until that date . . . In cross-examination Mr Blair [the resident engineer] agreed that members of other unions had remained at work throughout, unaffected by the strike of CEU members; and further that if all the CEU men had turned up on 1 September they would have started back without interruption. He was therefore bound to agree that the same could have happened on 2, 3 or 4 September, or at least that he could have found them work to do. In re-examination he explained that replanning was necessary in any case: they would have had to replan for a general resumption on the Thursday—they did not do so, but instead replanned for a staged resumption—and he added "I don't know how I could have employed a surplus crane-driver." All we can conclude from that evidence is that in the exercise of their prerogative the [employers] decided so to replan the work programme that they did not need the [employee's] services until 18 September. That involved a temporary cessation of work for him . . . Here we find that, as Mr Blair said, the work could have been replanned to give employment to all on 4 September: therefore the temporary cessation of work for some which resulted from the [employers'] alternative plan was on account of that deliberate choice of plan, and not on account of the strike in which [the employee] had recently taken part.'

Counsel for the employers submitted that there were four tests to be applied, and that the employee failed two of them. First, was there a cessation of work at the time when the employee was refused re-engagement or (as counsel for the employers put it) 'laid off'? It was conceded that that should be answered affirmatively. Secondly, was the employee laid off (in that sense) because of such cessation of work? It was submitted that that should be answered in the negative because the employers had served notice on the employee requiring him to return to work on 1st September and he did not do so. Therefore, it was said, he was laid off by reason of that notice and not by reason of a cessation of work. Thirdly, was the cessation of work temporary? It was conceded that the answer to that question was affirmative. Lastly, was the cessation of work *not* 'on account of a strike in which the employee takes part'? Otherwise para 5 (1) (b) has no application. Counsel submitted that the employee was unable to pass that test, because the cessation of work was a consequence which flowed from a strike and the employee was a person who had taken part in that strike.

We start with the fourth point. In our view the submission of counsel for the employers fails. We think that para 5 (3) means 'a temporary cessation of work on account of a strike in which the employee is currently taking part' and not 'a temporary cessation of work as a consequence of a strike in which the employee is currently taking part or has theretofore taken part'. We reach this conclusion for

a two reasons. First, the wording 'a strike in which the employee takes part' is similar to the wording in para 7 (2), 'the employee takes part in a strike'. Paragraph 7 (2) is indubitably referring to a current strike and not a past strike. The similar wording of para 5 (3) should be similarly construed. Secondly, the theory of the 1963 and 1965 Acts seems to be that a strike (originally, under the 1963 Act a strike not in breach of contract, but now any strike) does not disrupt continuity. If para 5 (3) is read in the manner submitted by counsel for the employers, a strike would in fact disrupt continuity for some employees in all cases in which the strike is followed by a phased and orderly return to work. We do not think that this can have been the intention of the legislature.

b We turn to the second point. The argument here is that the employee's absence from work was not on account of a temporary cessation of work but on account of the notice of dismissal. We think this is a narrow view. Admittedly the employee's contract had ended on account of the notice of dismissal which was served on him and became effective when he did not present himself on Monday of week 3. It is absolutely plain from the evidence and from the findings of the tribunal that the reason that he remained absent from work from Tuesday in week 3 until Thursday in week 5 was that the employers declined to re-engage him; the reason he was not re-engaged was not because he had been dismissed but because there was temporarily no need for the full complement of crane drivers; therefore, the reason that he was absent from work from Tuesday in week 3 until Thursday in week 5 was the cessation of any work for him. In our view, the case falls fairly and squarely within para 5 (1) (b).

c Counsel for the employers relied on *Fitzgerald v Hall Russell & Co Ltd*¹. In that case an employee was originally engaged in July 1958 and was ultimately dismissed by reason of redundancy in December 1967. The point at issue was whether a period of eight weeks' absence from work from November 1962 to January 1963 broke the continuity of his employment so that his qualifying service began in January 1963 and not in July 1958. The employee in question was a welder. Between June and December 1962 the respondent employer halved its labour force as a result of shortage of work. The appellant was among the 20 welders dismissed in November. The question before the House of Lords depended on the proper construction of the words 'absent from work on account of a temporary cessation of work' in para 5 (1) (b) of Sch 1 to the Contracts of Employment Act 1963. Both the Industrial Tribunal and the Court of Session held that the eight weeks period did not count by virtue of that provision. They were reversed by the House of Lords. The nature of the problem is summarised in the speech of Lord Morris of Borth-y-Gest²:

g 'The words "temporary cessation of work" are capable of more than one meaning. In cases falling within para. 5 of Sch. 1 the words fall to be considered in cases where someone after dismissal has been re-employed. After re-employment there will then be a process of looking back. Looking back at a period which was an interval between two periods of employment the question has to be asked—Was the employee absent from work on account of a temporary cessation of work? The word "temporary" will involve questions of degree. The words "cessation of work" may be differently regarded according to whether they are thought to refer to the employee's work or the employer's work. If over a period of years an employer manufactures a particular article but because of a temporary shortage of demand for the article he dismisses one who for years has been an employee but then re-employs him after a period which could properly be regarded as "temporary" there could be two points of view. The employer could at some later time say that his work had not at any moment ceased. The employee could at some later time say that he had worked for his employer for many years save only for a period of a few weeks during which he was absent from work on account of a temporary cessation of work.'

i [1969] 3 All ER 1140, [1970] AC 984

2 [1969] 3 All ER at 1144, [1970] AC at 994

Then later Lord Morris of Borth-y-Gest said³:

'If it was a period during which he would have been at work but for the fact that his employer could not find work for him but which period ended when the employer did find work for him, I consider that it could properly be said that he was absent from work on account of a cessation of work even though the employer's business or the particular department of it had not completely closed down.'

Counsel for the employers fastened on the following passage in the speech of Lord Upjohn⁴:

'No doubt in many cases a break of employment will prove fatal to a claim to throw the period of continuous employment back to the period of his earlier engagement; thus, if he gave notice himself for his own reasons, or was dismissed because he was unsatisfactory, it would no doubt be impossible for him to show that his employment was continuous from the earlier date.'

The argument of counsel for the employers was that as the employee's contract was terminated in consequence of his refusal to work on Monday of week 3 as required by the employers, so he was in the same position as a man who, in the words of Lord Upjohn⁴, 'was dismissed because he was unsatisfactory' or (in a later passage⁵ in his speech) 'because he took french leave'. In our view the decision in *Fitzgerald v Hall Russell & Co Ltd*⁶ does not sustain the contention which counsel for the employers sought to base on it. It is abundantly clear that para 5 (1) (b) applies notwithstanding that the employee was absent from work and had in fact been dismissed: see Lord Morris of Borth-y-Gest⁷ where he says with reference to para 5 (1) (c), that the provision 'deals with the cessation of the job of the employee who is dismissed'; and see Lord Upjohn⁴: 'That dismissal is not conclusive against the employee's claim is, I think, clear having regard to the whole structure of the Schedule to the Act of 1963'.

The question in the present case is whether the employee's absence from work during week 4 was on account of a temporary cessation of work for him to do or was on account of something else, i.e. his dismissal on Monday of week 3. In our view the facts found by the tribunal show that his absence from work stemmed from the fact that there was a temporary cessation of work for him to do. In other words his absence from work during week 4 was on account of a temporary absence of work available for him personally to do and not on account of the fact of his earlier dismissal.

There is a practical objection to the employers' submission. If the employers are correct, it will in practice become difficult, if not impossible, for employees or their trade unions to agree to a phased and orderly return to work after a strike. Otherwise, continuity of employment will be disrupted in regard to those employees who, under the phasing, are not due to return in the first phase. We think that this would be an unfortunate conclusion.

For the reasons which we have given, we consider that the tribunal was correct in its decision under para 5 (1) (b) and we dismiss the appeal.

Appeal dismissed.

Solicitors: *Maples, Teesdale & Co*, agents for *Lambert, Taylor & Galbraith*, Gateshead (for the employers); *W H Thompson* (for the employee).

Gordon H Scott Esq Barrister.

3 [1969] 3 All ER at 1145, [1970] AC at 996

4 [1969] 3 All ER at 1150, [1970] AC at 1001

5 [1969] 3 All ER at 1151, [1970] AC at 1003

6 [1969] 3 All ER 1140, [1970] AC 984

7 [1969] 3 All ER at 1145, [1970] AC at 995

a Schaefer v Schuhmann and others

PRIVY COUNCIL

LORD WILBERFORCE, LORD PARKER OF WADDINGTON, LORD HODSON, LORD SIMON OF GLAISDALE AND LORD CROSS OF CHELSEA

5th, 6th, 7th, 8th JULY, 7th DECEMBER 1971

- b Privy Council – Australia – New South Wales – Family provision – Will – Contract to make disposition by will – Disposition made in performance of contract – Inadequate provision for dependants – Order for further provision out of testator's estate – Whether burden of further provision should be shared by contractual legatee – Testator leaving house and contents to housekeeper in pursuance of contract – Specific pecuniary legacies to daughters – Residue of estate to be shared by sons – Order for further provision in favour of daughters – Whether burden of further provision to be borne in part by housekeeper – Testator's Family Maintenance and Guardianship of Infants Act 1916-1954, s 3 (1).

- d By his will made in 1962 the testator gave his four daughters legacies of \$2,000 each and left the residue of his estate to be shared equally between his three sons. In 1966 the testator purchased a house and, as he was in poor health, in May 1966 he engaged a housekeeper to keep house for him at \$12 a week. At the end of May the testator paid the housekeeper the wages to which she was entitled up to that date and in June he instructed his solicitor to prepare a codicil to his will. The testator received the document on 28th June and, his eyesight being poor, he asked the housekeeper to read it to him. By the terms of the codicil he devised the house in which he was living and its contents to the housekeeper if she should 'still be employed by me as a housekeeper at the date of my death'. Having had it read to him the testator executed the codicil on the same day. When on the following day, or the day after, the time came to pay the housekeeper her wages he told her that he did not propose to pay her any more wages because he had left her the house. Thereafter he only paid her sufficient money to meet household expenses. She was still employed as housekeeper in November 1966 when the testator died. He left an estate worth \$68,700 net, the house and its contents being worth \$14,500. The four daughters of the testator applied under s 3 (1)^a of the Testator's Family Maintenance and Guardianship of Infants Act 1916-1954 for further provision for their maintenance to be made out of the estate. The court decided that, although there was a contract between the testator and the housekeeper to leave her the house and contents, it had jurisdiction under the 1916-1954 Act to throw on the property given to the housekeeper such part as it thought fit of the additional provision to which, on the evidence, it held that three of those daughters were entitled. Accordingly the court made an order in favour of the three daughters and increased their legacies, such increase to be met in the first instance by a charge on the property given to the housekeeper, except as to a sum of \$2,300; thereafter the remaining burden of the orders in favour of the daughters was to fall on the three sons equally. The housekeeper appealed, contending that the court had no power to throw any of the burden of the additional provision on the property bequeathed to her and that the whole of it should come out of the residuary estate left to the sons.

- j **Held** (Lord Simon of Glaisdale dissenting) – The appeal would be allowed for the following reasons—

(i) it was a fair inference from the available evidence that between 28th and 30th June 1966 a change had been brought about in the contractual relations between the testator and the housekeeper whereby the contract of employment at a weekly wage was changed into a contract to serve for no wages on the footing that she was

^a Section 3 (1), so far as material, is set out at p 624 f to h, post

to become the owner of the house and its contents on the testator's death under his will; the executed codicil was an adequate memorandum of the contract (see p 626 h and j and p 627 c, post);

(ii) there was no basis for the contention that, where a testator had contracted to make a disposition under his will and the contract had been performed in that the will was framed in accordance with the testator's contractual undertaking, the rights of the other party to the contract became simply the rights of a legatee, for those rights, having arisen contractually, existed independently of the will; the 1916-1954 Act was based on the supposition that a free testator had chosen to deprive his wife or children of what he was at liberty, after satisfying any contractual claims, to leave them and on which they had some moral claim for maintenance; the court had no power therefore to interfere with testamentary dispositions made in pursuance of bona fide contracts; such a power could only be given by legislation deliberately framed for that purpose (see p 629 f, p 630 a and h and p 631 a and p 633 a and d, post).

Coffill v Comr of Stamp Duties (1920) 20 NSW SR 278, *Re Syme* [1933] VLR 283 and dictum of Nicholls CJ in *Re Richardson's Estate* (1934) 29 Tas LR at 155, approved and applied.

Dictum of Giffard LJ in *Re Brookman's Trust* [1869] 5 Ch App at 192 considered.

Dillon v Public Trustee of New Zealand [1941] 2 All ER 284 not followed.

Notes

For provision for maintenance out of a deceased's estate, see 16 Halsbury's Laws (3rd Edn) 460-462, paras 920-922, and for cases on the subject, see 24 Digest (Repl) 971-981, 9762-9798.

For the effect of contracts to make a gift by will, see 39 Halsbury's Laws (3rd Edn) 851-852, 854, paras 1286, 1287, 1290.

Cases referred to in opinions

Brookman's Trust, *Re* (1869) 5 Ch App 182, 39 LJCh 138, 22 LT 891, 48 Digest (Repl) 364, 3151.

Brown, *Re*, *Brown v Knowles* (1955) 105 LJ 169.

Central Trust & Safe Deposit Co v Snider [1916] 1 AC 266, 85 LJPC 87, 114 LT 250, 20 Digest (Repl) 505, 2119.

Coffill v Comr of Stamp Duties (1920) 20 NSW SR 278.

Dillon v Public Trustee of New Zealand [1941] 2 All ER 284, [1941] AC 294, 165 LT 357, 24 Digest (Repl) 975, *2570.

Edwards, *Macadam v Wright*, *Re* [1957] 2 All ER 495, [1958] Ch 168, [1957] 3 WLR 131, 48 Digest (Repl) 259, 2331.

Eyre v Munro (1857) 3 K & J 305, 26 LJCh 757, 30 LTOS 561, 40 Digest (Repl) 527, 372.

Graham v Wickham (1863) 1 De GJ & Sm 474, 12 Digest (Repl) 242, 1831.

Gregor v Kemp (1722) 3 Swan 404, 36 ER 926, 40 Digest (Repl) 529, 386.

Hammersley v De Biel (1845) 12 Cl & Fin 45, 8 ER 1312, *affg* sub nom *De Beil v Thomson* (1841) 3 Beav 469, 12 Digest (Repl) 146, 918.

Heydon's Case (1584) 3 Co Rep 7a, 76 ER 637, 44 Digest (Repl) 203, 149.

Hochster v De La Tour (1853) 2 E & B 678, [1843-60] All ER Rep 12, 27 LJQB 455, 22 LTOS 171, 1 CLR 846, 12 Digest (Repl) 377, 2960.

Hyman v Hyman [1929] AC 601, [1929] All ER Rep 245, 98 LJP 81, 141 LT 329, 93 JP 209, 27 Digest (Repl) 235, 1888.

Jervis v Wolferstan (1874) LR 18 Eq 18, 43 LJCh 809, 30 LT 452, 40 Digest (Repl) 527, 369.

Jones v How (1850) 9 CB 1, 137 ER 790; *subsequent proceedings*, 7 Hare 267, 48 Digest (Repl) 22, 93.

Maddison v Alderson (1883) LR 8 App Cas 467, 52 LJQB 737, 49 LT 303, 47 JP 821; *affg* sub nom *Alderson v Maddison* (1881) 7 QBD 174, 12 Digest (Repl) 182, 1245.

Oliver v Perrin (1946) 2 DLR 461.

- a* *Richardson's Estate, Re* (1934) 29 Tas LR 149, 24 Digest (Repl) 973, *2545.
Syme, Re [1933] VLR 283.
Synge v Synge [1894] 1 QB 466, [1891-94] All ER Rep 1164, 63 LJQB 202, 70 LT 221, 58 JP 396, 42 WR 309, 12 Digest (Repl) 388, 3017.
Tait's Trustees v Lees 1886 13 R 1104.
Wells v Matthews & Ors (1914) 18 CLR 440, 12 Digest (Repl) 58, *118.
b *Williams Estate, Re* (1951) 4 WWR (NS) 114.

Appeal

- This was an appeal by Elizabeth Schaefer against the order of Street J in the Supreme Court of New South Wales dated 26th September 1969 made in favour of three of the four applicants, Ellen Elizabeth Schuhmann, Mary Jane Fay Lousick, Maureen Joan Williams and Catherine Eileen Seery. The applicants, who were the daughters of the deceased testator, Edward Seery, had applied to the Supreme Court of New South Wales for further provision out of his estate under the Testator's Family Maintenance and Guardianship of Infants Act 1916-1954. The effective respondent to the appeal was the respondent to the application, Cornelius Patrick Seery, the executor of the testator's will. The facts are set out in the opinion of the majority of the Board.
- d* *K R Handley* (of the New South Wales Bar) for the appellant.
N C H Browne-Wilkinson for the respondent.

- LORD CROSS OF CHELSEA.** This is an appeal by Elizabeth Schaefer against so much of an order of Street J made on 1st December 1969 in proceedings in the Supreme Court of New South Wales under the Testator's Family Maintenance and Guardianship of Infants Act 1916-1954 as imposed a charge in favour of three of the daughters of the testator, Edward Seery, on a house, 124 Nuwarra Road, Chipping Norton, which the testator had by a codicil to his will devised to the appellant. The appellant contended that the devise had been made to her in fulfilment of a contract binding on the testator. Two points arose for decision in the proceedings: the first whether the testator and the appellant had entered into an enforceable contract with regard to the house, and the second whether, if they had, the court had nevertheless jurisdiction under the Act to interfere with the benefit which the testator had conferred on the appellant in pursuance of it. The judge decided the first question in favour of the appellant but the second question against her. The effective respondent to the appeal, Cornelius Patrick Seery, a son of the testator and the sole executor of his will, contended before the Board not only that the judge was right on the question of jurisdiction but also that even if he was wrong on that point the appeal should nevertheless be dismissed because he was wrong in finding that there was an enforceable contract between the testator and the appellant.
- e* *f* *g*

- The testator, who was a retired market gardener, died on 16th November 1966, aged 76. He was a widower with seven children—three sons and four daughters, three of whom were married. All the children were over 21 at the date of their father's death. He left an estate worth some \$90,000 gross. The net estate remaining after payment of debts, duties and expenses was worth about \$68,700 including the house above referred to and its contents worth together \$14,500. By his will which he made on 23rd January 1962 the testator gave each of his four daughters \$2,000 and left the residue of his estate equally between his three sons. His wife died in 1962. In the same year he retired from business and went to live with his bachelor son Edward and his unmarried daughter Catherine in a cottage belonging to the son. Early in 1966 he decided to live by himself and purchased 124 Nuwarra Road as a home to live in. He was in poor health and at the beginning of May he advertised in the local paper for a housekeeper. The appellant, who is a married woman with three children, answered the advertisement and the testator engaged her to keep house for him at a wage of \$12 a week. Her employment began on 13th May and she continued to
- h* *i*

look after the testator, who needed constant attention, and to keep house for him until his death. Her husband used to visit the house once or twice a week and there is no suggestion that the relations between the testator and the appellant were other than those between employer and employee. At the end of May the testator paid the appellant the wages to which she was entitled up to that date. Sometime in June he gave his solicitor instructions to prepare a codicil to his will. The solicitor having prepared the document posted it to the testator who received it on 28th June. His eyesight was not good and he asked the appellant to read it to him. It was in the following terms:

'NOW I HEREBY DECLARE that if my housekeeper ELIZABETH SCHAEFER shall still be employed by me as a housekeeper at the date of my death THEN but not otherwise I GIVE DEVISE AND BEQUEATH free of all duties payable in consequence of my death unto her absolutely my house and land known as Number 124 Nuwarra Road, Chipping Norton, being the whole of the land comprised in Certificate of Title Volume 5425 Folio 9 together with all my furniture and household effects contained therein.'

Having read the codicil to him the appellant called a taxi to take the testator to the bank where he executed the document that day. Next day or the day after when the time came for the testator to pay the appellant the wages due to her he told her that he did not propose to pay her any more wages because he had left her the house—adding 'If you need any money to help you out, let me know'. The testator provided the appellant with money to meet such household expenses as were paid for in cash but he paid her no wages after the end of May.

In 1967 after the will and codicil had been proved the four daughters of the testator applied to the court under the Testator's Family Maintenance and Guardianship of Infants Act 1916-1954. The only provisions of the Act to which it is necessary to refer are ss 3 (1) and 4 (1) which are in the following terms:

'Testator's family maintenance.'

'3. (1) If any person (hereinafter called "the testator") dying or having died since the seventh day of October, one thousand nine hundred and fifteen, disposes of or has disposed of his property either wholly or partly by will, in such a manner that the widow, husband, or children of such person, or any or all of them, are left without adequate provision for their proper maintenance, education, or advancement in life as the case may be, the court may at its discretion, and taking into consideration all the circumstances of the case, on application by or on behalf of such wife, husband, or children, or any of them, order that such provision for such maintenance, education, and advancement as the court thinks fit shall be made out of the estate of the testator for such wife, husband, or children, or any or all of them.

'Notice of such application shall be served by the applicant on the executor of the will of the deceased person.

'The court may order such other persons as it may think fit to be served with notice of such application . . .

'4. (1) Every provision made under this Act shall subject to this Act, operate and take effect as if the same had been made by a codicil to the will of the deceased person executed immediately before his or her death . . .'

The respondent to the applications was the executor, Cornelius Patrick Seery, but the appellant and another son, William John Seery, intervened in the proceedings by the leave of the court. The third son, Edward took no part in them. The judge having considered the evidence given by the four applicants as to their financial circumstances held that one of them, Mrs Lousick, had not established that she was left without adequate provision for her proper maintenance but that the other three applicants, Mrs Schuhmann, Mrs Williams and Miss Seery had made out cases

a for relief under the Act. He decided that the legacies of \$2,000 each given to Mrs Schuhmann and Mrs Williams should be increased to legacies of \$12,000 each and that Miss Seery should receive a legacy of \$4,000 in place of her legacy of \$2,000 and in addition a life interest in a fund of \$8,000. Having decided that he had jurisdiction to throw on the property given to the appellant such part as he thought fit of the additional provision which he was making for the three daughters he ordered that on b the appellant by her counsel undertaking not to bring any action against the executor for wages or other services in respect of her employment by the testator with liberty nevertheless to her to apply to be released wholly or partly from the performance of that undertaking the burden of the orders in favour of the three daughters be met in the first instance by, and be a charge on, the property given to the appellant except as to a sum of \$2,300 part thereof and that thereafter the remaining burden of the c orders in favour of the daughters should fall on the three sons equally. The wages which the appellant would have received, had no other arrangements been made, in the period from the end of May to the death of the testator would have been nearly \$300. So the effect of the order so far as concerns the appellant is to substitute a gift of \$2,000 for the gift of the house and furniture worth some \$14,500. The appellant does not dispute that the testator failed to make adequate provision for d the three daughters in question nor does she quarrel with the amount of the additional provision which the judge decided to award them. Her contention is simply that the judge had no power to throw any of it on the property given to her and that the whole of it should come out of the residuary estate left to the sons.

e Logically the first question which arises is that which the judge answered in favour of the appellant—namely whether the testator at the end of June 1966 bound himself by an enforceable contract to leave her the house by his will. The only evidence on this point is that set out above which was contained in an affidavit sworn by the appellant. It seems most unlikely that nothing more was said on either side at the time in connection with the disposal of the house beyond what was stated in the affidavit; but although the appellant was cross-examined at length on other matters f she was not asked a single question as to what the testator said to her about the gift of the house or as to how she reacted to what he said. The judge therefore had to proceed on the footing that what was stated in the affidavit was an accurate and complete record of what passed between the parties. The part of his judgment dealing with this aspect of the case is in the following terms:

g [Counsel for the appellant] has presented a powerful argument to the effect that the production to [the appellant] of this codicil for her to read, coupled with her subsequent rendering of these services, constituted a contract whereby the testator bound himself to leave this cottage to her if she should still be employed by him at the date of his death. The specific promise as propounded by [counsel for the appellant] was in the following terms: "On 28th h June, 1966, the testator made a written offer to [the appellant] that if she would work as his housekeeper until his death he would leave to her by will the property at 124 Nuwarra Road, Chipping Norton, together with furniture and household effects therein at his death."

i 'A number of questions arise in connexion with this argument. The first of these is whether or not what took place between the testator and [the appellant] was contractual in its nature. [Counsel] has contended that the facts fall rather within the type of situation described by Griffith, C.J. and Isaacs, J. . . . in *Wells v. Matthews & Ors*¹. This initial question is itself one of considerable difficulty, due in no small measure to the paucity of evidence from which one might infer that a contract had come into existence. [Counsel for the appellant] contends that the testator's asking [the appellant] to read the codicil aloud was a communication of the offer. Were it not for the conversation at the end of

June, deposed to in para. 15, I should have had great difficulty in concluding that this was intended to be contractual on the testator's part. The inescapable fact, however, is that the testator was then dependent to a large extent upon [the appellant's] continuing attention to his needs. The position in which she was employed was not perhaps a very attractive one, and he may well have anticipated difficulty in filling it again. It is quite clear that on any view of the evidence he held out to [the appellant] the knowledge that he had made this codicil in this way as an inducement to her to continue in his employment. The fact that he intended her to alter her position upon the faith of what was set forth in the codicil is borne out by the conversation towards the end of June to the effect that he would no longer pay her wages. It seems in these circumstances that one is justified in drawing the inference that his submission of the codicil to her for perusal—albeit that it was a perusal associated with it being read aloud to him—was intended by him to bring its contents to her notice, and to induce her to continue to serve him in her then capacity. I am disposed accordingly to regard the communication of this codicil to her as associated with a contractual intention on the part of the testator. The contract came into existence by reason of [the appellant] having discharged the consideration contemplated in the wording of the codicil, namely, being still employed as the testator's housekeeper at the date of his death. This connotes an element of the continuity in the employment from the date the codicil was shown to her through until the death of the testator.

It is contended that there was not sufficient memorandum of the contract, being one falling within the Statute of Frauds, to render it the subject of recognition in this Court. I am of the view, however, that the terms of the codicil themselves, being capable of being regarded—as I do regard them—as a written communication of the offer, are sufficient in that behalf.

Counsel for the respondent attacked the judge's finding that there was an enforceable contract on two grounds. In the first place he submitted that it was wrong to treat the communication to her of the terms of the codicil which he was about to execute as a contractual offer which she could convert into a binding contract by continuing to serve him. His reason for getting her to read the codicil to him was no doubt not simply that his sight was bad. It was a fair inference that by making known to her that he was leaving her the house by will if she remained in his service he was hoping to induce her to remain in an employment which she might well come to find increasingly irksome. But there is, it was argued, a world of difference between saying 'See what you will get under my will if you look after me until I die' and saying 'If you undertake to look after me until I die I will execute this document and not revoke it.' Secondly counsel submitted that even if there was a contract the codicil was not an adequate memorandum of it. He conceded that the fact that it was not executed until after the contract was alleged to have been made was no objection to its sufficiency as a memorandum but he submitted that it was defective first because it did not indicate the existence of any contract and secondly because it did not state any consideration. Their Lordships agree with the judge that it is a fair inference to be drawn from the scanty material available that between 28th and 30th June 1966 a change was brought about in the contractual relations between the testator and the appellant. The contract of employment at a weekly wage of \$12 was changed into a contract to serve for no wages on the footing that she was to become owner of the house and its contents on the testator's death under his will. That in the event she had to serve for only five months more to secure a house worth over \$14,000 and that the testator left his daughters insufficiently provided for are circumstances which incline one to view the appellant's case with little sympathy; but the result in law of what passed between them between 28th and 30th June would have been just the same if she had subsequently served for five years

a without wages, if the testator had had no family to provide for, and if he had revoked the codicil on his death bed and left the house to some new friend. Their Lordships think that the new contract may well not have come into being until the testator, after he had executed the codicil which the appellant had previously read, told her that as he had left her the house by will he was not going to pay her any more wages and she acquiesced in this arrangement. Viewed in that way the contract
b would have been a contract not to revoke the gift provided that she continued to serve him until his death and no memorandum would have been necessary. But it is somewhat unreal to draw a hard and fast line between what happened on 28th June and what happened on 29th or 30th June and although their Lordships feel the force of counsel's submissions as to treating the reading of the draft codicil as a contractual offer they think that the judge was entitled to consider what was the testator's intention
c in causing her to read it in the light of what he said to her next day or the day after. Again if once one views the terms of the codicil as a contractual offer capable of acceptance by conduct it would be an intolerable refinement to say that the executed codicil was not an adequate memorandum. By whichever route the result is arrived at their Lordships are not prepared to differ from the conclusion reached by the judge on the contract point.

d Their Lordships turn now to the question of the jurisdiction of the court under the 1916-1954 Act. The Act contains no definition of the 'estate' out of which the court is empowered by s 3 (1) to make provision for members of the family. It is, however, clear that it cannot mean the gross estate passing to the executor but must be confined to the net estate available to answer the dispositions made by the will. Again if one reads the section without having in mind the particular problem created by dispositions made in pursuance of previous contracts the
e language suggests that what the court is given power to do is to make such provision for members of the testator's family as the testator ought to have made, and could have made, but failed to make. The view that the court is not being given power to do something which the testator could not effectually have done himself received strong support from s 4 (1) which says that a provision made under the Act is to
f operate and take effect as if it had been made by a codicil executed by the testator immediately before his death.

That being the apparent meaning of the Act their Lordships pass to consider what are the rights of a person on whom a testator has agreed for valuable consideration under a bona fide contract to confer a benefit by will. If the benefit contracted for is a legacy the testator is at liberty to dispose of his property during his lifetime as he thinks fit; but on his death, if he has failed to leave the legacy the promisee can
g claim payment from his estate (*Hammersley v De Biel*²). Further if he dies insolvent then whether or not he has left the legacy by his will the other party to the contract is entitled to claim as a creditor for the amount of the legacy. This is shown by the decision of the Court of Appeal in Chancery in *Graham v Wickham*³. There a father covenanted on the marriage of his son Charles by his will to give and bequeath to him
h £2,500 to be held on certain trusts. Under his own marriage settlement the father had a power of appointment amongst his four children over a fund of £10,000 which in default of appointment was to pass to his children equally. By his will he appointed £2,500, part of the £10,000, to Charles saying that it was to be taken in discharge of his covenant; but it was held that this appointment could not satisfy the covenant since the fund of £10,000 did not belong to the testator but belonged
j to his children subject to their father's power of distribution. The father died insolvent and it was argued on behalf of his ordinary creditors that the £2,500 covenanted to be left in the form of a legacy was only payable out of assets applicable for payment of legacies and was not a debt coming into competition with other debts. The Lords Justices rejected that argument and held that the covenant to leave £2,500

2 (1845) 12 Cl & Fin 45

3 (1863) 1 De GJ & Sm 474

by will created a specialty debt. The decision would plainly have been the same had the testator bequeathed Charles a legacy of £2,500 but died, as he did, without assets sufficient to meet it as a legacy. If the covenant had been a covenant to leave a share of residue the decision would, of course, have been different since residue is only ascertained after debts have been paid (see *Jervis v Wolferstan*⁴).

If the contract is to devise or bequeath specific property the position of the promisee during the testator's lifetime is stronger than if the contract is simply to leave a legacy. If the testator sells the property during his lifetime the promisee can treat the sale as a repudiation of the contract and recover damages at law, which will be assessed subject to a reduction for the acceleration of the benefit and also if the benefit of the contract is personal to the promisee subject to a deduction for the contingency of his failing to survive the promisor. But if he can intervene before a purchaser for value without notice obtains an interest in the property he can obtain a declaration of his right to have it left to him by will and an injunction to restrain the testator from disposing of it in breach of contract (*Synge v Synge*⁵). No doubt if the property is land he could also register the contract or a caution against the title. Their Lordships were not referred to any case which deals with the position which would arise if the testator under such a contract retained the property in question until his death but died insolvent. It must however follow from *Graham v Wickham*⁶ that the property would form part of the general estate available for the payment of debts but that the promisee would be entitled to rank as a creditor for the value of the property as at the death in competition with other creditors of the same degree. If, therefore, the testator in this case had died insolvent the appellant would have had a right to be paid a dividend on a proof for \$14,500 and if the assets had been nearly sufficient to cover all the liabilities that dividend would have amounted to nearly the whole value of the house. If, on the other hand, the testator had left just sufficient assets to meet all his other liabilities without recourse to the house then, if the respondent is right, the court would have power to take the house away from the appellant and give it to the daughters. That the promisee might be better off if the testator died insolvent than if he died solvent would be very odd. Again if the respondent is right the promisee might be better off if the testator broke his contract by selling the property in question in his lifetime than if he kept it, since in the latter event the property might be taken from the promisee by an exercise by the court of its powers under the Act. In the case of *Dillon v Public Trustee of New Zealand*⁷—hereafter referred to—it was suggested that any damages which the promisor was ordered to pay would be assessed in the light of the possibility of the exercise by the court of its jurisdiction but it is difficult to see how in practice any deduction could be made for this contingency since at the date of the breach sued on it would be quite uncertain whether or not on any occasion for exercise of the court's powers under the Act would arise on the testator's death. If a testator having contracted to leave property by will to A leaves it to B and there is no need to have recourse to the property to pay his debts, then the executor will be ordered to convey it to A as the person beneficially entitled to it (see *Synge v Synge*⁸, *Re Edwards*, *Macadam v Wright*⁹). It is not easy to see how on the wording of the Act the court, in some circumstances at least, could have jurisdiction to override this trust arising in favour of the promisee. Suppose, for example, that the testator in this case had made a codicil immediately before his death revoking the devise to the appellant and leaving the house to his three daughters for whom he was held to have made insufficient provision and that the appellant claimed to have the house transferred to her under the trust in her favour arising by reason of the contract. If the words 'disposes of his property by will' as used in s 3 (1) include property which the testator has disposed of in breach of contract then

4 (1874) LR 18 Eq 18 at 24

5 [1894] 1 QB 466, [1891-94] All ER Rep 1164

6 (1863) 1 De GJ & Sm 474

7 [1941] 2 All ER 284, [1941] AC 294

8 [1894] 1 QB at 470, 471

9 [1957] 2 All ER 495, [1958] Ch 168

a the condition precedent to the arising of the court's jurisdiction would not be satisfied since the applicants' lack of provision would not be due to the dispositions of the will but to the appellant's insistence on her rights under the contract. If, on the other hand, the property to which the section refers does not include property which the testator has bound himself by contract to dispose of in a particular way it is hard to see how the court can have jurisdiction under the section to make orders affecting such property.

b Counsel for the respondent faced with these anomalies submitted that at all events if the testator died solvent having performed his contract the rights of the other party to the contract became as from that moment simply the rights of a legatee or devisee; that notwithstanding that the testator could not have made any other disposition without breaking his contract the court despite the wording of s 4 (1) could make a fresh disposition which he could not effectually have made; and that c the fact that the promisee might have been better off if the testator had died insolvent or broken his contract was irrelevant. The only English authority which counsel cited in support of these submissions was a dictum of Giffard LJ in *Re Brookman's Trust*¹⁰, where he said:

d 'If a testator is bound to make a will in a certain form, the law says there is no breach provided he makes a will in due form, and it is not owing to any act of his that the child does not take.'

In that case a father covenanted on his daughter's marriage to make a certain provision either by inter vivos settlement or by will for his daughter and her family. He made the provision by will and the terms of it followed exactly the wording of the covenant; but as the gift was by will the interest of a beneficiary who predeceased e the testator, and which had the provision been made by deed would have passed to his estate, lapsed. Malins VC¹¹ held that the will ought to have contained a declaration against lapse but Giffard LJ held on appeal that the absence of a declaration against lapse did not amount to a breach of the covenant. In the context of the actual decision it is their Lordships think impossible to treat the words of Giffard LJ f quoted above¹² as an authority which lends any support to the argument on behalf of the respondent.

Counsel for the appellant referred the Board to two cases in Australian courts which are inconsistent with the proposition that if the estate is solvent and the contract is performed the rights of the other party to the contract become simply the rights of a legatee. The first is a decision of the Court of Appeal in New South Wales (*Coffill v Comr of Stamp Duties*¹³). There a business which had been carried on g by a husband and wife in partnership was sold and the wife who had brought considerable sums of money into the partnership applied for her share of the assets. Thereupon an agreement was made between them that in consideration of the wife giving up all claims to the assets the husband should make a will leaving her £5,000 and not revoke it to her prejudice. After the husband's death the question arose whether in calculating duty the £5,000 left to the wife was deductible as a debt and h it was held that it was. The Chief Justice, after quoting *Graham v Wickham*¹⁴ and an earlier case of *Eyre v Munro*¹⁵ which is to the same effect, said¹⁶:

'It seems to me therefore that it is not open to the Commissioner to treat this particular legatee as if she had no other right than that which appears on the face of the will naming her as legatee. She is a person who could have sued for her share, whatever it was in the moneys realised by the sale of the partnership assets, and on the evidence before us only forbore to sue on the undertaking that j the money should be made good to her by the will of her husband.'

¹⁰ (1869) 5 Ch App 182 at 192

¹¹ In *Re Brookman's Trust* [1869] 5 Ch App 182

¹² (1869) 5 Ch App at 192

¹³ (1920) 20 NSW SR 278

¹⁴ (1863) 1 De GJ & Sm 474

¹⁵ (1857) 3 K & J 305

¹⁶ (1920) 20 NSW SR at 285

That decision, which seems to their Lordships to be good sense as well as good law, is inconsistent with the view that the mere fact that the estate is solvent and the contract performed turns the other party to the contract from a creditor into a mere legatee. The second case is *Re Syme*¹⁷. The facts are somewhat complicated and their Lordships do not think it necessary to set them out; but they agree with counsel for the appellant that that decision also is inconsistent with the proposition advanced by counsel for the respondent.

In 1935 the very point which their Lordships have to decide came before the Court of Appeal in Tasmania in the case of *Re Richardson's Estate*¹⁸. The facts there were that the testator had been separated from his wife for some thirty years before his death in 1934. From 1920 until his death, he lived with a Mrs Henderson. They pooled their resources and agreed that they should make mutual wills in one another's favour. In pursuance of that agreement the testator left his estate to Mrs Henderson. His wife and daughter brought proceedings under the Testator's Family Maintenance Act which gave the Tasmanian court the same powers as are given to the court by the New South Wales Act and contained in s 9 a provision similar to that contained in s 4 (1) of the New South Wales Act. When he heard the case at first instance Nicholls CJ, while pointing out that if the testator had broken his contract Mrs Henderson could have recovered damages, accepted the submission of counsel that as he had performed it the court had jurisdiction to make an order but he dismissed the application on the merits. The widow and daughter appealed and the appeal was dismissed by Nicholls CJ and Crisp J, Clark J dissenting. In his judgment dismissing the appeal Nicholls CJ expressed himself as follows¹⁹:

'All that I propose to add to what I already have said on this case, is that the respondent's rights do not arise under the will. They arise contractually and exist independently of the will. If the testator had made no will, or had made a will leaving everything to his widow and daughter, he would have made a breach of his contract with the respondent. She then could have sued for damages for the breach, and the measure of her damages would have been the value of the testator's estate. Her status afterwards would have been that of a judgment creditor. It is true that the performance of the contract was to be, and actually was, in the form of a will, but, as is proved by the fact that it prevents a cause of action for breach arising, the will operates as the performance of the contract, not as bounty, as it would in the ordinary case of a testator giving, by way of a free gift, property which he had the right to dispose of as he pleased. As against the respondent, he had no right to leave his property to his widow and child. Any interference with respondent's rights now, must amount to wholly or partially setting aside the contract. What we are asked to do is to reduce contractual rights to the level of gifts under a will, and to make the performance of the contract the reason why we can prevent its full performance, and to do that by an order which by section 9 will take effect as if it were a codicil, which as a fact the testator had no right to make. The "Testator's Family Maintenance Act" is based solely upon the supposition that a free testator has chosen to deprive his wife or children of what he was at liberty to leave to them and upon which they have some moral claim for maintenance. In such a case the Court is given a discretion to do what the testator could and should have done, but no more.'

Crisp J concurred in the dismissal of the appeal on the ground that Nicholls CJ was in any case right in exercising his discretion against the appellants. Clark J on the other hand thought that the court had jurisdiction and that Nicholls CJ had exercised his discretion wrongly. He appears to have recognised that if the testator had broken his contract Mrs Henderson would have been entitled to damages but he thought that

¹⁷ [1933] VLR 283

¹⁸ (1934) 29 Tas LR 149

¹⁹ (1934) 29 Tas LR at 155

a as the contract had been performed the court had jurisdiction notwithstanding s 9. Were it not for the decision of the Board in *Dillon v Public Trustee of New Zealand*²⁰, which is the sheet anchor of the respondent's case, their Lordships would have had no hesitation in preferring the view of Nicholls CJ in *Re Richardson's Estate*¹ to that of Clark J supported as it is by a consistent body of authority, earlier referred to, both in England and Australia as to the nature of the rights of persons under a contract to make a bequest by will.

b But on the other side, and clearly out of line with this body of authority is *Dillon's* case²⁰, the facts of which were as follows. Henry Dillon senior, a widower aged 79 with five grown up children, entered into a written agreement on 2nd February 1933 with his two sons. There had been litigation between the parties. The agreement which compromised the litigation provided that the lands belonging to the father and the sons respectively should be farmed in partnership, that one son should be appointed manager and devote his whole time to the work and that the other should work full time in the business as a general hand. Clause 17 was in the following terms:

c 'That the said Henry Dillon senior shall by his last will devise and bequeath his own farm lands to his trustees upon trust for his son Henry Dillon junior and his two daughters Mary Kathleen Dillon and Eileen Dillon in equal shares subject however to an annuity or rentcharge of fifty pounds (£50) per annum in favour of his daughter Elsie Higgins and shall forthwith execute a will containing such devise and bequest'

d

On 24th August 1935, when he was 81, Henry Dillon married again. It does not appear whether he had made a will implementing cl 17 of the agreement, but if he had the will was revoked by the marriage. On 17th March 1936 he made his last will devising his farm lands pursuant to cl 17 of the agreement and leaving his residue to his wife. He died on 29th January 1937 and on 28th July the widow applied to the court under the Family Protection Act 1908 asking for further provision to be made for her out of her husband's estate. Section 33 (1) of the Act—which corresponds to s 3 of the New South Wales Act—is in the following terms:

e

f 'If any person (hereinafter called the "testator") dies leaving a will, and without making therein adequate provision for the proper maintenance and support of the testator's wife, husband, or children, the court may at its discretion, on application by or on behalf of the said wife, husband, or children, order that such provision as the court thinks fit shall be made out of the estate of the testator for such wife, husband, or children.'

g

The Act contains no definition of 'estate' and no section corresponding to s 4 (1) of the New South Wales Act. Northcroft J, before whom the application came at first instance, held that the principle of two earlier cases which decided that agreements between husband and wife, whether made before or after marriage, under which she purported to relinquish all rights under the Act and to free her husband from his obligations under it were void covered the instant case, and on the merits he made an order in favour of the widow. That decision was reserved by the Court of Appeal—Myers CJ and Ostler J, Smith J dissenting. Myers CJ in his judgment first said that the two cases on which Northcroft J relied had no application to contracts made by the husband in the ordinary course of business. He then set out what were the rights of the promisees under the agreement made by the testator both before and after his death in accordance with the decision in *Synge v Synge*² and said that it would be an extraordinary thing if the fact that the testator had performed his agreement put the promisees in a worse position than they would have been in had he broken it

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20 [1941] 2 All ER 284, [1941] AC 294

1 (1934) 29 Tas LR 149

2 [1894] 1 QB 466, [1891-94] All ER Rep 1164

either by selling the property in his lifetime or leaving it by will to someone else. Finally he said that a person to whom a devise is made in pursuance of an agreement could not properly be regarded as an object of the testator's bounty and that the power given to the court by the Act did not extend beyond cancelling or diminishing in favour of his widow and children bequests made by him to other objects of his bounty. The judgment of Ostler J was to the same effect as that of Myers CJ. Smith J in his dissenting judgment said (1) that the agreement gave the promisees no interest in the lands but only a right to have the will framed in a particular way, (2) that the testator had fulfilled his contract by framing the will in that way, (3) that their right to the lands arose through an exercise of the testator's testamentary power—albeit he was obliged to exercise it in a particular way—and was therefore subject to the control of the court in the same way as any other benefit conferred by the will, (4) that if the testator failed to carry out his contract any right to damages or to specific performance to which the promisees would become entitled would be assessed or granted subject to, and in the light of, the exercise or possible exercise by the court of its powers under the Act.

The widow appealed to the Privy Council³ which allowed the appeal. The reasoning of the Board follows closely the dissenting judgment of Smith J. The testator's children—it was said—were simply devisees and not creditors; the testator did what he contracted to do; and if he had broken his contract the children's right to damages or specific performance would have been assessed or granted subject to the possible or actual impact of the power of the court under the Act. So far as appears the attention of the Board was not drawn either to the case, of *Coffill*⁴ and *Syme*⁵, which proceed on the footing that the fact that the testator carries out his contract does not change the character of the promisee's rights, or to the case of *Re Richardson's Estate*⁶.

Counsel for the respondent submitted in the court below that *Dillon's case*³ could be distinguished from this case because the New Zealand statute which was then under consideration contained no provision corresponding to s 4 (1) of the New South Wales Act. Street J refused to draw such a distinction and their Lordships think that he was clearly right to refuse to draw it. The terms of s 33 of the New Zealand Act and of s 3 of the New South Wales Act themselves indicate that the power of the court extends no further than the power of the testator. Section 4 (1) of the New South Wales Act only emphasises and makes explicit what would be implicit in the Act if it were not there. Refusing as he rightly did to distinguish *Dillon's case*³ Street J naturally followed it in the present case and held that he had jurisdiction to charge the house devised to the appellant with part of the provision which he thought it right to make for the testator's daughters.

In the light of the arguments presented to the Board on behalf of the appellant which were, it would seem, far fuller than those presented to the Board on behalf of the respondent in *Dillon's case*³ their Lordships, had the matter been *res integra*, would not have hesitated to hold that the court had no jurisdiction. But the matter is not *res integra* and *Dillon's case*³ was decided 30 years ago. It is true that it has met with some criticism both judicial and academic. Thus in *Oliver v Perrin*⁷ a case on all fours with *Dillon's case*³ which came before the Court of Appeal in Ontario but where all the judges in fact agreed that the claim failed in any case on the merits, Laidlaw JA plainly thought that *Dillon's case*³ was wrongly decided; and in *Re Williams Estate*⁸ Egbert J said by way of dictum that it was 'a somewhat surprising decision'. Again it was criticised by D M Gordon QC in the Canadian Bar Review⁹ and by the editor of Theobald on Wills¹⁰. On the other hand it may well be that

3 [1941] 2 All ER 284, [1941] AC 294

4 (1920) 20 NSWLR 278

5 [1933] VLR 283

6 (1934) 29 Tas LR 149

7 (1946) 2 DLR 461

8 (1951) 4 WWR (NS) 114

9 In two articles entitled 'The conflict between limitations on testamentary power by statute and contract': (1941) 19 Can BR 603; (1942) 20 Can BR 72

10 (1963) 12 Edn, pp 97, 98

a it has been on occasion accepted without argument as correct and that orders have been made in reliance on it (cf *Re Brown*¹¹).

In these circumstances their Lordships have considered anxiously whether or not they ought to decline to follow it. The conclusion which they have reached is that they should decline to follow it. It seems most unlikely that those who framed the New Zealand and New South Wales statutes—or for the matter of that the English Inheritance (Family Provision) Act 1938—had the problem posed by contracts to leave legacies or to dispose of property by will in mind. The question whether contracts made by a testator not with a view to excluding the jurisdiction of the court under the Act but in the normal course of arranging his affairs in his lifetime should be liable to be wholly or partially set aside by the court under legislation of this character is a question of social policy on which different people may reasonably take different views. In this connection it is not without interest to observe that, by the Law Reform (Testamentary Promises) Acts 1944 and 1949, the New Zealand legislature has itself enacted provisions designed to protect persons who have rendered services to testators in reliance on promises on their part which have not been honoured to leave them benefits by will. If and so far as it is thought desirable that the courts of any country should have power to interfere with testamentary dispositions made in pursuance of bona fide contracts to make them, it is, their Lordships think, better that such a power should be given by legislation deliberately framed with that end in view rather than by the placing of a construction on legislation couched in the form of that under consideration in this case which results in such astonishing anomalies as flow from the decision in *Dillon's case*¹². Their Lordships will therefore humbly advise Her Majesty that the appeal be allowed.

e If the judge had realised that he had no power to throw any part of the provision to be made for the daughters on the property devised to the appellant he might perhaps have made smaller provision for them. Their Lordships will therefore advise that the case be remitted to the court below for it to decide what additional provision should be made for the three daughters out of the estate of the testator on the footing that the testator had disposed of his property by will in such a manner that they were left without adequate provision for their maintenance, but that the court had no power to throw any part of any provision to be made for them on the property devised to the appellant.

f The costs of the appellant of her appeal to the Board taxed as between party and party will be paid out of the residuary estate.

g **LORD SIMON OF GLAISDALE.** I regret that I differ from the majority of their Lordships on the central issue of this appeal; in my judgment *Dillon's case*¹² was correctly decided. Moreover, I do not think that a contract between the testator and the appellant was ever established by her. But if this latter were my only matter of disagreement I should not have ventured to express my dissent from the majority of their Lordships, since the issue is, in all its circumstances, peculiar to the instant appeal. But the issue on *Dillon's case*¹² is of profound social importance and of potentially widespread repercussion. The New South Wales Testator's Family Maintenance and Guardianship of Infants Act 1916-1954, in its vindication of rights and duties of maintenance within the family, is concerned with a fundamental institution of society and with basic human rights; the statute has its counterpart in other jurisdictions; and the decision in *Dillon's case*¹² has stood for 30 years. So far as I am aware, there has only been one legislative modification of its effect, and that largely endorses it: the New Zealand Law Reform Act 1944, s 3, (now the Law Reform (Testamentary Promises) Act 1949) although providing that where a claimant proves an express or implied promise to reward him for services or work by making some testamentary provision for him the claim is to be enforceable against the estate of the

11 (1955) 105 LJ 169

12 [1941] 2 All ER 284, [1941] AC 294

deceased to the extent to which the deceased has failed to make that testamentary provision, goes on to stipulate that, if no amount is specified or if the promise (as in *Dillon's case*¹³ and in the instant appeal) relates to real property or to personal property other than money, the court may order payment to the claimant of such amount as is reasonable having regard, inter alia, to the nature and amounts of the claims of other persons against the estate, whether as creditors, beneficiaries, wife, husband, children, next-of-kin, or otherwise—which would seem to contemplate the statutory claims of family dependants competing with contractual claims, the competition to be resolved so as best to do justice to all concerned, exactly as envisaged by the Board in *Dillon's case*¹³. In view of the foregoing matters, I have felt bound to overcome my diffidence in expressing dissent.

The effect of overruling *Dillon's case*¹³ is that the New South Wales statute is so construed as to countenance the following situation: a widower is left with two infant children; he proposes marriage to another woman, promising to bequeath her the whole of his estate if she will accept him; she does accept him on these terms; he dies shortly afterwards; the court is powerless to order any provision out of his estate for his infant children. The legislatures of the various jurisdictions concerned may wish to consider this situation.

The alleged contract

The contract was alleged by the appellant to have been constituted by a written offer made to her by the testator on 28th June 1966 through his having asked her to read aloud the draft codicil sent to him by his solicitor, such offer allegedly having been accepted by performance on her part. But the codicil is not framed as a contractual offer; and I cannot see that it can become one through a purposing testator of failing eyesight asking his housekeeper, the purposed beneficiary, to read it to him. It is not alleged that the contract was constituted otherwise—for example, that the testator promised not to revoke the executed codicil in consideration of the appellant working for him without wages during joint lives, which is the (different) sort of contract the subsequent conversation about wages might have implied, if it were capable of being evidence of any contractual relationship at all. The codicil made no reference to the forgoing of wages. I can see the holding out of an inducement by the testator, but no contractual offer by him. I can see conduct by the appellant consistent with the expectation of a testamentary reward, but nothing which is only reasonably explicable on the basis that she was accepting by conduct a contractual offer. I cannot believe that if the appellant had left the service of the testator before his death—say, to remarry—she would have been adjudged to have been guilty of breach of contract.

The sort of testamentary provision with which the instant appeal is concerned is far from uncommon; and there must have been many cases in which the draft or the executed provision has been brought to the notice of the purposed beneficiary. But I know of only one case where it has been suggested that the testator (or purposing testator) was thereby contractually bound to carry out the testamentary disposition in question or that the proposed beneficiary became thereby a creditor of the estate. That one case, *Maddison v Alderson*¹⁴, has striking similarities to the instant one, although the evidence there in support of a contract was stronger and a jury had found a contract established; yet the House of Lords unanimously held the evidence to be insufficient to support the jury's findings. The appellant in that case was induced to serve the testator as his housekeeper without wages for many years by his oral promises to make a will leaving her a life estate in his farm; he did in fact sign a will with such a provision, which he read over to her, asking her 'whether she was satisfied'; but it was not duly attested. The Earl of Selborne LC discerned¹⁵—

¹³ [1941] 2 All ER 284, [1941] AC 294

¹⁵ (1883) LR 8 App Cas at 472

¹⁴ (1883) LR 8 App Cas 467

- a* 'conduct on the part of the appellant (affecting her arrangements in life and pecuniary interests) induced by promises of her master to leave her a life estate in the Moulton Manor Farm by will, rather than one of definite contract, for mutual considerations, made between herself and him at any particular time.'

Lord O'Hagan, in addition to concurring with the reasoning of the Earl of Selborne LC, said¹⁶:

- b* '... there would be no ground for inferring a contract for the conveyance or devise of landed estate to the person rendering the service, however valuable it might have been, and however clear might be the right to remuneration for it in another way, the rendering of it not being necessarily referable to any such contract.'

- c* Lord Blackburn said¹⁷:

'... the evidence is evidence from which a contract would not have been found by a jury, if it had been explained to them that to make a contract there must be a bargain between both parties.'

- d* Lord Fitzgerald said¹⁸:

- e* '... the acts of the [appellant] had no necessary reference to any contract such as is relied on, or indeed to any contract whatever... and would be properly accounted for by some expectation of bounty from her master... There is not to be found in it [the will] any allusion to any agreement or promise or representation, nor is the intended devise for her benefit said to be as a reward for her services... although [the testator] probably made representations to her of the benefits he intended to confer on her if she remained with him during his life, there never was any agreement binding on him to do so.'

All these observations seem to me to be cogently applicable to the instant case; indeed, the first, with its reference to 'promises', is a fortiori.

- f* *Dillon's case*¹⁹

I do not presume to cover ground already traversed by the opinion of the Board in *Dillon's case*¹⁹. What I propose to say is by way of marginal comment.

The 'mischief' of the statute

- g* Men and women necessarily have different functions to perform in the creation of new members of society and in their upbringing to independent membership. A functional division of co-operative labour generally calls for a sharing of the rewards of the labour. The social function carried out by women in the bearing and upbringing of children puts them at an economic disadvantage. Indeed, it is by the woman's assumption of responsibility as childbearer and homekeeper that the man is freed for his assumption of responsibility as breadwinner. In consequence of this division of responsibility the man incurs an obligation to share the loaf with the woman and the woman acquires a right to share in it. Similarly, their children, who did not ask to be brought into the world and whose upbringing is required by society for its continuity, have a right to support until capable of self-support—primarily from their father, since it is he who has been released to be the breadwinner. The family is the social and legal institution within which these various rights and obligations are worked out.

- j* Moreover, the rights and obligations do not necessarily come to an end on the death of the husband and parent. The wife's needs and, generally, her economic impairment subsist. The children continue to need support until themselves ready to

¹⁶ (1883) LR 8 App Cas at 486

¹⁷ (1883) LR 8 App Cas at 487

¹⁸ (1883) LR 8 App Cas at 492, 493

¹⁹ [1941] 2 All ER 284, [1941] AC 294

assume independent membership of their society. On the other hand, the means of the husband and father available for the support of wife and child are not necessarily cut off by his death. He may have been enabled to make an accumulation which is available. a

Most societies enforce by law the husband and parent's duty to provide for dependants not only during joint lives but after death as well. Many adopt a system whereby a portion of a deceased's estate is reserved from his testamentary power and allocated to the support of his dependants. The Scottish system of *jus relictæ* for the widow and legitim for the children, leaving only the 'dead's part' (a third if there are widow and children) subject to testamentary disposition, is an example. 'Whatever may be the nature of the *jus relictæ*, whether a claim for division or a claim for debt', said the Lord Justice-Clerk (Lord Moncrieff), in *Tait's Trustees v Lees*²⁰, 'this at all events is certain that the testator has no right and no power to test upon it'. Such a system obtained in England until the end of the 17th century (and even later by local custom). Then, after an interval of unbridled testamentary licence, English law and its associated systems adopted a discretionary code, first in the New Zealand Family Protection Act 1908 (which fell for construction in *Dillon's case*¹), and then in similar legislation elsewhere, including the New South Wales Family Maintenance and Guardianship of Infants Act 1916-1954, with which (as amended) we are concerned in the instant appeal, and the English Inheritance (Family Provision) Act 1938. b
c
d

The legislative intention cannot therefore be in doubt: it was to prevent family dependants being thrown on the world with inadequate provision, when the person on whom they were dependent died possessed of sufficient estate to provide for or contribute towards their maintenance. This was the 'mischief' for which the statute was providing a remedy; and the courts should endeavour so to construe the statute as to advance the remedy and abate the mischief: *Heydon's Case*². A construction which permits the sort of situation which I gave as an illustration at the beginning of this opinion obviously fails to fulfil this requirement. e

The competing claims on the estate

We are concerned here with three different sorts of social obligation to which legal effect has been given. The first arises because a system of *quid pro quo* is fundamental to ordered human society. Legal regimes therefore enforce contractual obligations if the promisor himself makes default; and, if the promisor dies in default, will generally make his personal representative do what the deceased should himself have done. The second type of obligation arises where property gets into a person's hands which is not meant for his own benefit and in such circumstances that justice demands that he should use it for the purpose for which it was in fact intended. Obvious examples are the situations of a trustee or of the personal representative of a deceased's estate. I accept that where A covenants to bequeath property to B, A's personal representative will generally be constructive trustee of the property for B, and that the law (as developed in courts of equity) will generally compel the personal representative to do what the deceased should himself have done. The third type of obligation—that of a deceased to provide for his dependants—arises juristically from the statute, which (like that rule of equity) empowers the court to order the personal representative to do what the deceased should himself have done. f
g
h

But I cannot see any reason, social or juridical, which makes the first two types of obligation in any way more potent or overriding than the third. On the contrary, a statutory provision generally prevails over a rule of judge-made law where there is any conflict. But in the instant situation, in my view, none of the three types of obligation overrides any other; they are concurrent. The promisee's contractual or equitable rights fall to be considered along with the dependant's statutory rights. i

20 1886 13 R 1104 at 1110

2 (1584) 3 Co Rep 7a

1 [1941] 2 All ER 284, [1941] AC 294

- a In my judgment the headnote in *Dillon's case*³ correctly summarises the opinion of the Board:

'The court, in considering how its discretion should be exercised and how far it is just and necessary to modify the provisions of a will, will pay regard to the circumstances in which the will is drawn as it is, to the interests of the members of the family, and to all relevant circumstances, among which may be the fact that the testator was under obligation to a third party.'

- b On this approach justice will so far as possible be done to all concerned. Certainly, in the instant case Street J's order seems to me to be an entirely just one.

- c Even on a narrowly technical approach, the property which was the subject-matter of the alleged covenant passed into the hands of the executor. As Lord Parker of Waddington said in *Central Trust & Safe Deposit Co v Snider*⁴:

'... the testator's promise to devise a moiety of the property in her favour is inconsistent with her being intended to remain in equity the owner of such moiety, whether the testator did or did not make such a devise. A contract to devise a beneficial interest assumes an estate in the person who contracts sufficient to enable the contract to be performed, and it would be contrary to ordinary equitable principles to construe a promise to settle as a present declaration of trust.'

- d To apply these words to the instant case, the property allegedly promised to the appellant remained the testator's up to the moment of his death; the property was part of the estate of the testator; as such it passed on death to his executor; then, for the first time, the appellant acquired an interest in it; but then, simultaneously, her interest had to compete with that of the testator's dependants under the statute. (Insofar as *Synge v Synge*⁵ appears to decide that a promisee has any interest before the death of the promisor, it not only seems to depend on *Hochster v De La Tour*⁶ being good law, but also to be inconsistent with the line of authorities which establishes that the promisee must survive the promisor in order to have any remedy: *Jones v How*⁷;
- f *Re Brookman's Trust*⁸.)

The authorities

- I do not find it necessary to discuss all the many authorities which were cited to us. How difficult of reconciliation is the totality of the case law is to be seen from the article by W A Lee, 'Contracts to make Wills'⁹; and insofar as principles of distinction can be discerned it is often difficult to grasp either their logic or their justice. Of the cases cited to us, apart from *Dillon's case*¹⁰, only *Re Richardson's Estate*¹¹ had the instant situation in judicial contemplation—namely, a contractual or equitable claim competing with one under the statute. In *Richardson's case*¹¹, Nicholls CJ held that the promisee's equitable rights prevailed over the dependants' statutory rights (in effect, accepting the argument advanced by the instant appellant). Clark J, dissenting, held that the testator had fulfilled his obligation by making a will in implementation of his covenant; and that the court was not precluded from making family provision out of the estate (in effect, accepting the argument advanced by the instant respondent). Crisp J concurred in the result with Nicholls CJ, but on the ground

- 3 [1941] AC 294. Italics added, and see especially [1941] AC at 301, [1941] 2 All ER at 287
- 4 [1916] 1 AC 266 at 270, 271
- j 5 [1894] 1 QB 466, [1891-94] All ER Rep 1164
- 6 (1853) 2 E & B 678, [1843-60] All ER Rep 12
- 7 (1850) 9 CB 1
- 8 (1869) 5 Ch App 182
- 9 See (1971) 87 LQR 358
- 10 [1941] 2 All ER 284, [1941] AC 294
- 11 (1934) 29 Tas LR 149

that 'in all the circumstances, . . . the Chief Justice's discretion here was well exercised', i.e. treating the case as if Nicholls CJ had *not* held that the statute could not operate at all on the subject-matter of the promise, but as if it could, and Nicholls CJ in his discretion had preferred the claim of the promisee to that of the dependants. This is hardly a satisfactory authority; but if anything it is in favour of the instant respondent, only the appellate judgment of Nicholls CJ being inconsistent with *Dillon's case*¹².

As for the other cases relied on by the appellant, it may be that if facts similar thereto arose in a situation where a promisee's contractual or equitable claim has to compete with one of a dependant under the statute, the conclusions in those cases might require modification rather on the lines that the Board in *Dillon's case*¹³ suggested that damages for breach of contract might have to be modified by the impact of the statute.

Another way of reconciling *Dillon's case*¹² with the authorities relied on by the appellant would be to imply in every covenant to leave property by will a proviso 'so far as the law allows'. This would seem to be necessary in those systems which limit a testator's power of disposition to part only of his estate (cf the passage cited from *Tait's Trustees v Lees*¹⁴). In the context of the discretionary code with which we are concerned in the instant appeal, the implied proviso would be spelt out as 'subject to the statutory discretion vested in the court to order family provision'. Such an implied proviso would be closely analogous to the refusal of the law to allow any contractual derogation from its discretionary power to order maintenance for an ex-wife (see *Hyman v Hyman*¹⁵), or (to look a little wider) the refusal of those systems which have adopted a regime of rent restriction or security of tenure to allow the powers of the courts to be pre-empted by covenant.

There is an alternative way of approaching the concept advanced in the previous paragraph. Some of the conflict of authorities before *Dillon's case*¹² can be resolved by drawing a distinction (however unjustly it works out in particular instances) between a promise to leave by will a specific sum or asset, e.g. *Graham v Wickham*¹⁶, *Synge v Synge*¹⁷ on the one hand, and a share of the residue, e.g. *Jervis v Wolferstan*¹⁸ on the other. But even where a share of the residue is promised, the testator will not be permitted fraudulently (in the sense used in equity) to render his promise nugatory by making substantial gifts inter vivos or by way of specific legacy (*Gregor v Kemp*¹⁹). In principle, similarly a testator should not be permitted to render his dependants' statutory rights nugatory by covenants to make bequests by will.

In any event, whatever difficulty the cited cases might raise if the Act limited the powers of the court to the 'net estate' of the deceased, statutorily defined, as does the English Inheritance (Family Provision) Act 1938 (on which, however, I must not be taken as expressing a view), only *Coffill v Comr of Stamp Duties*²⁰ and *Re Syme*¹ need cause any embarrassment in construing the New South Wales Act, which refers merely to the 'estate' of the deceased. For all the appellant's contention, it seems to me unarguable that the subject-matter of her bequest did not form part of the testator's 'estate'. If it did not form part of his estate, it could not pass to the appellant under his will, as she claims it did. Moreover, the passage cited from *Central Trust & Safe Deposit Co v Snider*² is clear authority that it did form part of his estate.

As for *Re Syme*¹, Lowe J regarded the claim which competed with the promisee's as that of a 'mere volunteer'; and his judgment turned on the contrast, juristically well established, between a promisee's equitable interest and the interest of a 'mere volunteer'. But that case was in no way concerned with family provision; and

12 [1941] 2 All ER 284, [1941] AC 294

13 [1941] 2 All ER at 289, [1941] AC at 304, 305

14 1886 13 R at 1110

15 [1929] AC 601, [1929] All ER Rep 245

16 (1863) 1 De GJ & Sm 474

17 (1894) 1 QB 466, [1891-94] All ER Rep 1164

18 (1874) 18 LR Eq 18

19 (1722) 3 Swan 404

20 (1920) 20 NSWLR 278

1 [1933] VLR 283

2 [1916] 1 AC 266 at 270, 271

- a 'mere volunteer' is to my mind quite inapt to describe the status of a family dependant under the statute. I cannot therefore regard the decision in *Re Syme*³ as providing any cause for impugning the validity of the subsequent decision in *Dillon's case*⁴. As for *Coffill's case*⁵, I do not find it necessary to hold that it must inevitably be considered to be overruled if *Dillon's case*⁴ stands. The covenant in *Coffill's case*⁵ was peculiar, and there was no question of any competing statutory provision for dependants. A contract to leave property by will is a most unusual one, in that it can only
- b be performed at the moment of death. It may be that different considerations apply, on the one hand, to a revenue case pure and simple and, on the other, to one where the promisee's claim competes with a claim under the Testator's Family Maintenance and Guardianship of Infants Act 1916-1954. It may be significant that there has been no attempt in the supervening 30 years to argue that *Coffill's case*⁵ has been, in effect, overruled by *Dillon's case*⁴. If I had to choose between *Coffill's case*⁵ and *Dillon's case*⁴, I should unhesitatingly prefer the latter.
- c

The alleged 'anomalies'

- I have tried to indicate how the alleged anomalies largely disappear if ancient authorities decided in a different social context are not carried forward hypnotically to what may seem their logical conclusions regardless of the impact of a modern
- d statute of clearly ascertainable social purpose, or if there is read into every contract to leave property by will the proviso 'so far as the law allows' or 'subject to the statutory discretion of the court to order family provision'. But even were anomalies to remain, desirable as it is to adopt a construction which does not produce anomalous results, it is still more desirable in my view to adopt a construction which accords
- e with the ascertainable intention of the legislature and which promotes justice between conflicting interests. This, I believe, would be done by following *Dillon's case*⁴.

*The juridical setting of Dillon's case*⁴

I respectfully agree with Street J's statement in his judgment in the instant case:

- f 'The effect of the decision of the Privy Council [in *Dillon's case*⁴] is but an instance of the general proposition enunciated by Giffard LJ in *Re Brookman's Trust*⁶: "If a testator is bound to make a will in a certain form, the law says there is no breach provided he makes a will in due form, and it is not owing to any act of his that the child does not take." . . . [The promisee's] rights to the property are to be drawn through the will and hence are subject to certain laws
- g affecting testamentary succession. A promisee's rights under a contract to leave property by will may, without any breach on the part of the testator, be subject to an inroad upon the property being made without thereby giving any consequential right, either to damages or otherwise, to the promisee under that contract. An order under the Testator's Family Maintenance Act is an instance of such an inroad.'

- h *Appeal allowed. Case remitted for the court to decide what additional provision should be made for the respondents.*

Solicitors: *Barfield & Hubbard* (for the appellant); *Church, Adams, Tatham & Co* (for the respondents).

S A Hatteea Esq Barrister.

j

3 [1933] VLR 283

4 [1941] 2 All ER 284, [1941] AC 294

5 (1920) 20 NSWSR 278

6 (1869) LR 5 Ch App at 192

Practice Direction

FAMILY DIVISION

Family Division – Procedure – Blood tests – Tests to determine paternity – Direction for use of blood tests – Arrangements for taking and testing of samples.

When a direction is given pursuant to Part III of the Family Law Reform Act 1969 for the use of blood tests in proceedings in the Family Division and divorce county courts the arrangements for the taking and testing of blood samples will be made by the solicitor for the party on whose application the direction was given.

Where the application is proceeding at the Divorce Registry, on receipt of a copy of the court's direction the solicitor should apply to the Registry for the necessary number of copies of the direction form prescribed by the Blood Tests (Evidence of Paternity) Regulations 1971¹; a form is required in respect of each person to be tested. He should, in consultation with the solicitors for the other parties, get in touch with a tester (a list of the authorised testers is available) and a sampler and make arrangements for the taking and testing of the samples. The solicitor should then complete Parts I and II of a direction form in respect of each person to be tested and attend with the forms before the registrar by whom the direction was given, or if it was not given by a registrar before the registrar for the day. If the registrar is satisfied with the arrangements he will sign the forms and return them to the solicitor with a copy of the Notes for the Guidance of Samplers.

The subsequent procedure is set out in the regulations and in RSC Ord 112 in the case of High Court proceedings, and CCR Ord 46, r 23, in the case of proceedings in the county courts.

Issued with the concurrence of the Lord Chancellor.

17th February 1972

COMPTON MILLER
Senior Registrar

¹ SI 1971 No 1861

a

National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd

HOUSE OF LORDS

VISCOUNT DILHORNE, LORD SIMON OF GLAISDALE, LORD CROSS OF CHELSEA AND LORD KILBRANDON

b 8th, 9th, 11th, 12th, 15th NOVEMBER 1971, 26th JANUARY 1972

Bank – Account – Separate accounts – Right to combine or set-off – Company – Winding-up – Agreement between bank and company to keep separate frozen and active accounts – Existing current account of company substantially in debit – Agreement to freeze account at existing figure and to open new account to be maintained on a credit basis – Purpose of agreement to keep company on its feet as a going concern – Agreement to remain in operation for four months – Resolution for voluntary winding-up after two months – Credit account substantially in credit at date of winding-up – Whether agreement precluding bank from setting-off balance on credit account against debit on frozen account – Whether ‘mutual credits’ and ‘mutual dealings’ – Companies Act 1948, s 317 – Bankruptcy Act 1914, s 31.

d In February 1968 the account of the respondent company (‘the company’) with the appellant bank (‘the bank’) was overdrawn to the extent of £11,339. On 23rd February the bank informed L, a director of the company, that the account was ‘unacceptable’ to the bank. At a meeting between the bank and L on 4th April it was agreed that in order to maintain the company’s business so that it could be disposed of as a going concern the company’s account (the ‘no 1 account’) would be frozen at its then present figure and ‘no further transactions save for permanent reduction are to take place thereon’. In addition the company was to open a new account with the bank (the ‘no 2 account’) ‘to be maintained strictly on a credit basis’. Furthermore L undertook to come to a decision regarding the sale of the company ‘within the next four months’. For its part the bank agreed to adhere to the proposed scheme of arrangement for the period of time ‘in the absence of materially changed circumstances’. On 24th May the company gave notice of a meeting of creditors to be held on 12th June to consider a resolution to wind up the company. Although this constituted a material change of circumstances the bank indicated that it was prepared to continue to operate the no 2 account provided that it was kept in credit. On 12th June a cheque drawn by G Ltd in favour of the company for £8,611 5s 10d was paid into the no 2 account before the creditors’ meeting was held that afternoon.

g At that meeting a resolution was passed for the voluntary winding-up of the company. On 13th June the amount of £8,611 5s 10d was credited to the no 2 account and the cheque was cleared on 14th June. On 19th June the bank told the liquidator that they considered that their claim in the liquidation would be ‘for the net balance between all accounts, plus outstanding interest and commission’. The figure of £8,611 5s 10d represented virtually the whole of the credit balance on the no 2 account

h which the bank thus claimed to be entitled to set off against the company’s indebtedness to the bank on the no 1 account. The liquidator however maintained that the bank were in no better position than any other creditor and that he was entitled to the £8,611 5s 10d. Subsequently the company brought an action claiming that the bank had wrongfully and in breach of the agreement of 4th April refused to pay over the £8,611 5s 10d.

j **Held** – The bank were entitled to set-off the balance on the no 2 account, including the sum of £8,611 5s 10d, against the debt on the no 1 account and to claim in the liquidation for the net balance for the following reasons—

(i) the substratum of the agreement of 4th April 1968 was that the company was to be kept on its feet as a going concern or for the profitable disposal of its assets; it could not have been in the contemplation of the parties that the agreement should

continue in force after liquidation, which event would make either of its objectives unattainable; accordingly, once the resolution for winding-up the company had been passed the agreement was at an end; thereupon the bank was entitled to consolidate the two accounts and to exercise the right which, in the absence of agreement, existed on a winding-up to set off the balance on the no 2 account against the company's debt on the frozen no 1 account (see p 651 b and d, p 654 b and c, p 655 f and p 662 c and f, post); dictum of Lord Macnaghten in *British Guiana Bank v Official Receiver* (1911) 104 LT at 755 applied;

(ii) even if the bank was not otherwise entitled to combine the two accounts it could do so by virtue of s 31^a of the Bankruptcy Act 1914 as applied by s 317^b of the Companies Act 1948 because—

(a) notwithstanding the fact that the agreement had the temporary effect of precluding the bank from appropriating any credit on the no 2 account towards the debt on the no 1 account, the dealings giving rise to the obligations were 'mutual dealings' within the meaning of s 31 and the credits were 'mutual credits'; it was impossible to regard the opening of the no 2 account and the payment into it by the company from time to time of their customers' cheques against which they drew cheques for their trading expenses as being in any way analogous to the deposit by a debtor with his creditor of money to be applied by the creditor for a special purpose (see p 650 b d e g and h, p 651 g and j to p 652 a, p 654 j to p 655 a and c, p 662 h and p 663 e, post);

(b) by their agreement of 4th April 1968 the parties had not contracted out of the provisions of s 31 since the agreement only remained operative so long as the company was a going concern (see p 649 d e and h, p 651 d, p 655 f and p 662 e and f, post);

(c) (Lord Cross of Chelsea dissenting) it was not in any event possible for the parties to contract out of s 31 since the provisions of that section were mandatory, prescribing the course to be followed in the administration of the bankrupt's property (see p 649 c, p 652 b and e, p 663 j and p 665 e, post); dicta of Lord Selborne LC in *Re Devezé, ex parte Barnett* (1874) 9 Ch App at 295 and in *Mersey Steel & Iron Co Ltd v Naylor, Benzon & Co* [1881-85] All ER Rep at 367, of Lord Hanworth MR in *Re City Life Assurance Co Ltd* [1925] All ER Rep at 457, in *Re Fenton (No 1)* [1930] All ER Rep at 18 and in *Re City Equitable Fire Insurance Co Ltd (No 2)* [1930] All ER Rep at 318, 319, of Hallett J in *Victoria Products Ltd v Tosh & Co Ltd* (1941) 165 LT at 80, and *Rolls Razor Ltd v Cox* [1967] 1 All ER 397 applied; dicta of James and Baggallay LJ in *Re Vaughan, ex parte Fletcher* (1877) 6 Ch D at 357, *Deering v Hyndman* (1886) 18 LR (Ir) QB 467 and dictum of Wright J in *Watkins v Lindsay & Co* (1898) 5 Mans at 29 disapproved.

Decision of the Court of Appeal sub nom *Halesowen Presswork & Assemblies Ltd v Westminster Bank Ltd* [1970] 3 All ER 473 reversed.

Notes

For the statutory right of set-off in cases of insolvency, see 2 Halsbury's Laws (3rd Edn) 480, 481, para 952, and for cases on the subject, see 4 Digest (Repl) 436-444, 3859-3913.

For combination of different accounts, see 2 Halsbury's Laws (3rd Edn) 172, 173, para 322, for a banker's set-off on combining accounts, see *ibid* 213, para 395, and for cases on the subject, see 3 Digest (Repl) 328, 1027-1029.

For the Bankruptcy Act 1914, s 31, see 3 Halsbury's Statutes (3rd Edn) 80, and for the Companies Act 1948, s 317, see 5 *ibid* 344.

Cases referred to in opinions

Ashby v White (1703) 1 Bro Parl Cas 62, Holt KB 524, 2 Ld Raym 938, 6 Mod Rep 45, 1 Salk 19, 3 Salk 17, 1 Digest (Repl) 26, 197.

Asphaltic Wood Pavement Co, Re, Lee & Chapman's Case (1885) 30 Ch D 216, 54 LJCh 460, 153 LT 65, 10 Digest (Repl) 990, 6814.

Ayr Harbour Trustees v Oswald (1883) 8 App Cas 623, 11 Digest (Repl) 103, 5.

^a Section 31, so far as material, is set out at p 646 g, post

^b Section 317, so far as material, is set out at p 646 j, post

- a* *Bank of Australasia v Palmer* [1897] AC 540, 66 LJPC 105, 3 Digest (Repl) 239, 626.
Bradford Old Bank Ltd v Sutcliffe [1918] 2 KB 833, 88 LJKB 85, 119 LT 727, 3 Digest (Repl) 296, 914.
British Guiana Bank v Official Receiver (1911) 104 LT 754, 3 Digest (Repl) 332, *947.
City Equitable Fire Insurance Co Ltd (No 2), Re [1930] 2 Ch 293, [1930] All ER Rep 315, 99 LJCh 536, 143 LT 444, 4 Digest (Repl) 423, 3750.
- b* *City Life Assurance Co Ltd, Re* [1926] Ch 191, [1925] All ER Rep 453, 95 LJCh 65, 134 LT 207, 10 Digest (Repl) 1173, 8160.
Deering v Hyndman (1886) 18 LR (Ir) 323, 467, 4 Digest (Repl) 450, *1753.
Deveze, Re, ex parte Barnett (1874) 9 Ch App 293, 43 LJBCy 87, 29 LT 858, 4 Digest (Repl) 433, 3844.
- c* *Fenton (No 1), Re, ex parte Fenton Textile Association Ltd* [1931] 1 Ch 85, [1930] All ER Rep 15, 99 LJCh 358, 143 LT 273, 4 Digest (Repl) 434, 3849.
Greenhalgh (W P) & Sons v Union Bank of Manchester Ltd [1924] 2 KB 153, [1924] All ER Rep 338, 93 LJKB 844, 131 LT 637, 3 Digest (Repl) 180, 313.
Keever (a bankrupt), Re, ex parte The Trustee of the Property of the Bankrupt v Midland Bank Ltd [1966] 3 All ER 631, [1967] Ch 182, [1966] 3 WLR 779, Digest (Cont Vol B) 59, 7903a.
- d* *Mersey Steel & Iron Co Ltd v Naylor, Benzon & Co* (1884) 9 App Cas 434, [1881-85] All ER Rep 365, 53 LJQB 497, 51 LT 637, 10 Digest (Repl) 990, 6813.
Mid-Kent Fruit Factory, Re [1896] 1 Ch 567, 65 LJCh 250, 74 LT 22, 4 Digest (Repl) 427, 3788.
Morel (E J) (1934) Ltd, Re [1961] 1 All ER 796, [1962] Ch 27, [1961] 3 WLR 57, Digest (Cont Vol A) 50, 915a.
- e* *Pollitt, Re, ex parte Minor* [1893] 1 QB 455, 62 LJQB 236, 68 LT 366, 4 Digest (Repl) 428, 3802.
Rolls Razor Ltd v Cox [1967] 1 All ER 397, [1967] 1 QB 552, [1967] 2 WLR 241, Digest (Cont Vol C) 120, 7349b.
Spurling v Bantoft [1891] 2 QB 384, 60 LJQB 745, 65 LT 584, 56 JP 132, 33 Digest (Repl) 452, 38.
- f* *Vaughan, Re, ex parte Fletcher* (1877) 6 Ch D 350, 37 LT 282, 4 Digest (Repl) 449, 3942.
Victoria Products Ltd v Tosh & Co Ltd (1941) 165 LT 78, 4 Digest (Repl) 423, 3751.
Watkins v Lindsay & Co (1898) 5 Mans 25, 67 LJQB 362, 4 Digest (Repl) 547, 4783.

Appeal

g National Westminster Bank Ltd ('the bank') appealed against an order of the Court of Appeal (Lord Denning MR and Winn LJ, Buckley LJ dissenting) dated 29th July 1970 and reported [1970] 3 All ER 473 reversing the judgment of Roskill J dated 5th November 1969 and reported [1970] 1 All ER 33 whereby the action by Halesowen Presswork and Assemblies Ltd ('the company') against the bank was dismissed. The facts are set out in the opinion of Viscount Dilhorne.

R A MacCrindle QC and R M Yorke QC for the bank.
h *Allan Heyman QC and M K I Kennedy* for the company.

Their Lordships took time for consideration.

26th January. The following opinions were delivered.

j **VISCOUNT DILHORNE.** My Lords, the respondent company's account with the Halesowen branch of the appellant bank was in February 1968 overdrawn to the extent of £11,339. Mr F I Lewis was at all material times a director of the company. He was also interested in two other associated companies, Lewis Distributors Ltd and Jack Lewis Properties (Halesowen) Ltd, both of which had accounts with the bank which were in debit in February 1968, the bank being owed £143,289 by Lewis Distributors Ltd and £8,943 by Jack Lewis Properties (Halesowen) Ltd.

The bank being concerned about the position, their assistant manager in Birmingham saw Mr Lewis on 23rd February and, after their meeting, wrote him a letter dated 23rd February. In the letter he recorded that he had stated at the meeting that the accounts of the company and Lewis Distributors Ltd were 'unacceptable to the Bank, which itself needs to reserve all its rights of action'. The assistant manager said that additional security was required in the absence of cash as an initial measure and enclosed debentures and guarantees to be issued and given by Lewis Distributors Ltd and the company which, he said, had been prepared 'in accordance with what you agreed'.

Mr Lewis then consulted a Mr Bernard Phillips, an accountant and member of the firm of Bernard Phillips & Co, who wrote to the assistant manager on Mr Lewis's behalf in reply to the letter of 23rd February. In his letter Mr Phillips said that from a draft statement of affairs which had been prepared, it was 'clear that a proper realisation of the company's assets would enable the company to discharge all its debts and obligations in full' but that 'a forced realisation . . . would show a position of insolvency'. Consequently, he said, if the directors were to comply with the bank's request, they might be accused of attempting a fraudulent preference, or if the company were to be wound up within 12 months, the debenture would prove invalid. He went on to say that active steps had been taken to dispose of the business as a going concern and that the figures involved in such a transaction would 'certainly' enable all the creditors of the company to be paid in full and he asked that a reasonable opportunity should be given to the directors 'to effect a transaction which will enable all the company's liabilities to be dealt with equally'.

On 15th March 1968 Mr Phillips wrote to the bank saying that no one had shown any interest in making an offer for the company's factory and that the bank were right in assuming that the company's banking business was being passed through the company's account at Lloyds Bank, Halesowen. The account at Lloyds had been opened, as Mr Lewis admitted at a meeting on 4th April, as he was afraid to pay in receipts to the bank's branch at Halesowen lest the bank should freeze on to them. The account at Lloyds was conducted on a credit basis. A memorandum of that meeting on 4th April, prepared by a district manager of the bank, records that Mr Lewis—

'mindful in particular of the incidence of interest on the large debts, said that in no circumstances would he persist in his endeavour to sell [the company] as a going concern for more than six months. In fact, he might in four months' time come to this decision so as to sell on a break-up basis in the two month remaining period.'

Later the memorandum stated:

' . . . if we [the bank] are able to arrange for Mr. Lewis to have the time which he seeks it was agreed that an active credit account would be reopened at Birmingham Branch with the existing indebtedness there . . . entirely frozen.'

On 17th April 1968 the assistant general manager of the bank wrote to Mr Lewis, saying *inter alia*:

'In an endeavour to resolve the present somewhat disastrous situation of your two Companies we have now obtained approval to proceed on the lines we discussed with you on the 4th April . . . So far as the existing account at our Birmingham Branch of [the company] is concerned, this is to be frozen at its present figure and no further transactions save for permanent reduction are to take place thereon . . . As part of the arrangements it was agreed that all of the Company's current business should be passed through [the bank], and I look to you, therefore, to arrange for the account with Lloyds Bank to be closed

- a** so that all transactions henceforward may be passed through a new account to be opened at Birmingham Branch. This new account is, of course, to be maintained strictly on a credit basis and you should bear in mind that the bank charges, including interest on the indebtedness at Birmingham, will, in the usual way, be debited to this new account . . . There is, I feel, no need for me to underline the Bank's concern regarding the overall indebtedness, and in acknowledgment of this you undertook to come to a decision regarding a sale of [the company], or failing this the disposal of its assets, within the next four months, and in the absence of materially changed circumstances in the meantime we for our part will adhere to the present scheme of arrangements for this period of time.'
- b**

Mr Lewis replied to this letter on 22nd April saying that he accepted the conditions and arrangements that had been laid out.

- c** A new account, called the no 2 account, in the name of the company was opened at the Halesowen branch of the bank. Then, on 20th May 1968, just a month later, the company gave notice (received by the bank on 24th May) that on 12th June a meeting of creditors would be held for the purposes mentioned in ss 294 and 295 of the Companies Act 1948. This notice was acknowledged by the bank by letter dated 28th May 1968, in which they said:
- d**

'Needless to say, in the light of these events the Bank wishes the Company's No. 2 Account to be maintained to credit at all times and I am sure that we can rely on your co-operation to provide cleared funds in the Account to meet cheques which may be presented.'

- e** It was common ground that the giving of the notice of the meeting of creditors was a material change of circumstance which would have entitled the bank to treat the arrangement made in the letters of 17th and 22nd April as at an end. The letter of 28th May shows that they did not do so. They were, despite that material change of circumstance, prepared to allow the company to continue to operate the no 2 account provided that it was kept in credit.

- f** On 12th June a cheque drawn by Girlings Ltd in favour of the company for £8,611 5s 10d was paid into the no 2 account at the bank's Halesowen branch before the creditors' meeting was held that afternoon. At that meeting a resolution was passed for the voluntary winding-up of the company and Mr Bernard Phillips was appointed liquidator. The amount of £8,611 5s 10d was credited to the no 2 account on 13th June and the cheque was cleared on 14th June.

- g** By letter dated 19th June the bank told the liquidator that they considered their claim in the liquidation would be 'for the net balance between all accounts, plus outstanding interest and commission'. On this basis they said that the net amount due to the bank was £3,219 17s 10d. Mr Phillips did not agree. He maintained that the bank were in no better position than any other creditor and claimed to be entitled to the £8,611 5s 10d and asserted that that could not be set off against the company's indebtedness to the bank.
- h**

- On 7th January 1969 a writ was issued by the company against the bank. The company alleged that the bank had wrongfully and in breach of their agreement refused to pay over the £8,611 5s 10d and claimed that as the proceeds of the cheque for that amount were collected after the commencement of the winding-up, the bank were accountable therefor to the liquidator. In the statement of claim it was also alleged that it was agreed at the meeting on 4th April that 'at no time should the . . . Bank have the right to consolidate the two . . . accounts'. The bank strenuously denied ever having agreed to that. The action was tried by Roskill J¹ who accepted the evidence given on behalf of the bank and rejected that given on behalf of the company on this issue. He said that they had failed to satisfy him that any such agreement

had been made. Roskill J's finding on this has not been challenged either in the Court of Appeal² or in this House but the company have throughout contended that the bank were not entitled to consolidate the two accounts. If they are right, then the agreement they alleged would have been superfluous.

If I read his judgment correctly, Roskill J held³ that the banker's right of lien, although abrogated as long as the banker-customer relationship continued between the company and the bank—

'became enforceable as soon as that relationship determined as it did on 12th June by reason of the resolution to wind up. At that moment the Girling cheque had already passed into the possession of the bank and, on the resolution to wind up, the bank's right of lien extended to that cheque and subsequently to its proceeds as well as to the whole balance on the no 2 account.'

The bank did not at the trial seek to rely on s 31 of the Bankruptcy Act 1914, as applied to companies by s 317 of the Companies Act 1948, so the effect of that section was not considered by Roskill J¹ who gave judgment for the bank.

On appeal² his decision was reversed by a majority (Lord Denning MR and Winn LJ; Buckley LJ dissenting). Lord Denning MR⁴ thought that the use of the word 'lien' in this context was misleading and that one should speak simply of a banker's right to combine accounts or a right to 'set-off' one account against the other. Buckley LJ said⁵:

'When that cheque was cleared, as it was on 14th June 1968, it ceased to be a negotiable instrument and also ceased to be in the possession of the bank. Any lien of the bank on the cheque must thereupon have come to an end . . . The money or credit which the bank obtained as a result of clearing the cheque became the property of the bank, not the property of the [company]. No man can have a lien on his own property, and consequently no lien can have arisen affecting that money or that credit.'

I agree with Buckley LJ. It was not contended in this House that the bank were entitled to set off one account against the other in the exercise of any lien and if the bank were entitled to do so, that must depend on other grounds.

In the Court of Appeal² and in this House the bank relied on the provisions of s 31 of the Bankruptcy Act 1914 which so far as material is in the following terms:

'Where there have been mutual credits, mutual debts or other mutual dealings, between a debtor against whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under the receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively . . .'

The Companies Act 1948, s 317, provides:

'In the winding up of an insolvent company . . . the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable . . . as are in force for the time being under the law of bankruptcy in England with respect to the estates of persons adjudged bankrupt . . .'

In the Court of Appeal² and in this House the company contended that s 31 did

² [1970] 3 All ER 473, [1970] 3 WLR 625

³ [1970] 1 All ER at 52, [1970] 2 WLR at 775

⁴ [1970] 3 All ER at 477, [1970] 3 WLR at 634

⁵ [1970] 3 All ER at 487, [1970] 3 WLR at 645

a not apply. They did so on two grounds: first, that the dealings were not mutual; and, secondly, that by the agreement made in April the bank had contracted out of their rights under the section. This second ground involves consideration of two separate questions: (1) could the bank contract out of s 31, and (2) had the bank by entering into the agreement purported to do so?

b There is a conflict of judicial opinion on whether it is possible to contract out of s 31. In *Re Vaughan, ex parte Fletcher*⁶ where the debtors alleged an agreement—

‘by the creditors to keep them upon their legs, if possible; and, in order to enable them to do so, to suspend their rights, and that all goods supplied on either side should be paid for in cash’

c Bacon CJ held⁸ that the agreement could not put an end to the pre-existing rights of creditors if the time came—

‘when those suspended rights must be enforced . . . But the Act of Parliament is plain, and it provides that when a man becomes bankrupt the accounts are to be taken in the manner stated by Lord Selborne in *Ex parte Barnett*, where he says⁹: “When there have been mutual credits, debts, or mutual dealings, and a proof is to be made in bankruptcy, there is to be a rule of set-off, not, as I understand it, at the option of either party, but an absolute statutory rule, ‘the balance of such account, and no more, shall be claimed or paid on either side respectively.’” The law of mutual credit, therefore, is an especial statutory law, and if there were such an agreement as alleged by the debtors, that law put an end to it.’

e In *Mersey Steel & Iron Co Ltd v Naylor, Benzon & Co*¹⁰ Lord Selborne said:

‘Your Lordships observe that it is not that it *may be*—it is not a thing which is optional, but it is a positive, absolute rule for the purpose of proof in bankruptcy, and nothing can be proved according to that rule in such cases except the balance of the account; that only is regarded as the claim which it is competent for the creditor to make when he comes in to prove under the bankruptcy.’

f In both *Re Devezé, ex parte Barnett*¹¹ and in the *Mersey Steel* case¹² the statutory provisions under consideration were similar in all material respects to s 31 of the Bankruptcy Act 1914. In both cases Lord Selborne said there was an absolute statutory rule. By that I understand him to have said that it was a rule the operation of which could not be avoided. In *Re Devezé, ex parte Barnett*¹³ he said that the rule was not ‘at the option of either party’; in the *Mersey Steel* case¹⁴ that it was ‘not a thing which is optional’. He did not seek to distinguish between an option exercised by one party and an agreement between debtor and creditor or an option sought to be exercised consequent on an agreement between the parties. I take him to have meant that the absolute statutory rule could not be waived either at the option of one party or at the option of both.

h *Re Vaughan, ex parte Fletcher* went to the Court of Appeal⁸. The report of the proceedings in that court is very brief. It shows that the point was taken that it was competent to exclude by special agreement the right of set off given by s 39 of the

6 (1877) 6 Ch D 350

7 (1877) 6 Ch D at 355

8 (1877) 6 Ch D at 356

9 *Re Devezé, ex parte Barnett* (1874) 9 Ch App 293 at 295

10 (1884) 9 App Cas 434 at 438, [1881-85] All ER Rep 365 at 367

11 (1874) 9 Ch App 293

12 (1884) 9 App Cas 434, [1881-85] All ER Rep 365

13 (1874) 9 Ch App at 295

14 (1884) 9 App Cas at 438, [1881-85] All ER Rep at 367

Bankruptcy Act 1869, but it does not indicate what arguments were advanced or whether any authorities were cited in support of that proposition. The judgments, if given as reported, were very brief. All three members of the court held that the agreement was not one to exclude the right of set-off but James and Baggallay LJ also indicated that such an agreement, if made, would have been effective. James LJ said¹⁵:

'The Respondents are entitled to the set-off which they claim unless there is some agreement binding at law or in equity which excludes their right.'

Baggallay LJ said¹⁵:

'The right to the set-off is clear unless the Respondents have precluded themselves from enforcing it by some special agreement.'

One cannot reconcile their statements with the observations of Bacon CJ and Lord Selborne. Neither James LJ nor Baggallay LJ are reported as having referred to the observations of Bacon CJ or to those of Lord Selborne which he cited. I think it is very odd that if they intended to disagree with him, they should not have said so and stated their reasons for doing so. The headnote of the report is clearly inaccurate and I think that the accuracy of the reports of the judgments in the Court of Appeal¹⁶ is open to question. In any event, the remarks of James and Baggallay LJ, if correctly reported, were clearly obiter.

In *Deering v Hyndman*¹⁷ May CJ and Johnson J followed the observations of James and Baggallay LJ and held that the statutory right of set-off of mutual debts and credits under s 251 of the Irish Bankrupt and Insolvent Act 1857 was excluded. Their decision was affirmed on appeal. And in *Watkins v Lindsay & Co*¹⁸ Wright J said:

'in order to prevent the set-off (which in bankruptcy is automatic and not dependent on the option of the party) there must be something equivalent to a binding agreement that there shall be no set-off.'

He thus appears to distinguish between the exercise of an option by one party to waive his rights under the section from its exercise pursuant to an agreement. I cannot think that this is a valid distinction. Why should a creditor be unable to waive the right to set-off of his own volition but able to do so if and only if he has made an agreement to do so.

The exclusion of the set-off was sought to be justified in *Deering v Hyndman*¹⁷ by the application of the principle 'quilibet potest renunciare juri pro se introducto' but if this principle is to be applied, it would equally apply in relation to the exercise of an option by a claimant to waive the set-off.

In *Victoria Products Ltd v Tosh & Co Ltd*¹⁹ Hallett J considered the effect of *Re Vaughan, ex parte Fletcher*¹⁶. He expressed the view that it was impossible to find in the judgments of the Court of Appeal in that case 'any really clear indication whether the Lords Justices would or would not have upheld the decision of the Chief Judge in Bankruptcy on the other point' (i.e. whether it is possible to contract out of the right to set-off). He thought that the true view was that expressed by Bacon CJ²⁰ and Lord Selborne¹ and said²:

'The object and effect of sect. 31 is . . . that all the mutual claims of the character there contemplated should be dealt with by the process there laid down in the course of the bankruptcy or the winding-up; and an attempt to leave outside that process some particular item is one which should be regarded as against the policy of the insolvency laws and, therefore, defeated.'

¹⁵ (1877) 6 Ch D at 357

¹⁶ (1877) 6 Ch D 350

¹⁷ (1886) 18 LR (Ir) 323, 467

¹⁸ (1898) 5 Mans 25 at 29

¹⁹ (1941) 165 LT 78 at 80

²⁰ (1877) 6 Ch D at 356

¹ (1874) 9 Ch App at 295

² (1941) 165 LT at 80

a In *Re City Life Assurance Co Ltd*³ Pollock MR⁴ said in relation to s 31 of the Bankruptcy Act 1914:

‘It is not merely permissive, but it is a direct statutory enactment that the balance only is to be claimed in bankruptcy.’

In *Re Fenton (No 1)*, *ex parte Fenton Textile Association Ltd*⁵ he made similar observations.

b In *Rolls Razor Ltd v Cox*⁶ Lord Denning MR⁷ and Danckwerts LJ⁸ said that parties cannot contract out of s 31, a view repeated in this case⁹ by Lord Denning MR and accepted by Buckley LJ.

c The weight of opinion expressed in the cases to which I have referred appears to me to be in favour of the conclusion that it is not possible to contract out of s 31. The word used in that section is ‘shall’ not ‘may’, the word used in s 34 in relation to a trustee’s power to make a payment out of the bankrupt’s property for the use of an apprentice. Looking at the Act by itself, while recognising that it is sometimes right to interpret the word ‘shall’ in an Act as meaning ‘may’, I think that the terms of s 31 and of the sections that follow it show that ‘shall’ was used in all those sections in its directory and mandatory sense, prescribing the course to be followed in the administration of the bankrupt’s property.

d If, contrary to my view, it is possible to contract out of s 31, the agreement made in this case did not, in my opinion, purport to do so. It was an agreement similar in some respects to that in *Re Vaughan, ex parte Fletcher*¹⁰. It was to enable the company to carry on so that they might, if they could, sell the business as a going concern; an agreement whereby the bank agreed not to seek to secure payment of the amount owed to them for four months unless there was a material change of circumstance.

e It was not an agreement to provide what should happen in the event of liquidation. In *British Guiana Bank v Official Receiver*¹¹ the bank agreed with its customer that another current account, to be called the no 2 account, should be opened and that the bank would not appropriate any sum in credit on that account in reduction of the overdraft on the no 1 account without the customer’s knowledge and consent. Lord Macnaghten, delivering the judgment of the Board, said¹²:

f ‘The whole question in this case turns upon the real meaning of the agreement . . . In their Lordships’ opinion it is an ordinary business agreement, intended to be operative so long as the accounts are alive, and no longer. There is nothing in it to exclude the operation of the right of set off.’

g The Supreme Court of British Guiana had held that it was possible to contract out of the statutory obligation to set-off in a liquidation. I do not think that the fact that Lord Macnaghten did not refer to this justifies the conclusion that he accepted their view. As he held that there was nothing in the agreement to exclude the right to set-off, it was unnecessary for him to consider whether, if there had been, it would have been effective.

h The agreement in the *British Guiana Bank* case¹¹ is indistinguishable from that in this case where in my view there was nothing in the agreement to exclude the right of set-off. It follows that if the debit on the no 1 account and the credit on the no 2 account amounted to ‘mutual credits, mutual debits or other mutual dealings’ within the

3 [1926] Ch 191 at 203, [1925] All ER Rep 453 at 457

4 Subsequently Lord Hanworth MR

5 [1931] 1 Ch 85, [1930] All ER Rep 15

j 6 [1967] 1 All ER 397, [1967] 1 QB 552

7 [1967] 1 All ER at 403, [1967] 1 QB at 570

8 [1967] 1 All ER at 405, [1967] 1 QB at 573

9 [1970] 3 All ER 473, [1970] 3 WLR 625

10 (1877) 6 Ch D 350

11 (1911) 104 LT 754

12 (1911) 104 LT at 755

meaning to be given to those words in s 31, that section applies. Lord Denning MR and Winn LJ¹³ thought that there were not mutual dealings. Lord Denning MR thought that the arrangements were so special as to deprive them of mutuality and Winn LJ thought that the agreement provided that the balance on the frozen no 1 account should be treated as separated out from the future mutual dealings of the bank and customer 'all of which were expressly to be effected and recorded on the no 2 account'.

I do not myself think that the arrangements made by the agreement made in April were so special as to deprive them of mutuality. They do not seem to me more special than the arrangements made in the *British Guiana Bank* case¹⁴ which were said to constitute 'an ordinary business agreement'. The bank and the company could have achieved the same result by agreeing that the overdraft should remain at its then level for four months unless there was a material change of circumstances but that the bank would honour cheques drawn on that account if and only if amounts sufficient to cover the cheques had been credited to the account. It was, we were told, only because it was easier to secure that the overdraft did not increase that the no 2 account was opened and the existing debit frozen.

The account which became the no 1 account had been the company's current account. It did not change its character when the company ceased to use it; nor do I think that its character was changed when the bank and the company agreed that it should be frozen, i.e. that the company would continue not to use it, and when they agreed that no further transactions would take place on it for a limited period 'save for permanent reduction' of the overdraft. While it is true that after the agreement all future dealings save for the reduction of the debit were to take place on the no 2 account, I do not think that that fact and the agreement itself lead to the conclusion that the debit balance was to be separated out from mutual dealings and to be regarded as not having arisen therefrom. In my view Buckley LJ put the matter correctly when he said¹⁵:

'The effect of the agreement was to postpone the right of the bank to require payment of the amount due on the no 1 account during the currency of the agreement. The debit on the no 1 account remained a debt owing by the [company] to the bank, although it ceased to be presently payable. Each of the obligations on either side on the two banking accounts arose from the relationship between the parties as banker and customer . . . The agreement was intended to have a temporary effect only, at the end of which the parties contemplated that both accounts would become part of their general relationship as banker and customer. In my judgment, notwithstanding the fact that the agreement had the temporary effect of precluding the bank from appropriating any credit on the no 2 account towards discharging the debt on the no 1 account, the dealings giving rise to the obligations were "mutual" dealings within the meaning of s 31 and the credits were "mutual credits".'

I agree with Buckley LJ in thinking that s 31 applies and consequently that on this ground the appeal should be allowed.

The bank also contended that, quite apart from s 31, they were entitled to set-off one account against the other. That they would have been entitled, had they chosen to do so, to regard the receipt of the notice of the creditors' meeting as a material change of circumstances was not disputed, but in my opinion their letter of 28th May 1968 shows clearly that they did not wish to treat the agreement as terminated on that account. Considerable argument was directed to the question whether the agreement was only terminable by the bank by notice. It may be that if the bank

¹³ [1970] 3 All ER 473, [1970] 3 WLR 625

¹⁴ (1911) 104 LT 754

¹⁵ [1970] 3 All ER at 490, [1970] 3 WLR at 648

- a had decided to treat the agreement as brought to an end by the receipt of that notice, they would have been under an obligation to inform the company of that but I do not think it necessary to express an opinion on the matter as the bank did not so decide. The agreement was, to use the words of Lord Macnaghten in *British Guiana Bank v Official Receiver*¹⁶, only 'intended to be operative so long as the accounts are alive', that is to say, while the relationship of banker and customer existed and
- b the company was a going concern. In my opinion the agreement came to an end when the winding up resolution was passed. Could the bank then, the agreement being at an end, combine the two accounts? For the reasons very clearly stated by Roskill J¹⁷ in my opinion the answer is, Yes.

I would therefore allow the appeal on this ground also.

- c **LORD SIMON OF GLAISDALE.** My Lords, I have had the advantage of reading the speeches prepared by my noble and learned friends. They are in agreement on every issue in this appeal save one—namely, whether s 31 of the Bankruptcy Act 1914 (applicable in this case by reason of s 317 of the Companies Act 1948) can be the subject of an agreement to contract out of its terms. I concur with my noble and
- d learned friends on all their agreed conclusions and content myself with expressing such concurrence. I also agree with my noble and learned friends that, even if the section may be excluded by agreement, there was in the present case no agreement to exclude it; this appears both from an independent construction of the agreement of 4th April 1968, as evidenced by the letter of 17th April 1968, and because that agreement in all its circumstances is indistinguishable from the similar agreement in *British Guiana Bank v Official Receiver*¹⁸, in all the circumstances of that case. Any
- e further observations on s 31 are therefore liable to be taken as further obiter dicta, or at least to raise the question how far what is said is a concurrent ratio decidendi. But the matter was carefully argued before your Lordships, who were urged by both sides to express a view in the hope of providing some guidance to those engaged in preparing the promised bankruptcy legislation and to practitioners in the meantime. I follow your Lordships in acceding to the plea made to us.

- f But before I venture to indicate my own view on whether s 31 may be excluded by agreement, there is one subsidiary matter on that section with which I should like to deal. The section concerns the right or duty of set-off 'Where there have been mutual credits, mutual debts or other mutual dealings'. It was common ground that 'mutual dealings' would not cover a transaction in which property is made over for a 'special (or specific) purpose': see *Re Pollitt, ex parte Minor*¹⁹. *Re Mid-Kent Fruit Factory*²⁰ and *Re City Equitable Fire Insurance Co Ltd (No 2)*¹. But I regret that I cannot agree with the view of the majority of the Court of Appeal² on what meaning should be attached to this concept of 'special (or specific) purpose'. I prefer the view of Buckley LJ; and I agree with all that my noble and learned friend, Viscount Dilhorne, has said on this matter. Every payment of money, every contractual provision, is for a special or specific purpose in the ordinary sense of those words; something
- h more is required to take the transaction out of the concept of 'mutual dealings'. It was suggested on behalf of the bank that the situation only arises when the transaction gives rise to a payment on which a quasi-trust is imposed. My only quarrel with this way of putting it is that quasi-anything gives uncertain guidance in the law. I would prefer to say that money is paid for a special (or specific) purpose so as to exclude

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16 (1911) 104 LT at 755
 17 [1970] 1 All ER at 51, 52, [1970] 2 WLR at 773, 774
 18 (1911) 104 LT 754
 19 [1893] 1 QB 455
 20 [1896] 1 Ch 567
 1 [1930] 2 Ch 293, [1930] All ER Rep 315
 2 [1970] 3 All ER 473, [1970] 3 WLR 625

mutuality of dealing within s 31 if the money is paid in such circumstances that it would be a misappropriation to use it for any other purpose than that for which it is paid. I think that all the cases cited on this point are explicable on this basis; but I cannot see anything in the instant case which amounts to such a special purpose so as to negative mutuality of dealing. a

I turn finally, then, to the question whether s 31 can be excluded by agreement. On this matter I concur in the reasoning and conclusions of my noble and learned friends, Viscount Dilhorne and Lord Kilbrandon. The maxim 'Quilibet potest renunciare juri pro se introducto'³ begs the question whether the statutory provision in s 31 was introduced for the benefit of any particular person or body of persons or was prescribing a course of procedure to be followed in the administration of a bankrupt's property. I appreciate that the imposition of a duty on a public officer does not necessarily preclude a private right arising therefrom: *Ashby v White*⁴. But in *Broom*⁵ the maxim is, for good reason, translated 'Anyone may at his pleasure, renounce the benefit of a stipulation or other right introduced *entirely in his own favour*' (my italics). It is also significant that, in the discussion of this maxim, s 31 of the Bankruptcy Act 1914 is nowhere mentioned. Having regard both to the terminology of s 31 and to its statutory context, it seems to me to be impossible so to construe the wording of the section as introducing a right entirely in favour of anyone. The change in terminology between the Bankruptcy Act 1849, s 171, and the Bankruptcy Act 1869, s 39 ('may' to 'shall') must have been, at the least, to avert doubts. This part of the Act is laying down a code of procedure whereby bankrupts' estates (and, by reference, insolvent companies) are to be administered in a proper and orderly way; this is a matter in which the commercial community generally has an interest; and the maxim has no application in a matter where the public have an interest (see *Broom*⁵, citing *Ayr Harbour Trustees v Oswald*⁶ and *Spurling v Bantoft*⁷). There is a clear preponderance of authority against there being a right to contract out of the section; and I agree with the analysis of the case law made by my noble and learned friend, Viscount Dilhorne. b

It was argued for the respondent company that, if there could be no contracting out of s 31, a very usual type of compromise between creditors, in their common interest to keep an insolvent afloat, would be impossible. To this there are, I think, two answers: first, there would be nothing to prevent any such agreement after an act of bankruptcy had been committed; and, secondly, so far as companies are concerned, s 206 of the Companies Act 1948 gives power, subject to the sanction of the court, for a compromise to be made in certain circumstances with creditors which will be binding on all creditors (or all creditors of the class involved). But the mere fact that this argument could be advanced at all in view of the conflict of dicta and what I cannot but regard as a clear preponderance of authority emphasises the desirability that the promised legislation in this field should not be unduly delayed. c

In view of the construction that I venture to put on s 31, as well as for the reasons stated by my noble and learned friends on the other issues in this case, I agree that the appeal should be allowed. d

LORD CROSS OF CHELSEA. My Lords, the facts of this case have been stated by my noble and learned friend Viscount Dilhorne and I need not repeat them. If a banker permits his customer to have two accounts, one—sometimes called a 'loan account'—which records the indebtedness of the customer to the bank in respect of advances made to him, and the other a current account which the customer e

3 *Broom's Legal Maxims* (1929), 10th Edn, p 477

4 (1703), 1 Bro Parl Cas 62

5 *Broom's Legal Maxims* (1929), 10th Edn, p 481

6 (1883) 8 App Cas 623

7 [1891] 2 QB 384 f

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a keeps in credit and uses for the purpose of his trade or business or ordinary expenditure, then, unless the bank makes it clear to the customer that it is retaining the right at any moment to apply the credit balance on the current account in reduction of the debt on the loan account, it will be an implied term of the arrangement that the bank will not, so long as it lasts, consolidate the two accounts. As Scrutton LJ pointed out in *Bradford Old Bank Ltd v Sutcliffe*⁸, unless such a term is implied no customer
b could feel any security in drawing a cheque on his current account if he had a loan account greater than the credit balance on his current account. It was common ground that there was such an implied term in this case. It was also common ground that the sending out by the company on 20th May 1968 of the notice under s 293 of the Companies Act 1948 constituted a 'material change of circumstances' which entitled the bank to put an end to the agreement made on 4th April notwithstanding that the four months had not elapsed. In the Court of Appeal⁹ the question was
c raised whether the bank had to give the company notice of its intention no longer to be bound by the agreement. To my mind that question does not really arise for even if one assumes in favour of the bank that it could there and then have consolidated the accounts without notice it is clear that it chose not to treat the service of the notice as an event entitling it to do so. In its letter of 28th May to the company it made it clear that notwithstanding the notice it was prepared to go on
d honouring cheques on the no 2 account provided that it was kept in credit, and in fact between that date and 12th June the company made a number of payments into and drawings out of the account. But as the question whether notice was necessary was argued before us I ought perhaps to express a view on it.

I cannot agree with Lord Denning MR and Winn LJ that any period of notice was necessary, for on receipt of such a notice the company could have defeated the object
e with which it was given by at once drawing out the credit balance on the account. The choice as I see it lies between a notice taking immediate effect and no notice at all. On any footing the bank would be obliged to honour cheques drawn up to the limit of the apparent credit balance before the company became aware that the bank was consolidating the accounts and so it might be said that notification to the customer was not a condition precedent to the exercise by the bank of its right of consolidation
f but only a measure of precaution which the bank might take to end its liability to honour cheques. But as counsel for the company pointed out, until the company knew that the bank was putting an end to the agreement they might go on paying cheques into the account which they would have paid into an account at some other bank if they were aware of the true position. So, for my part, I incline to the view favoured by Buckley LJ that the bank could not consolidate the accounts on a material
g change of circumstances in the four months' period without notifying the company that it was doing so and also subject to a liability to honour any cheques drawn up to the limit of the credit balance before the company received the notification.

In the judgments below the question is raised whether the rights which the bank claims to exercise can be properly described as an aspect of the 'banker's lien'. No doubt the bank acquired a 'lien' on the cheque drawn by Messrs Girling on their bankers.
h But that cheque was duly honoured and any lien which the bank had on the piece of paper and the obligation of Messrs Girling created by their drawing the cheque was soon replaced by an increase in the bank's indebtedness to the company. I agree with Lord Denning MR and Buckley LJ that a debtor cannot sensibly be said to have a lien on his own indebtedness to his creditor. It may be that as a matter of history the recognition by the courts of the right of a banker to treat several accounts as one
j was influenced by their earlier recognition that in the absence of agreement to the contrary a banker had a lien on all securities in his hands for the general balance owing to him on all accounts. But to describe the right to consolidate several accounts as an example of the banker's lien is, I think, a misuse of language.

It was common ground between the parties that the passing of the resolution to wind up the company in the afternoon of 12th June cancelled the mandates given by the company to the bank for the operation of the accounts and put an end to the existing relationship of banker and customer—although, of course, a fresh relationship was soon entered into between the bank and the company acting through their liquidator in place of the board of directors. This brings one to the crux of the case. Did the agreement entered into on 4th April come to an end on the passing of the resolution? To my mind it did. It was entered into in order to give the company time to dispose of their assets to advantage as a going concern and whatever may have been in the mind of the liquidator it was certainly not in the minds of the bank's representatives that it might affect the bank's rights on a liquidation. To adopt the language used by Lord Macnaghten of a similar arrangement in *British Guiana Bank v Official Receiver*¹⁰, the agreement was intended to be operative so long as the accounts were alive and no longer. After all, as the assistant general manager of the bank pointed out in evidence, what the parties wished to achieve could just as well have been effected without a second account being opened at all. The company could have agreed once more to pass all their business through the existing account and never to allow the overdraft on it to exceed the existing figure and the bank could have agreed not to call in any overdraft not exceeding that figure for four months if there was no material change of circumstances. Had the arrangement taken that form the bank would automatically have had the benefit of all cheques paid into the account before the winding-up. Indeed had the credit balance on the no 2 account at the date of the passing of the resolution been what it would have been apart from the Girling cheque—namely a few hundred pounds—I do not suppose that it would have occurred to anyone to challenge the bank's right to treat the company's indebtedness on the no 1 account as reduced by that amount. What has given rise to all the trouble is that the company without any intent to prefer the bank paid a large cheque into the no 2 account an hour or so before the resolution was passed. It is understandable that the liquidator with the interests of the other creditors in mind should think it wrong that the bank should retain this windfall; but the bank has chosen to insist on its legal rights and I think that Roskill J¹¹ was right in holding that it was entitled to consolidate the accounts, quite apart from the 'set-off' provisions in s 31 of the Bankruptcy Act 1914.

In the Court of Appeal¹² Lord Denning MR and Buckley LJ held that as no notice to determine it had been previously given, the agreement remained in operation after the liquidation. Winn LJ, on the other hand, agreed with counsel for the bank that the agreement came to an end on the passing of the resolution but held—for reasons which are not clear to me—that nevertheless the bank had no right to consolidate the accounts. It therefore became necessary for all three members of the court¹² to consider whether s 31 of the 1914 Act applied to the case and in deciding that question they had to proceed on the footing that it is not possible for the parties to exclude the operation of the section by agreement since that had been decided by the Court of Appeal itself in *Rolls Razor Ltd v Cox*¹³. Lord Denning MR and Winn LJ held that even so the section did not apply since the dealings between the company and the bank which gave rise to the debts on the two accounts respectively were not 'mutual dealings' within the meaning of those words as used in the section. Buckley LJ, on the other hand, held that the section applied and that the debts on the two accounts must be 'set off'. If, contrary to my opinion, the bank was not entitled to consolidate the accounts apart from the section, then I agree with Buckley LJ that the section applied. The view favoured by Lord Denning MR and

¹⁰ (1911) 104 LT 754 at 755

¹¹ [1970] 1 All ER 33, [1970] 2 WLR 754

¹² [1970] 3 All ER 473, [1970] 3 WLR 625

¹³ [1967] 1 All ER 397, [1967] 1 QB 552

- a Winn LJ places on the phrase 'mutual dealings' a meaning which in the light of the decided cases is far too narrow.

Before your Lordships counsel for the company sought to support the view of the majority of the Court of Appeal¹⁴ by reference to the so-called 'special purpose' cases (*Re Pollitt, ex parte Minor*¹⁵, *Re Mid-Kent Fruit Factory*¹⁶ and *Re City Equitable Fire Insurance Co Ltd (No 2)*¹⁷). These are all cases in which the bankrupt or the insolvent company had placed money in the hands of a person to whom it owed money on another account to be applied by him in a certain way and in the first and third cases the purpose had not been fully carried out at the time of the insolvency. Counsel for the bank submitted that the *Mid-Kent* case¹⁶ was wrongly decided since in it the purposes for which the money had been handed to the solicitors had been fully carried out and they were simply debtors of the bankrupt to the extent of the unexpended surplus and could set it off against his debt to them. It is, however, as I see it, unnecessary to consider any of these cases in detail since it is impossible to regard the opening of the no 2 account and the payment into it by the company from time to time of their customers' cheques against which they drew cheques for their trading expenses as being in any way analogous to the deposit by a debtor with his creditor of money to be applied by the creditor for a special purpose. Counsel for the company also submitted that this case was taken out of s 31 by the proviso since the serving of the notice of the creditors' meeting was equivalent to an act of bankruptcy and the bank by omitting to put an end to the agreement made on 4th April on receipt of this notice gave fresh credit to the company. This appears to me to be a hopeless contention. The bank gave credit to the company when it advanced the sums which made up the loan account. Not to enforce a debt as soon as one is entitled to do so cannot itself amount to giving fresh credit.

e Before your Lordships counsel for the company contended that the Court of Appeal¹⁴ was wrong in deciding as it did in the *Rolls Razor* case¹⁸ that the parties cannot contract out of s 31 and that the agreement made in this case excluded the operation of the section. As I have said I think that the agreement ceased to have any operation on the passing of the resolution to wind up and a fortiori it did not purport to exclude the operation of s 31. Therefore the question whether its operation can be excluded by contract does not, as I think, arise at all. However, in view of the unsatisfactory state of the authorities counsel on both sides joined in asking us to express our views on the point. The strength of the argument in favour of the view that the operation of the section cannot be excluded by agreement lies, of course, in the mandatory terms in which it is couched. The court is told that where there have been 'mutual dealings' between the debtor and someone who claims to prove as a creditor an account of the mutual dealings *shall be* taken, there *shall be* a 'set-off' of the sums mutually owing and it is only the balance that the creditor is to pay or prove for as the case may be. But on the other side one must bear in mind that the rule of 'set-off' in bankruptcy is a rule for the benefit of the man who has had mutual dealings with a bankrupt. It arose to prevent the injustice of such a man having to pay in full what he owed in respect of such dealings while only receiving a dividend on what the bankrupt owed him in respect of them (see per Mellish LJ in *Re Deveze, ex parte Barnett*¹⁹). It was a rule which was applied in practice by commissioners in bankruptcy before it received statutory sanction first in a temporary statute²⁰ and then in the series of Bankruptcy Acts stretching from 1732 to 1914. The wording of the relevant section in the successive Acts has varied slightly from time to time but I

j 14 [1970] 3 All ER 473, [1970] 3 WLR 625

15 [1893] 1 QB 455

16 [1896] 1 Ch 567

17 [1930] 2 Ch 293, [1930] All ER Rep 315

18 [1967] 1 All ER 397, [1967] 1 QB 552

19 (1874) 9 Ch App 293 at 297

20 4 & 5 Ann, c 17

do not think that any argument either way can be founded on these slight differences which do not affect the substance of the matter. I cannot see why in principle the person in whose interest it would be to invoke the rule of 'set-off' should not be entitled to agree in advance that in the event of the bankruptcy of the other party he will not invoke it. In general quilibet potest renunciare juri pro se introducto. No doubt it would not be often that a single individual dealing with a prospective bankrupt would intend to give up his right for the benefit of the other party's general creditors. But when a trader is in difficulties a number of his creditors may well enter into an agreement between themselves and with him, a term of which is that none of them shall rely on the right. Indeed the Irish case¹ hereafter to be mentioned is an example of such an agreement. So, apart from authority, I would have thought that the section, although mandatory in its terms, should be read as being subject to any agreement to the contrary.

I proceed, therefore, to consider the authorities. The first is *Re Deveze, ex parte Barnett*². There the bankrupt owed B and Co £3,010 and B and Co owed the bankrupt £88 in respect of which the bankrupt had a lien on goods belonging to B and Co which were in his possession. The trustee in bankruptcy claimed the right to retain possession of the goods until B and Co paid him the £88. B and Co on the other hand claimed to have the £88 deducted from the £3,010 owing to them, to prove only for the balance and to have the goods returned to them on the footing that the £88 had been paid. The Court of Appeal in Chancery held that B and Co were right. In his judgment Lord Selborne used these words which are in truth the foundation of the argument that the parties cannot contract out of the section—which was then s 39 of the Bankruptcy Act 1869³:

'... it says, without noticing the subject of security at all, that when there have been mutual credits, debts, or mutual dealings . . . and a proof is to be made in bankruptcy, there is to be a rule of set-off, not, as I understand it, at the option of either party, but an absolute statutory rule—"The balance of such account, and no more, shall be claimed or paid on either side respectively."'

In that case the court was not concerned with an antecedent agreement by both parties that the section should not apply but with a claim by the debtor's trustee to be entitled to retain possession of the goods despite the provisions of the section which were being invoked by the creditor. No doubt it is possible to read the words 'not at the option of either party' as covering a mutual agreement made before the act of bankruptcy. But it is certainly not necessary so to read them, and I think it most unlikely that Lord Selborne had such a case in mind. If he had had it in mind and had wished to cover it by an obiter dictum I think that he would have expressed himself far more clearly.

The next case is *Re Vaughan, ex parte Fletcher*⁴. There V and Co, the bankrupts, owed J and Co £1,762 odd and J and Co owed the bankrupts £1,167. They claimed to set this off against the £1,762 owed to them but the trustee contended that when the bankrupts were getting into difficulties J and Co and other creditors agreed with them to transact business on a cash basis, that the £1,167 debt arose out of transactions subsequent to the agreement and that the agreement deprived J and Co of their right of set-off. Bacon CJ held in reliance on the words used by Lord Selborne in *Re Deveze, ex parte Barnett*³ which I have quoted that even if there was such an agreement as alleged by the trustee the law would not allow it to have effect. But the Court of Appeal dealt with the matter quite differently. Each member said that J and Co were entitled to the right of set-off unless it could be shown by the trustee that they had entered into a binding agreement to forego it, and that the evidence

1 *Deering v Hyndman* (1886) 18 LR (Ir) 323, 467

2 (1874) 9 Ch App 293

3 (1874) 9 Ch App at 295

4 (1877) 6 Ch D 350

a did not disclose any such binding agreement. It is true that counsel for J and Co was not called on to argue and therefore the case cannot be treated as a positive decision by the Court of Appeal that the section can be excluded by agreement, but at least it is clear that the members of the court saw no reason, *prima facie*, why it should not be excluded and so presumably they did not regard the words used by Lord Selborne as showing that he thought that it could not be excluded.

b The next case is *Mersey Steel & Iron Co v Naylor, Benzon & Co*⁵. Section 10 of the Supreme Court of Judicature Act 1875 provided:

‘... the same rules shall prevail and be observed ... as to debts and liabilities provable ... as may be in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt’.

c One question which arose in the case was whether the rules as to set-off contained in s 39 of the Bankruptcy Act 1869 were rules ‘as to debts and liabilities provable’. In deciding that they were Lord Selborne said⁶:

d ‘Your Lordships observe that it is not that it *may be*—it is not a thing which is optional, but it is a positive, absolute rule for the purpose of proof in bankruptcy, and nothing can be proved according to that rule in such cases except the balance of the account; that only is regarded as the claim which it is competent for the creditor to make when he comes in to prove under the bankruptcy. That being so, how is it possible to say that this is not a rule, both within the general spirit and intention of the section and within the express words “as to debts and liabilities provable”?’

e With regard to those words I would say as I said of the similar language used by Lord Selborne in *Re Devezé, ex parte Barnett*⁷ that he was not considering the case of an agreement to exclude the section. Even if the section can be excluded it is obvious that the rules contained in it are rules ‘as to debts and liabilities provable’. In 1886 came the Irish case of *Deering v Hyndman*⁸. The headnote which states the facts sufficiently runs as follows⁹:

f ‘A. & Sons, a firm of flax spinners in Belfast, stopped payment in January, 1884, and called a meeting of their creditors, when a committee, of which the defendant was a member, was appointed to consider the best course to be pursued for the benefit of the creditors, and they reported in favour of continuing the business merely for the purpose of winding it up. At the time of the suspension the defendant was a creditor for over £2000. Immediately after the suspension, g A. & Sons opened what is known in Belfast as a No. 2 account with their bankers and customers; and the defendant subsequently sold goods to A. & Sons, for which he was paid in cash, and by cheques drawn on the No. 2 account, from which facts and the other evidence given in the case it appeared that the defendant was acquainted with the fact of the No. 2 account having been opened, and that h he was dealing on that account. In the month of June, 1884, the defendant purchased £1189 8s. 4d. worth of goods from A. & Sons, to be paid for in cash upon delivery. He did not, however, pay for these goods, and A. & Sons were adjudicated bankrupts on the 23rd December, 1885. In the proceedings in bankruptcy the defendant claimed to set off, under the 251st section of the Irish Bankrupt and Insolvent Act, 1857, against the debt of £1189 8s. 4d. due by him, so much of the debt due to him before the stoppage as would be sufficient i to meet it; to this the assignees objected, and brought this action to recover the sum of £1189 8s. 4d. and the defendant relied upon his right to set off.

5 (1884) 9 App Cas 434, [1881-85] All ER Rep 365

6 (1884) 9 App Cas at 438, [1881-85] All ER Rep at 367

7 (1874) 9 Ch App at 295

8 (1886) 18 LR (Ir) 323, 467

9 (1886) 18 LR (Ir) at 323, 324

Evidence, on behalf of the plaintiffs, was given, that the effect of opening a No. 2 account in Belfast was perfectly well understood by all the merchants and traders there, and that the effect was to exclude all right of set-off between transactions before and after the opening of the No. 2 account, whether bankruptcy ensued or not. The jury found, on this evidence—1st, that the committee of creditors, acting on their behalf, and with the assent of the creditors, including the defendant, had entered into an agreement with A. & Sons, that all goods thereafter sold by A. & Sons should be sold on the terms of cash payment on delivery, and that no creditor of the firm thereafter purchasing goods should have or claim any right of set-off; 2ndly, that the defendant purchased the goods in question on the terms that he would pay for them in cash, and would not set off against them the debt due by A. & Sons.

On those findings by the jury Palles CB gave judgment against the defendant for the £1,189 but the defendant applied to the Queen's Bench Division for an order to change the judgment against him into one in his favour on the ground (a) that the evidence did not support the finding that there was an agreement between the creditors to which the defendant was a party to exclude the right of 'set off' in the event of a bankruptcy and (b) that in any event the right of set-off could not be excluded by agreement. The majority of the court (May CJ and O'Brien J, Johnson J dissenting) held that there was evidence to support the verdict and all the members of the court having considered *Re Devege, ex parte Barnett*¹⁰ and *Re Vaughan, ex parte Fletcher*¹¹ held that the defendant could effectually waive by agreement the right of 'set off' given by the relevant section of the Irish Bankruptcy Act. The Irish Court of Appeal (Lord Ashbourne LC, Michael Morris CJ, Fitzgibbon and Barry LJJ) affirmed the decision of the Queen's Bench Division without calling on the respondents. In *Watkins v Lindsay & Co*¹² Wright J said:

'in order to prevent the set-off (which in bankruptcy is automatic and not dependent on the option of the party) there must be something equivalent to a binding agreement that there shall be no set-off.'

The use of the word 'option' suggests that the judge had in mind what Lord Selborne said in *Re Devege, ex parte Barnett*¹³ and interpreted his language as I would do. In 1910 in the *British Guiana Bank* case¹⁴—referred to above in connection with the construction of the agreement in this case—Bovell CJ after considering *Re Devege, ex parte Barnett*⁹, *Re Vaughan, ex parte Fletcher*¹⁰ and *Watkins v Lindsay*¹⁵ held that the 'set-off' provisions in the local insolvency ordinance, which corresponded to the current provisions in the English Act—s 38 of the 1883 Act—could be excluded by agreement and Hewick and Berkeley JJ were of the same opinion. The first reason in the appellant's case in the Privy Council¹⁴ was that this view was wrong but the Privy Council in allowing the appeal did so expressly on the ground that the construction placed on the agreement by the Chief Justice was to be preferred to that placed on it by his colleagues. Lord Macnaghten would hardly have said¹⁶, 'There is nothing in it to exclude the operation of the right of set off' if he had accepted the appellant's contention that whether or not it purported to exclude the right of 'set-off' made no difference.

¹⁰ (1874) 9 Ch App 293

¹¹ (1877) 6 Ch D 350

¹² (1898) 5 Mans 25 at 29

¹³ (1874) 9 Ch App at 295

¹⁴ (1911) 104 LT 754

¹⁵ (1898) 5 Mans 25

¹⁶ (1911) 104 LT at 755

a In *Re City Life Assurance Co Ltd*¹⁷, which was not a case dealing with an agreement purporting to exclude the operation of the section, Pollock MR¹⁸ said¹⁹:

‘It is to be observed that s. 31 is definite in its terms that where there is a mutual credit, mutual debt or other mutual dealings, the sums are to be set-off and the balance of the account and no more shall be claimed or paid on either side respectively. It is not merely permissive, but it is a direct statutory enactment that the balance only is to be claimed in bankruptcy.’

b I read those words as an echo of what was said by Lord Selborne in *Re Devezé, ex parte Barnett*²⁰ and in the *Mersey Steel & Iron Co* case¹. I do not think that Pollock MR, any more than Lord Selborne, had the question of an agreement to exclude the section in mind at all. The same may I think be said of the similar observation made by Lord Hanworth MR in *Re Fenton (No 1)*² where again there was no question of an agreement to exclude the operation of the section. In *Victoria Products Ltd v Tosh & Co Ltd*³ the plaintiffs alleged that the defendants had agreed to abandon their right of set-off in the event of the plaintiffs going into liquidation. Hallett J held that on the true construction of the agreement they had not done so. He went on, however, to consider the question of law. Having referred to what Lord Selborne said in *Re Devezé, ex parte Barnett*²⁰ and to the judgment of Bacon CJ in *Re Vaughan, ex parte Fletcher*⁴ he said that the judgments of the members of the Court of Appeal in *Re Vaughan, ex parte Fletcher*⁴ could not be regarded as showing that they disagreed with Bacon CJ’s view that the section could not be excluded by agreement and that therefore the only real authorities on the point were *Re Devezé, ex parte Barnett*²⁰ and the view taken of *Re Devezé, ex parte Barnett*²⁰ by Bacon CJ in *Re Vaughan, ex parte Fletcher*⁴. Hallett J was not referred to the Irish case⁵ which is clear authority to the effect that the section can be excluded. Further the judgments of the Court of Appeal in *Re Vaughan, ex parte Fletcher*⁴, although not amounting to a decision that the section can be excluded by agreement, certainly indicate that the members of the court did not construe Lord Selborne’s remarks in *Re Devezé, ex parte Barnett*²⁰ as covering the case of an agreement.

e Finally one comes to *Rolls Razor Ltd v Cox*⁶ which is a decision of the Court of Appeal in England that the ‘set-off’ provisions cannot be excluded by agreement. Lord Denning MR said⁷:

‘the parties cannot contract out of the statute. Where there are mutual dealings, the statute says that “the balance of the account, and no more, shall be claimed or paid on either side”. That is an absolute statutory rule which must be observed (see *Re Devezé, Ex p. Barnett*²⁰, by LORD SELBORNE, L.C.).’

g Danckwerts LJ said⁸:

‘A question was raised whether the statutory set-off could be excluded by the terms of the agreement between the parties. The authorities are meagre on this point and not very clear, but in my opinion the statutory set-off, being a matter of statute, cannot be excluded.’

h

17 [1926] Ch 191, [1925] All ER Rep 453

18 Subsequently Lord Hanworth MR

19 [1926] Ch at 203, [1925] All ER Rep at 457

20 (1874) 9 Ch App at 295

1 (1884) 9 App Cas 434, [1881-85] All ER Rep 365

2 [1931] 1 Ch 85 at 104, [1930] All ER Rep 15 at 18

3 (1941) 165 LT 78

4 (1877) 6 Ch D 350

5 *Deering v Hyndman* (1886) 18 LR (Ir) 323, 467

6 [1967] 1 All ER 397, [1967] 1 QB 552

7 [1967] 1 All ER at 403, 404, [1967] 1 QB at 570

8 [1967] 1 All ER at 405, [1967] 1 QB at 573

j

Winn LJ did not deal with the point specifically and it may be that he decided in favour of set-off rather on the ground that the agreement in question did not purport to exclude the section than on the ground that it could not do so. So far as appears the court was not referred to the Irish case⁹.

The position on the authorities seems to be as follows. The view that the operation of the set-off provisions cannot be excluded by agreement stems from some words used by Lord Selborne in *Re Devezze, ex parte Barnett*¹⁰, and in the *Mersey Steel & Iron Co* case¹¹, which several judges, i.e. Bacon CJ¹², Hallett J¹³, Lord Denning MR and Danckwerts LJ¹⁴, have construed as meaning that Lord Selborne considered that there could be no 'contracting out'. On the other hand, other judges, i.e. the members of the Court of Appeal in *Re Vaughan, ex parte Fletcher*¹⁵, the Irish judges in *Deering v Hyndman*⁹, Wright J¹⁶, and the local judges and the members of the Board in the *British Guiana* case¹⁷ appear not to have so read Lord Selborne's words. So far as decisions go we have the decision of the Irish Court of Appeal⁹ on the one side and the decision of the English Court of Appeal¹⁴ on the other. For my part, as I have said, I can see no reason in principle why the section should not be excluded by agreement; I do not think that Lord Selborne intended to indicate that the thought that it could not be excluded by agreement; and I prefer the decision in *Deering v Hyndman*⁹ to that in the *Rolls Razor* case¹⁸. Therefore if, contrary to my opinion, the agreement in this case did not determine on the winding up and was intended to exclude the operation of s 31 I would think that the company were entitled to succeed. As it is, however, I would allow the appeal.

LORD KILBRANDON. My Lords, the history of the last days of the respondent company as a going concern may be briefly summarised as follows. In February 1968 the company were substantially indebted, on current account, to the appellant bank. In order to protect their cash assets in the event of the bank demanding repayment, a trading account, which was always in credit, had been kept with Lloyds Bank. On 23rd February the bank formally warned the company that the position of the company's account was unacceptable to the bank. The position taken up by the company's then financial adviser, Mr Phillips, afterwards the liquidator, was that the company, while insolvent in the practical sense of being unable to meet their liabilities, including that to the bank, as they fell due, were solvent in the sense of their assets exceeding their liabilities on a 'proper' as opposed to a 'forced' realisation. This was the situation giving rise to the meeting of 4th April, at which the agreement between the bank and the company, the source of this litigation, was negotiated.

On 17th April the assistant general manager of the bank wrote to the company setting out his account of what was agreed at the meeting, and on 22nd April a director of the company replied: 'I herewith confirm that I accept the conditions and arrangements that have been laid out.' Nevertheless, at the trial before Roskill J¹⁹, an attempt was made in evidence for the company to prove an express oral agreement, said to have been arrived at at the meeting—

'that in the event of the [company] agreeing to open a no 2 account . . . the

⁹ *Deering v Hyndman* (1886) 18 LR (Ir) 323, 467

¹⁰ (1874) 9 Ch App at 295

¹¹ (1884) 9 App Cas 434, [1881-85] All ER Rep 365

¹² In *Re Vaughan, ex parte Fletcher* (1877) 6 Ch D 350

¹³ In *Victoria Products Ltd v Tosh & Co Ltd* (1941) 165 LT 78

¹⁴ In *Rolls Razor Ltd v Cox* [1967] 1 All ER 397, [1967] 1 QB 552

¹⁵ (1877) 6 Ch D 350

¹⁶ In *Watkins v Lindsay & Co* (1898) 5 Mans 25 at 29

¹⁷ (1911) 104 LT 754

¹⁸ [1967] 1 All ER 397, [1967] 1 QB 552

¹⁹ [1970] 1 All ER 33 at 36, [1970] 2 WLR 754 at 759

- a* bank would in no circumstances seek to set-off any balance on that no 2 account against the frozen overdraft on the no 1 account.'

The learned judge did not accept the evidence of such an oral agreement, but I pause to observe that that evidence seems to have offended against the principle, as laid down, for example by Lord Morris in *Bank of Australasia v Palmer*¹ that—

- b* 'parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract.'

I will also add that the subsequent conduct and attitudes of the company seem to be strongly coloured by their erroneous belief that such an agreement had in fact been concluded.

- c* The agreement had been, substantially, (a) that the company's current account should become a loan account (no 1 account) and become frozen at its then figure, no further transactions other than permanent reductions to take place thereon; (b) the Lloyds Bank account was to be closed and a new account (no 2 account) opened with the bank, to be maintained strictly in credit, and to bear the bank charges, including the interest due on the no 1 account; (c) the company's representatives undertook to come to a decision regarding a sale of the company, or failing that a disposal of their assets, 'within the next four months', while the bank stipulated that 'in the absence of materially changed circumstances in the meantime we for our part will adhere to the present scheme of arrangements for this period of time'.

- e* On 20th May the company gave notice, under s 293 of the Companies Act 1948, of a meeting of creditors to be held on 12th June. This notice was received by the bank on 24th May, and on 28th May the bank acknowledged it to the company in terms which, in my opinion, make it quite clear that the bank were not to rely on the notice as a change of circumstances within the meaning of the agreement, although it is common ground that they would have been entitled to treat the notice in that way.

- f* On 12th June the company received from one of their customers, in ordinary course, a cheque for £8,611 5s 10d, and at about noon passed this cheque to the bank for collection. At 2.30 pm the company resolved that they be wound up voluntarily. On 13th June the cheque was credited to the no 2 account, and on 14th June the cheque was cleared. The question is whether, having regard to the terms of the agreement between the bank and the company the proceeds of the cheque fall to be included in the assets of the company for distribution among the creditors, or whether the bank are entitled to apply them towards the discharge of the company's liability on the no 1 account.

- g* In the ordinary case, and in the absence of any agreement expressing or necessarily implying the contrary, where a customer has two current accounts, the bank is entitled to utilise the credit balance on one account to cover a debit on the other.
- h* I agree with the criticism by Lord Denning MR² of the dictum to the contrary by Swift J in *W P Greenhalgh & Sons v Union Bank of Manchester Ltd*³. The bank, however, cannot combine accounts where one of the accounts is a loan account and the other is a current account, as here: see *Bradford Old Bank Ltd v Sutcliffe*⁴. This exception was, naturally, founded on by the company. But the latter rule does not apply in bankruptcy. In *Re E J Morel (1934) Ltd*⁵ the principal question at issue related to the proper way of arriving at the sum of the bank's preferential claim arising out of

1 [1897] AC 540 at 545

2 [1970] 3 All ER at 478, [1970] 3 WLR at 635

3 [1924] 2 KB 153, [1924] All ER Rep 338

4 [1918] 2 KB 833 at 844

5 [1961] 1 All ER 796, [1962] Ch 21

advances for the payment of wages: see the analysis by Roskill J in the report of this case⁶. But in the course of considering whether the current account and the wages account were in the circumstances, to be treated as a single entity, Buckley J observed⁷:

'If it be right to regard all three accounts of the company as separate accounts, of course, there has to be a set-off of the credit on the No. 2 account against the debits on the No. 1 account and the wages account',

the no 1 account being, as here, a frozen loan account. This right of set-off, in bankruptcy, between a loan and a current account is also implied in the judgment of Ungood-Thomas J in *Re Keever (a bankrupt)*⁸.

The main question in the case, and on one view the only question, is whether as a matter of construction the agreement between the bank and the company was intended to, and did, provide that in the event which happened, i.e. a winding-up of the company, the bank were to be deprived of the power, which they would in the absence of agreement have had, to combine the no 1 and the no 2 accounts. This depends on a construction of the agreement. I have formed the opinion that such was not the intention or the effect of the agreement.

The substratum of the agreement was that the company were to be kept on their feet as a going concern for the purpose of being sold as a going concern, or for the profitable disposal of their assets. I do not see how it can have been in the contemplation of parties that the agreement should continue in force after liquidation, which event would make either of its objectives unattainable. An alleged express stipulation which would have had that effect has been disproved, and I can see no grounds for inferring one. The terms of the agreement themselves are all against any such intention. The contemplated course of dealings, during the currency of the agreement, was to consist of permanent reductions of the balance on the no 1 account, and the continuance of current business on the no 2 account transferred from Lloyds Bank for the purpose. Neither of these were consistent with a winding-up. In my opinion the words of the judgment of the Privy Council in *British Guiana Bank v Official Receiver*⁹ are appropriate to this case: '... it is an ordinary business agreement, intended to be operative so long as the accounts are alive, and no longer.'

A subsidiary point was made, to the effect that, granted there was power to combine accounts, this could only be done on due notice. Normally a bank is not entitled to close a customer's account without due notice. This is at least mainly for the protection of outstanding cheques. Not only does that reason cease to operate on liquidation, but it is difficult to see, after liquidation, what relevant information notice by the bank could give to the company.

If, on a proper construction of the agreement, the arrangement between the parties was not intended to and did not in fact extend beyond the period of the company's active life, and therefore did not survive the winding-up, that is an end of the case in the bank's favour. But a great deal of the argument was directed to s 31 of the Bankruptcy Act 1914, as applied to liquidations by s 317 of the Companies Act 1948, and it is necessary to deal with the points which were raised. In the Court of Appeal¹⁰ Lord Denning MR held that the section did not apply because the 'dealings' between the parties were not 'mutual'. Buckley LJ took a different view, holding that there were here mutual dealings, and that s 31 applied. I agree with the reasoning of Buckley LJ and cannot express my own opinion in any more convincing way.

In holding that the section, for want of mutuality, did not apply, Winn LJ restated the position he had adopted in *Rolls Razor Ltd v Cox*¹¹ saying¹² that it is possible that persons dealing with one another on a running account—

6 [1970] 1 All ER at 51, [1970] 2 WLR at 774

7 [1961] 1 All ER at 804, [1962] 1 Ch at 33

8 [1966] 3 All ER 631, [1967] Ch 182

9 (1911) 104 LT at 755

10 [1970] 3 All ER 473, [1970] 3 WLR 625

11 [1967] 1 All ER 397, [1967] 1 QB 552

12 [1970] 3 All ER at 486, [1970] 3 WLR at 643

- a* 'may separate out from such mutual dealings and agree to make the subject of separate payment some particular transaction or transactions or some particular aspect of their relations.'

He goes on to give some examples of instances in which, with great respect, I cannot see on the authorities that set-off would not arise. The concept of 'separating out', except insofar as it resembles the topic I am next to discuss, is, in my view, of doubtful

- b* validity as a test of the applicability of the right of set-off; in any case I do not think that the present transaction, in the banker/customer relationship, could properly fall under such a description.

There are several cases in which set-off under s 31 has been held inapplicable where the bankrupt has supplied the creditor with funds for what has been called a 'special purpose'; the creditor is not entitled to set-off against that sum the debt in respect

- c* of which he is to prove in the bankruptcy. In *Re Pollitt*¹³ the creditor, a solicitor, held money entrusted to him by the bankrupt for future costs; he could not set this off against costs already incurred. In *Re Mid-Kent Fruit Factory*¹⁴ the fund which could not be set-off represented a surplus held by a solicitor out of a sum specially provided by the bankrupt for the satisfaction of claims made prior to bankruptcy.

- d* In *Re City Equitable Fire Insurance Co Ltd (No 2)*¹⁵ a fund held by way of guarantee against the carrying out of specific obligations was held to be 'special' in this sense. In all these cases the funds may be said to have been impressed with quasi-trust purposes and that is sufficient to destroy the mutuality which is a prerequisite of the right to set-off arising, since it is necessary that the debts were between the parties in the same right, a condition which the holding of a sum as trustee would destroy: see

- e* *Re Asphaltic Wood Pavement Co, Lee & Chapman's Case*¹⁶. That there was a particular motive in the present case, not always discernible in the banker/customer relationship, is clear, but that does not mean that the sum sought to be set-off was due by the bank to the company in any different right of a fiduciary character. In my opinion, accordingly, there is nothing in the present agreement to take the dealings between the parties outside the range of s 31.

- f* The question to which I now turn is, on the view I have formed, really hypothetical, and not calling for decision, but we were urged on any contingency to give our opinions on it. The question is whether, if assumptions be made that the transactions between the parties were such that the provisions of s 31 would have been applicable on a winding-up, and that the terms of the agreement were such as to express an intention to 'contract out' of the requirements as to set-off contained in that section, the law permits the provisions of the section to be set aside by agreement of parties

- g* in such circumstances. As a preliminary to the examination of the authorities, some assistance can be gained from the history of the provision. The determining words are:

- h* 'an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively.'

We were referred to the relevant Acts of 1729, 1732, 1825, 1849, and 1869 (the Act immediately preceding that of 1914), all of which make provision for set-off. The language in its present form was first used in 1869; in previous Acts provisions of similar import, although narrower in scope, contained such phrases as 'one debt or demand may be set against another'. It is at least not improbable that the mandatory form of words was introduced as a matter of policy, in order to emphasise that the operation of set-off was not to be in the option of the parties or one of them; certainly there is an ample number of expressions of judicial opinion, whether obiter dicta or not seems immaterial, lending support to that view.

13 [1893] 1 QB 455

14 [1896] 1 Ch 567

15 [1930] 2 Ch 293, [1930] All ER Rep 315

16 (1885) 30 Ch D 216

An interesting feature of this controversy is that while by s 318 of the Companies Act 1948 the provisions of the Bankruptcy (Scotland) Act 1913 relating to ranking of claims are imported into the Scottish liquidation code, there is no equivalent to s 31 to be found in the latter Act. The right of set-off, or, as Bell¹⁷ calls it, the balancing of accounts in bankruptcy, stands on the common law of compensation or retention, expanded in cases of bankruptcy to include debts which would not be susceptible of set-off in the case of a solvent creditor. For example, in bankruptcy, the debts need not be of the same nature, or both due at the same time, or both liquid. Bell¹⁸ supplies an illuminating account of the parallel development of the law in England and Scotland respectively. It would hardly be possible to maintain in Scotland that set-off is mandatory, and independent of the act or agreement of parties, since 'it must be pleaded by the debtor who wishes to take advantage of it' and again¹⁹:

'Compensation may be pleaded not only by the primary debtor, but even *illo tacente vel negante*, by anyone having an interest, as a cautioner in a bond, or an indorser of a bill of exchange . . .'

So, if set-off be mandatory in England, this seems to be one of the fields in which the law relating to British companies varies according as they are registered in England or in Scotland.

The authorities are not in a condition entirely satisfactory for the drawing of a confident conclusion. *Obiter dicta* apart, I do not think that until *Rolls Razor Ltd v Cox*²⁰ there was any case in which it was decided that an actual agreement which purported to contract out of s 31 was pro tanto unenforceable, although there are cases, such as *British Guiana Bank v Official Receiver*¹ and *Watkins v Lindsay & Co*², in which it was held that an actual agreement did not in fact purport to contract out. In the latter case Wright J (if correctly reported) said³: 'there must be something equivalent to a binding agreement that there shall be no set-off'—an expression which, read literally, does not seem to be consistent with the proposition that such an agreement could never have legal effect. The same observation is true of the judgments in the Court of Appeal in *Re Vaughan, ex parte Fletcher*⁴.

In *Deering v Hyndman*⁵ a firm had committed an act of bankruptcy. A number of creditors agreed among themselves that the business should be continued for the purpose of its being wound up. They entered into a contract with the firm to the effect that thereafter the firm were to sell exclusively for cash on delivery, and on no other terms as to payment whatever, and that no creditor of the firm who thereafter purchased goods from the firm should have any right of set-off of the debt of the firm to himself as against the goods so purchased. Hyndman, who was a party to this contract, in defiance of its terms bought goods from the firm on credit, and claimed to set-off against the unpaid price the amount the firm owed him. It was in these circumstances that the Irish court held that 'the defendant is bound to pay for the goods which he purchased and pay for them in cash, not by setting up a set-off': per May CJ⁶. Although Johnson J decided the case on the maxim *quilibet potest renunciare juri pro se introducto*, and his judgment therefore supports the company's case, May CJ⁶ expressly went on the ground that—

'a special agreement was entered into in this case, not by any particular

¹⁷ Bell's Commentaries II, 119

¹⁸ Bell's Commentaries II, 119-121

¹⁹ Goudy on Bankruptcy (4th Edn) pp 551, 552

²⁰ [1967] 1 All ER 397, [1967] 1 QB 552

¹ (1911) 104 LT 754

² (1898) 5 Mans 25

³ (1898) 5 Mans at 29

⁴ (1877) 6 Ch D at 357

⁵ (1886) 18 LR (Ir) 323, 467

⁶ (1886) 18 LR (Ir) at 332

a creditor, but by the general body, to exclude a set-off . . . and . . . agreement not inconsistent with the Bankruptcy Code, but, on the contrary, in harmony with that Code, and in order to further and protect the rights of the general body of the creditors.’

The case of *Deering*⁷ is thus seen to be of a very special character, depending on an agreement far removed both in content and objective from that in the present case; it can in my opinion not be relied on as contradicting the general rule against contracting out which has so often been stated.

b Apart from the express decision of the Court of Appeal in *Rolls Razor Ltd v Cox*⁸, the proposition that the provisions for set-off in bankruptcy are mandatory, and cannot be contracted out of, depends on a number of dicta which I will not cite again but will merely refer to. I may observe that the plain statements by Lord Selborne LC in *Re Deveze*, *ex parte Barnett*⁹ and in *Mersey Steel & Iron Co v Naylor, Benzon & Co*¹⁰ appear not to have been cited in *Deering v Hyndman*¹¹. In *Re Vaughan, ex parte Fletcher*¹², the opinion of Bacon CJ after quoting Lord Selborne LC in *Re Deveze, ex parte Barnett*¹³ that ‘if there were such an agreement as alleged by the debtors, that law put an end to it’, was not touched on in the judgments of the Court of Appeal⁸. The rule was stated three times by Lord Hanworth MR in *Re City Life Assurance Co Ltd*¹⁴, *Re Fenton (No 1)*¹⁵ and *Re City Equitable Fire Insurance Co Ltd (No 2)*¹⁶. It was also referred to with approval by Hallett J in *Victoria Products Ltd v Tosh & Co Ltd*¹⁷.

In my opinion, accordingly, the rule now is that the terms of s 31 are mandatory in the sense that not only do they lay down statutory directives for the administration of claims in bankruptcy, but they also make it impossible for persons effectively to contract, either before or after an act of bankruptcy has occurred, with a view to the bankruptcy being administered otherwise than in accordance with the statutory directives. In other words, as Lord Denning MR said in *Rolls Razor Ltd v Cox*¹⁸, ‘the parties cannot contract out of the statute’. I must admit to having been impressed by the argument that such a rule—enunciated as it was for the first time in 1967, otherwise than by obiter dicta, albeit some of great weight—may be expected to form a serious embarrassment to those wishing to adopt the beneficial course of agreeing to moratoria for the assistance of business in financial difficulties. But if that be so, it seems to call for the intervention of the legislature. It is, in any event, generally agreed that a restatement of the law of bankruptcy, both for England and for Scotland, is overdue.

For these reasons, I would allow this appeal.

g Appeal allowed.

Solicitors: *Waltons & Co* (for the bank); *Landau & Co* (for the company).

S A Hatteea Esq Barrister.

7 (1886) 18 LR (Ir) 323, 467
 8 [1967] 1 All ER 397, [1967] 1 QB 552
 h 9 (1874) 9 Ch App 293
 10 (1884) 9 App Cas 434, [1881-85] All ER Rep 365
 11 (1886) 18 LR (Ir) 323, 467
 12 (1877) 6 Ch D 350
 13 (1874) 9 Ch App at 295
 14 [1926] Ch at 202, [1925] All ER Rep at 457
 15 [1931] 1 Ch at 104, [1930] All ER Rep at 18, 19
 j 16 [1930] 2 Ch 293 at 310, [1930] All ER Rep 315 at 318, 319
 17 (1941) 165 LT at 80
 18 [1967] 1 All ER at 403, [1967] 1 QB at 570

Canada Safeway Ltd v Inland Revenue Comrs ^a

CHANCERY DIVISION

MEGARRY J

25th, 26th NOVEMBER 1971

Stamp duty – Relief from duty – Transfer between associated companies – Associated companies – One company beneficial owner of not more than 90 per cent of issued share capital of the other – Meaning of issued share capital – Canadian company having two classes of share – American company owning less than 90 per cent of nominal issued share capital of Canadian company but more than 90 per cent in value of issued share capital of Canadian company – Transfer of shares held by American company in English company to Canadian company – Whether American company beneficial owner at time of not less than 90 per cent of issued share capital of Canadian company – Whether issued share capital meaning nominal issued share capital or value of issued share capital – Whether American and Canadian companies associated companies – Finance Act 1930, s 42, as amended by Finance Act 1967, s 27. ^b ^c

At 28th December 1967 the issued share capital of the taxpayer company ('the Canadian company') consisted of 62,387 cumulative redeemable preference shares of 100 Canadian dollars each, with a nominal value of 6,238,700 Canadian dollars, and 280,000 ordinary shares of 10 Canadian dollars each with a nominal value of 2,800,000 Canadian dollars. An American company owned the whole of the ordinary shares but none of the preference shares in the Canadian company. On nominal values the American company therefore owned less than one-third of the issued share capital of the Canadian company. The actual value of the ordinary shares, however, amounted to 195 million dollars, whereas the actual value of the preference shares was less than 7 million dollars. Accordingly, on an actual value basis, but not on a nominal value basis, the American company owned more than 90 per cent of the issued share capital of the Canadian company. On 28th December 1967 the American company sold and transferred to the Canadian company 2,770,000 'A' ordinary shares in an English company for nearly 18 million US dollars. The consideration for the transfer of the shares was stated in the form of transfer to be 10s, but the Stamp Duty Office claimed ad valorem duty amounting to £23,080 under the head 'Conveyance or Transfer on Sale' in the First Schedule to the Stamp Act 1891. The Canadian company claimed relief from duty under s 42^a of the Finance Act 1930, as amended by s 27 of the Finance Act 1967, on the ground that, at the relevant date, the American company was the beneficial owner of not less than 90 per cent of the 'issued share capital' of the Canadian company so that the two companies were associated companies. ^d ^e ^f ^g

Held – The transfer was liable to ad valorem duty because—

(i) *prima facie* the phrase 'issued share capital' meant issued nominal share capital; the words 'share capital' . . . [divided] into shares of a fixed amount' in s 2 (4)^b of the Companies Act 1948 presupposed a context wholly removed from whatever fluctuating value might be put on shares from time to time, and s 42 (2) of the Finance Act 1930, in referring to 'issued share capital', used language which was entirely consonant with that of the 1948 Act; the word 'capital' in s 42 (2) was inept if it was intended to convey the idea of actual value, for the capital of a company might remain wholly unchanged while estimates of the value of the company's assets or its undertaking or its shares might fluctuate greatly on the stock exchange or elsewhere; to proffer a percentage of the value of the issued share capital was no compliance with a statutory demand for a percentage of the issued share capital (see p 671 b to f, post); ^h ^j

^a Section 42, as amended and so far as material, is set out at p 669 h and j to p 670 b, post

^b Section 2 (4), so far as material, is set out at p 671 b, post

- a** (ii) there was no good reason for ousting the prima facie construction of the phrase; the test of nominal value, in contrast to actual value, was simple, workable and, above all, related to the words 'share capital' (see p 671 j, post).

Notes

For relief from transfer stamp duty in the case of transfers of property as between associated companies, see 6 Halsbury's Laws (3rd Edn) 786, para 1585.

- b** For the Finance Act 1930, s 42, see 32 Halsbury's Statutes (3rd Edn) 237.
For the Companies Act 1948, s 2, see 5 *ibid* 123.

Cases referred to in judgment

Curzon Offices Ltd v Inland Revenue Comrs [1944] 1 All ER 606; *affg* [1944] 1 All ER 163, 9 Digest (Repl) 709, 4703.

- c** *Escoigne Properties Ltd v Inland Revenue Comrs* [1958] 1 All ER 406, [1958] AC 549, [1958] 2 WLR 336, Digest (Cont Vol A) 178, 4703a.
Lever Bros Ltd v Inland Revenue Comrs [1938] 2 All ER 808, [1938] 2 KB 518, 107 LJKB 669, 159 LT 136, 9 Digest (Repl) 420, 2720.

Case stated

- d** 1. The opinion of the court was desired as to the stamp duty chargeable on a transfer dated 28th December 1967 ('the transfer') being a transfer to the appellant, Canada Safeway Ltd ('the Canadian company') of 2,770,000 'A' ordinary shares in Safeway Food Stores Ltd ('the English company') which had been presented by the Canadian company to the commissioners under s 12 of the Stamp Act 1891 for the opinion of the commissioners as to the stamp duty with which it was chargeable.
- e** 2. Safeway Stores Inc ('the American company') was a body corporate which was incorporated with limited liability in 1926 under the laws of the State of Maryland.
3. The Canadian company was a body corporate which was incorporated in Canada with limited liability on 14th January 1929 by letters patent under the Companies Act of Canada under the name of Safeway Stores Ltd. The Canadian company's name was changed to its present name on 23rd June 1947. At all relevant times its authorised share capital was 14,038,700 Canadian dollars divided into 112,387 cumulative redeemable preferred shares of 100 Canadian dollars each ('the preferred shares'), of which 62,387 were issued, and 280,000 common shares of 10 Canadian dollars each ('the common shares') all of which were issued and fully paid. All of the common shares were in the beneficial ownership of the American company and carried the right to one vote per share at all general meetings of the Canadian company. None of the preferred shares was in the beneficial ownership of the American company.
- g** The preferred shares carried no right to vote at any meeting of the shareholders of the Canadian company unless and until the Canadian company from time to time should fail to pay in the aggregate six quarterly dividends on the preferred shares of any series on the dates on which the same should have been paid according to the terms thereof. At all relevant times no such failure had occurred. The preferred shares were quoted on the Montreal and Toronto stock exchanges. They were redeemable at any time by the Canadian company on 30 days' notice at a price varying in accordance with the date of redemption from 104 Canadian dollars to 100½ Canadian dollars and the Canadian company had the right to purchase preferred shares in the open market for cancellation, but at all relevant times the 62,387 preferred shares had not been redeemed nor purchased for cancellation.
- h**
- j** 4. The consolidated balance sheet of the Canadian company as at 30th December 1967 showed what was therein described as 'shareholders' equity' to be 95,907,431 Canadian dollars. The 'shareholders' equity' comprised the par value of the preferred shares (6,238,700 Canadian dollars), the par value of the common shares (2,800,000 Canadian dollars) and retained earnings (86,868,731 Canadian dollars). At all relevant times the actual value of the preferred shares (as ascertained from the stock market quotations) was below par value and the actual value of the common shares (as

ascertained from the balance sheet) exceeded 90 per cent of the aggregate actual values of the 62,387 preferred shares and of the common shares. a

5. The English company was a private company incorporated in England with limited liability on 3rd June 1954 under the Companies Act 1948. At all relevant times its authorised share capital was £4,000,000 and its issued share capital consisted of 2,770,000 'A' ordinary shares of £1 each credited as fully paid up and of 250,000 'B' ordinary shares of £1 each credited as fully paid up. Prior to the date of the transfer the 2,770,000 'A' ordinary shares were in the beneficial ownership and registered in the name of the American company. b

6. By an agreement ('the agreement') executed on 27th December 1967 but expressed to be dated and entered into as of 30th September 1967 and made between the American company and the Canadian company the American company agreed to sell and transfer to the Canadian company and the Canadian company agreed to purchase and acquire from the American company 'effective immediately after the close of business on 30th September 1967', inter alia, the 2,770,000 'A' ordinary shares owned by the American company in the English company for an aggregate purchase price of 17,827,876.40 US dollars, of which 5,539,187.36 US dollars represented the proportion payable in respect of the ordinary shares. c

7. The agreement was duly completed on 28th December 1967 when the American company executed and delivered to the Canadian company, inter alia, the transfer and received in return the aggregate consideration of 17,827,876.40 US dollars. d

8. It was contended by the Canadian company that the transfer was relieved from liability to ad valorem 'Conveyance or Transfer on Sale' duty by s 42 of the Finance Act 1930 (as amended by s 27 of the Finance Act 1967) because the effect of the transfer was to convey or transfer a beneficial interest in property from one body corporate (namely the American company) to another (namely the Canadian company) and that the bodies in question were associated in that the American company was at the relevant time the beneficial owner of not less than 90 per cent of the issued share capital of the Canadian company, as it owned not less than 90 per cent of the actual value of the said issued share capital. e

9. The commissioners were of the opinion that relief under s 42 (as amended) was not appropriate because the American company and the Canadian company were not associated at the relevant time in that the American company was beneficial owner of less than 90 per cent of the issued share capital of the Canadian company, as it owned less than 90 per cent of the nominal value of the issued share capital. f

10. It was common ground that if the contention of the Canadian company was correct and relief under s 42 (as amended) was appropriate where one body corporate was beneficial owner of not less than 90 per cent of the actual value of the issued share capital of the other, although not beneficial owner of not less than 90 per cent of the nominal value of the issued share capital of the other, the Canadian company would be entitled to the relief which it claimed. g

11. The commissioners therefore refused relief under s 42 and assessed the transfer with ad valorem 'Conveyance or Transfer on Sale' duty at the rate of 10s for every £50 or part of £50 on the amount or value of the consideration expressed in the agreement, i.e. 5,539,187.36 US dollars converted at the rate of 2.4 US dollars to £1, namely £2,307,994. The duty thus assessed amounted to £23,080. h

12. Being dissatisfied with the assessment made and having paid the duty in accordance therewith the Canadian company for the purposes of an appeal against the assessment to the High Court required the commissioners to state and sign a case. i

J G Monroe for the Canadian company.

Michael Wheeler QC and *P L Gibson* for the Crown.

MEGARRY J. This case involves a short point on the law of stamp duty. It arises on a case stated for the opinion of the court by the Commissioners of Inland

- a* Revenue under the Stamp Act 1891, s 13. The question is whether or not a transfer of shares is liable to stamp duty of £23,080 as assessed by the commissioners. The shares are in an English company called Safeway Food Stores Ltd, and the transfer is dated 28th December 1967. The transferor is a company incorporated in Maryland called Safeway Stores Inc, and the transferee is a company called Canada Safeway Ltd, incorporated in Canada. I shall call the two companies 'the American company' and 'the Canadian company' respectively. It is the Canadian company which is the appellant before me, the commissioners being the respondents. The consideration for the transfer of the shares is stated in the transfer to be 10s, but the transfer was made pursuant to an agreement under seal executed on 27th December 1967; and it is not disputed that the consideration under that agreement that is appropriate to transfer is 5,539,187·36 US dollars. This, converted at the rate of 2·40 US dollars to the £1, is equivalent to £2,307,994. The ad valorem duty on this under the head 'Conveyance or Transfer on Sale', at the rate of 10s for every £50 or part of £50, comes to the £23,080 in dispute.

- b* One question alone arises for decision, and that is whether or not the Canadian company is entitled to relief from stamp duty under the Finance Act 1930, s 42, as amended by the Finance Act 1967, s 27. Stated broadly, s 42 exempts an instrument from stamp duty when it is shown that the instrument transfers a beneficial interest from one body corporate to another body corporate, and the two bodies corporate are 'associated' in the sense that, inter alia, one is the beneficial owner of not less than 90 per cent of the issued share capital of the other. Here, the position at the date of the transfer was that the issued share capital in the Canadian company had a total nominal value of 9,038,700 Canadian dollars. This falls into two classes. There were 62,387 cumulative redeemable preference shares of 100 Canadian dollars each, with a nominal value of 6,238,700 Canadian dollars: and of these the American company owned none. The rest of the issued share capital in the Canadian company consisted of 280,000 ordinary shares of 10 Canadian dollars each; and the American company owned all of these. It had a nominal value of 2,800,000 Canadian dollars. On nominal values, the American company accordingly owned less than one-third of the issued share capital, and thus fell far short of the requisite 90 per cent for exemption from stamp duty. On the other hand, it is agreed that the actual value of the shares owned by the American company was over 195 million dollars, while the shares not owned by that company were worth less than 7 million dollars. If the test is actual value and not nominal value, the American company thus easily satisfies the 90 per cent requirement. It is accordingly common ground that the whole question in dispute turns on whether the percentage to be taken is to be based on actual value or on nominal value: if the former, the exemption applies and the appeal succeeds; if the latter, the exemption does not apply and the appeal fails.

- c* I turn to the Act. By s 42 (1):

- d* 'Stamp duty under the heading "Conveyance or Transfer on Sale" in the First Schedule to the Stamp Act, 1891, shall not be chargeable on an instrument to which this section applies.'

- e* There is then a proviso relating to the formalities of exemption which has not been relied on and which I need not read. The original sub-s (2) was, by the Finance Act 1967, s 27 (2), replaced by a new sub-s (2) and sub-s (3), and these were in force before the execution of the transfer in question. The two new subsections read as follows:

- f* '(2) This section applies to any instrument as respects which it is shown to the satisfaction of the Commissioners that the effect thereof is to convey or transfer a beneficial interest in property from one body corporate to another, and that the bodies in question are associated, that is to say, one is beneficial owner of not

less than ninety per cent. of the issued share capital of the other, or a third such body is beneficial owner of not less than ninety per cent. of the issued share capital of each. a

(3) The ownership referred to in subsection (2) above is ownership either directly or through another body corporate or other bodies corporate, or partly directly and partly through another body corporate or other bodies corporate, and Part I of Schedule 4 to the Finance Act 1938 (determination of amount of capital held through other bodies corporate) shall apply for the purposes of this section with the substitution of references to issued share capital for references to ordinary share capital.' b

The argument, of course, centred round the phrase 'ninety per cent. of the issued share capital' in sub-s (2). For the Canadian company counsel accepted that the phrase admitted of either construction, namely, nominal value or actual value. He also accepted that one might well start with an initial idea of the nominal value being the right construction. But, he said, one must consider the purpose of the section, and adopt the construction which best effectuated that purpose. By way of example he guided me to some sections in the Companies Act 1948 which used phrases which made it clear, or at least rather clearer, which meaning was intended; and, on behalf of the commissioners, counsel for the Crown matched counsel for the Canadian company by guiding me to other sections in the same Act to a similar effect: see ss 141 (2) and 209 (1), (2), and ss 5 (2) (a) and 134 (b). Counsel for the Canadian company also pointed to the difficulty of applying the nominal value test to the shares of no par value that are to be found in some unlimited companies and some foreign companies; and he took me to some general statements of the purpose of this legislation that had been made in *Curzon Offices Ltd v Inland Revenue Comrs*¹, per Goddard LJ, and in *Escoigne Properties Ltd v Inland Revenue Comrs*², per Lord Denning. Counsel for the Canadian company's broad submission was that to make sense one had to bring in the idea of actual value rather than nominal value. Where, as here, one company has, by actual value, what in substance is the overwhelming ownership of another company, it was unreasonable that effect should be denied to that overwhelming ownership merely because the nominal value of the shares fell short of the requisite percentage. Where there was only one class of shares, either test would naturally produce the same result; but where, as here, there were two classes, and the two tests produced different results, effect should be given to the test of actual value, thus preferring substance to form. c
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The legislature could, of course, have adopted any test it wished. The percentage might have been in terms based on nominal values, actual values, number of shares, control, or, indeed, anything else. One may subscribe wholeheartedly, as I do, to Lord Denning's views in the *Escoigne* case² as to the value of examples as showing how a complicated statutory provision works, and the need to 'get the feel' of the provision before interpreting it; but ultimately, as Lord Denning pointed out, one is driven back to the actual words used in the Act. In giving instances of how s 42 worked, Lord Denning³ used the phrases 'holds more than ninety per cent. of the shares' and 'a ninety per cent. shareholding'. For the purpose of the examples these no doubt were convenient phrases; but they cannot be applied literally to a case where, for example, there are 950 shares of 5p each and 50 shares of £1 each. The owner of the 950 shares owns more than 90 per cent of the shares, but holds far less than 90 per cent of the nominal value of the shares. Rightly, nobody has suggested to me that the test could be the number of shares, rather than the nominal value or the actual g
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¹ [1944] 1 All ER 606 at 607

² [1958] 1 All ER 406 at 413-415, [1958] AC 549 at 564-567

³ [1958] 1 All ER at 414, 415, [1958] AC at 566, 567

a value. A similar comment applies to the phrase of Goddard LJ in the *Curzon* case⁴, where he spoke of 'the whole or practically the whole of the shares'. In the statutory phrase (which is identical in both the original and the revised versions of s 42 (2)) the percentage relates to the 'issued share capital', and not the 'issued shares'.

b Now it seems to me that the *prima facie* meaning of the phrase 'ninety per cent. of the issued share capital' is 90 per cent of the nominal or face value of the issued share capital, rather than 90 per cent of its market value. The Companies Act 1948, s 2 (4), provides that:

'In the case of a company having a share capital—(a) the memorandum must also, unless the company is an unlimited company, state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount . . .'

c The concept is that of a 'share capital' which is 'divided into shares of a fixed amount'. This is a concept wholly removed from whatever fluctuating value may be put on those shares from time to time. When the Finance Act 1930, s 42 (2), refers to 'issued share capital', it uses language which, as might be expected, is entirely consonant with that of the Companies Act 1948. The 90 per cent in s 42 (2) is a percentage of the
d 'capital' of the company, as qualified by the adjectival words 'issued share'. The word 'capital' seems to me to be a word which in this context is inept if it is intended to convey the idea of actual values. The capital of a company may remain wholly unchanged while estimates of the value of the company's assets or its undertaking or its shares fluctuate greatly on the stock exchange and elsewhere. To proffer a percentage of the value of the issued share capital is no compliance with a statutory
e demand for a percentage of the issued share capital itself. Furthermore, the phrase 'actual value', as with most phrases relating to value, is capable of a variety of meanings. Is one speaking of the market value of the shares, of the business as a going concern, or of the assets? Is one speaking of the value on the information in fact known to the world, or is one assuming that all is known and that no secret information remains unrevealed? Various express statutory phrases relating to value have
f proved difficult enough to construe, but here what is in effect sought to be done is to imply some reference to 'actual value': and the process of first ascertaining and then construing an unexpressed formula is unlikely to be easier than that of construing a formula set out in express terms.

I accept, of course, that there may be cases which seem to fall within the general object or purpose of s 42 but fail to satisfy its terms. However, that cannot alter the
g effect of the words used. Given a general object, the draftsman, in looking for a simple and workable test, may hit on a formula which gives substantial effect to the general purpose, but nevertheless is liable to include some marginal cases that ought to be excluded, or exclude some marginal cases that ought to be included. It may be possible to achieve an exact coincidence between the purpose and the test only at the expense of deplorable complexity; and so in the end the simpler test may remain,
h with whatever marginal faults it may have. In such cases, the duty of the court is to put a fair meaning on the language actually used, and not to adopt a procrustean distortion in order to fit what may be thought to be the overriding purpose of the section. The reasons for laying down a rule must not be confounded with the rule itself.

j In the present case, I can see no good reason for ousting the *prima facie* construction of the phrase in question, and good reason for adhering to it. The test of nominal value is simple, workable and, above all, related to the words 'share capital'. Counsel for the Crown also prayed in aid the minimum of departmental bother that it would occasion the commissioners; but I doubt whether experience is sufficiently uniform to demonstrate that this is an object that Parliament has invariably sought to achieve.

Counsel for the Crown also relied to some extent on *Lever Bros Ltd v Inland Revenue Comrs*⁵, a stamp duty case in which the phrase 'ninety per cent. of the issued share capital' in the Finance Act 1927, s 55 (1), was apparently assumed by all concerned to refer to nominal value. Counsel engaged were most distinguished, and the decision was by the Court of Appeal; but at best it is an authority sub silentio in a case in which the issue before me does not seem to have been even mentioned. I can therefore give it little weight, beyond saying that it shows that the statutory phrase readily and easily induces an assumption that nominal values are to be applied. a

I also bear in mind that the state of shareholding between associated companies is normally a matter between those companies, and where two companies find themselves linked by a percentage which is sufficient by actual value but not by nominal amount, the matter will usually not be beyond cure if proper advice is taken in time. Nor do I forget that s 42 (3) makes the Finance Act 1938, Sch 4, Part I, applicable, with modifications, and the phrase that I am construing may have repercussions in other spheres. I do not think I need read the six lengthy paragraphs in that Part of that Schedule; I refer to them because I should not like it to be thought that after the discussion before me I had left out of account provisions evidently framed with so thoroughgoing a zeal. I say no more than that I can see nothing in those provisions which provides any impetus towards a basis of actual value. b

The case is one in which the exemption applies only where it 'is shown to the satisfaction of the Commissioners' that the provisions of the subsection are satisfied. I can only say that, despite the gallant endeavours of counsel for the Canadian company, in my judgment the commissioners were quite right not to be satisfied in this case. Accordingly, to the first question in the case stated for the opinion of the court, namely, whether the transfer is liable to duty as assessed by the commissioners, I give the answer 'Yes'; and on that answer the second question does not arise. c

Appeal dismissed. d

Solicitors: *Lawrence Jones & Co* (for the Canadian company); *Solicitor of Inland Revenue.* e

K Buckley Edwards Esq Barrister. f

⁵ [1938] 2 All ER 808, [1938] 2 KB 518

a Knipe v British Railways Board

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, SACHS AND STAMP LJJ

4th, 5th NOVEMBER 1971

- b* Limitation of action – Extension of time limit – Material fact outside knowledge of plaintiff – Material fact of decisive character – Lack of knowledge of extent of injury – Plaintiff injured on employers' premises in 1948 – Full extent of injury not realised until after six year limitation period expired – Plaintiff receiving offer of workmen's compensation in settlement in 1968 when became redundant – Plaintiff's union advising him throughout no common law claim – Plaintiff only seeking legal advice after became redundant – Plaintiff bringing negligence action within 12 months of receiving legal advice – Whether claim statute-barred – Limitation Act 1939, s 2 (1) – Limitation Act 1963, ss 1, 7.

- The plaintiff was an engine-driver employed by the defendants. In March 1948 he was injured when he fell on a faulty step on the defendants' premises. His injury was diagnosed as a 'strained knee'. He was off work for several weeks and was paid *d* some £13 workmen's compensation. In 1958 his knee began to give him serious trouble. He saw a consultant who informed him that he had a ruptured tendon and that he would have to wear a caliper. Had the ruptured tendon been diagnosed in 1948 when the accident occurred it could have been remedied by an operation. The plaintiff then told his union, of which he had been a member from the age of 13, that he wished to file a claim against the defendants. They informed him that he *e* could only claim workmen's compensation and that it was the defendants' practice to wait until an employee retired and then to pay a lump sum in settlement of any workmen's compensation for partial incapacity. The plaintiff was dismissed by reason of redundancy in 1968 and he forthwith asked his union to institute a claim for damages in respect of the accident in 1948. The union still took the view that it was only a matter for a lump sum settlement under the Workmen's Compensation *f* Act 1925. The plaintiff was offered £75 by the defendants in settlement of any claim which he might have under the 1925 Act. He rejected the offer and on 20th January 1969 consulted a firm of solicitors. Within a year of that date he issued a writ against the defendants claiming damages for personal injuries, having been given leave under the Limitation Act 1963. The defendants contended that the plaintiff could not pursue his action at common law because (i) by accepting the workmen's *g* compensation payments in 1948 he had exercised his option under s 29 (1)^a of the 1925 Act and (ii) his action having been barred by s 2 (1)^b of the Limitation Act 1939 in 1954, he was not entitled to take advantage of the Limitation Act 1963.

Held – (i) The plaintiff was not barred by s 29 of the 1925 Act from pursuing his claim at common law since the defendants had failed to establish that the plaintiff knew

- h* *a* Section 29 (1), so far as material, provides: 'When the injury was caused by the personal negligence ... of the employer or of some person for whose act or default the employer is responsible ... the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act. . .'
- j* *b* Section 2 (1), so far as material, provides: 'The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued . . . (a) actions founded on . . . tort . . .' The proviso to s 2 (1) added by s 2 (1) of the Law Reform (Limitation of Actions, etc) Act 1954 provides: 'Provided that, in the case of actions for damages for negligence . . . where the damages claimed by the plaintiff for the negligence . . . consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years.'

when he accepted the £13 that he had an option under s 29 and a person could not be held to have exercised an option unless he knew that he had one to exercise (see p 676 j to p 677 b, p 678 g and h and p 681 a, post). a

Young v Bristol Aeroplane Co Ltd [1946] 1 All ER 98 and *Leathley v John Fowler & Co Ltd* [1946] 2 All ER 326 applied.

(ii) Although the plaintiff could not, by virtue of the 1939 Act, have brought a common law action after 1954, he was entitled to take advantage of the 1963 Act and pursue his claim for the following reasons— b

(a) by the time his action became statute-barred by the 1939 Act he could not have known that he had a worthwhile cause of action since he did not then know the extent of his injuries (see p 677 j to p 678 a, p 679 h to p 680 a and p 681 a, post).

(b) he did not have actual or constructive knowledge of the material fact that he had a worthwhile cause of action until he saw his solicitor in January 1969 and in the circumstances he could not reasonably be expected to have sought advice from a solicitor earlier; accordingly he fulfilled the requirements of ss 1 (3)^c and 7^d of the 1963 Act (see p 677 g and h, p 678 c, p 679 d, p 680 a d and f and p 681 a, post); *Smith v Central Asbestos Co Ltd* [1971] 3 All ER 204 applied. c

c Section 1, so far as material, provides:

‘(1) Section 2 (1) of the Limitation Act 1939 (which, in the case of certain actions, imposes a time limit of three years for bringing the action) shall not afford any defence to an action to which this section applies, in so far as the action relates to any cause of action in respect of which—(a) the court has . . . granted leave for the purposes of this section, and (b) the requirements of subsection (3), of this section are fulfilled. d

‘(2) This section applies to any action for damages for negligence . . . where the damages claimed by the plaintiff for negligence . . . consist of or include damages in respect of personal injuries to the plaintiff . . . e

‘(3) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that the material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—(a) either was after the end of the three-year period relating to that cause of action or was not earlier than twelve months before the end of that period, and (b) in either case, was a date not earlier than twelve months before the date on which the action was brought . . .’ f

d Section 7, so far as material, provides:

‘(3) In this Part of this Act any reference to the material facts relating to a cause of action is a reference to any one or more of the following, that is to say—(a) the fact that personal injuries resulted from the negligence . . . constituting that cause of action; (b) the nature or extent of the personal injuries resulting from that negligence . . . (c) the fact that the personal injuries so resulting were attributable to that negligence . . . or the extent to which any of those personal injuries were so attributable. g

‘(4) For the purposes of this Part of this Act any of the material facts relating to a cause of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a reasonable person, knowing those facts and having obtained appropriate advice with respect to them, would have regarded at that time as determining, in relation to that cause of action, that (apart from any defence under section 2 (1) of the Limitation Act 1939) an action would have a reasonable prospect of succeeding and of resulting in the award of damages sufficient to justify the bringing of the action. h

‘(5) . . . for the purposes of this Part of this Act a fact shall, at any time, be taken to have been outside the knowledge (actual or constructive) of a person if, but only if,—(a) he did not then know that fact; (b) in so far as that fact was capable of being ascertained by him, he had taken all such action (if any) as it was reasonable for him to have taken before that time for the purpose of ascertaining it; and (c) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such action (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances . . . i

‘(8) In this section “appropriate advice”, in relation to any fact or circumstances, means the advice of competent persons qualified, in their respective spheres, to advise on the medical, legal and other aspects of that fact or those circumstances, as the case may be.’

Notes

- a** For the extending of the limitation period, see Supplement to 24 Halsbury's Laws (3rd Edn) para 381, and for cases on the subject, see Digest (Cont Vol B) 500-502, 1933a-2022Aa and Digest (Cont Vol C) 641-644, 1933b-2022Ad.
- For repeals and savings under the Industrial Injuries Acts, see 27 Halsbury's Laws (3rd Edn) 665, 666, para 1204.
- b** For the Limitation Act 1939, s 2, see 19 Halsbury's Statutes (3rd Edn) 61, and for the Limitation Act 1963, ss 1 and 7, see *ibid* 103, 108.

Cases referred to in judgments

- Leathley v John Fowler & Co Ltd* [1946] 2 All ER 326, [1946] KB 579, 115 LJKB 424, 175 LT 212, 34 Digest (Repl) 705, 4835.
- c** *Newton v Cammell Laird & Co (Shipbuilders and Engineers) Ltd* [1969] 1 All ER 708, [1969] 1 WLR 415, Digest (Cont Vol C) 644, 2022Ac.
- Pickles v National Coal Board* [1968] 2 All ER 598, [1968] 1 WLR 997, Digest (Cont Vol C) 641, 1933c.
- Smith v Central Asbestos Co Ltd* [1971] 3 All ER 204, [1971] 3 WLR 206.
- Young v Bristol Aeroplane Co Ltd* [1946] 1 All ER 98, [1946] AC 163, 115 LJKB 63, 174 LT 39, 34 Digest (Repl) 705, 4834.
- d**

Appeal

- This was an appeal by the defendants, the British Railways Board, from the judgment of Cusack J given on 6th May 1971 at Carlisle Assizes awarding the plaintiff, John Knife, an employee of the defendants, £2,134.63 damages for personal injuries sustained in an accident at the defendants' locomotive depot at Moor Row, Whitehaven, in the county of Cumberland, on 2nd March 1948. The facts are set out in the judgment of Lord Denning MR.
- e**

Tudor Evans QC and *Hart Jackson* for the defendants.

I H Morris-Jones QC and *A W Bell* for the plaintiff.

- f** **LORD DENNING MR.** This is a most unusual case. Mr John Knife was an engine-driver employed by the London Midland and Scottish Railway Company in Cumberland. Over 23 years ago, on 2nd March 1948 he was going to work. He was walking down some steps to the depot at Moor Road, Whitehaven. One of the steps gave way. He fell and injured his knee. He says that those steps were dangerous; that they had been a subject of complaint by a works council; and that his employers were at fault because they had not repaired them.
- g**

- The records show that that injury was described at the time as 'strained knee, left leg' and that Mr Knife was paid workmen's compensation by his employers from 2nd March to 19th April 1948, a total sum of £13 13s 4d. After some weeks he went back to his work as an engine-driver. He was aware of weakness in the knee all the time, but he managed reasonably well for many years. Then, in 1958, ten years after the accident, his knee gave him serious trouble. It often gave way, and he could not walk over rough ground. He went to his doctor, and then to a consultant. It was then discovered that his injury was far more serious than had originally been thought. He had a ruptured tendon. The consultant said: 'It is obvious in retrospect that the injury must have gone undiagnosed.' The original doctors did not realise how bad it was. They thought it was just a strained knee, and let him go back to work. If they had realised that it was a ruptured tendon, it could have been remedied by an operation. But, after ten years, it was too late to do anything. In 1958 the doctors told him that he would have to wear a caliper, i.e. an iron support for his leg. From that time onwards he has had to wear it, but he has carried on with his work as an engine-driver all the way through.
- h**
- i**

On 16th November 1958 Mr Knife wrote to his union in these words:

'I wish to file a claim against British Railways. On March 2nd 1948 on my way to duty some steps belonging to British Railways collapsed and this resulted in the tendon of my left knee to become ruptured. In latter years there has been wasting of the muscles which forced me to consult my doctor, who transferred me to the specialist, the result being I now have to wear a caliper, the injury has impeded my walking.'

The union advised him that he had no claim for damages. It was, they said, a workmen's compensation case, and nothing else. That advice was quite correct—at that time. The statute of limitations barred any action for damages. The union told him that he could only claim workmen's compensation, and only then if he was not earning his full wages. They told him that the practice of the railway company was to wait until he retired, and then the company would pay him a lump sum in settlement of any workmen's compensation for partial incapacity. Mr Knipe was dissatisfied with this advice, but he did not think he could go against it. He acquiesced in what they said, and went on working for another ten years. Then in 1968 diesel engines were introduced, and he became redundant. On 4th May 1968 he left the service and received redundancy money.

At once Mr Knipe said to himself: 'Now is the time when the union told me I should get my compensation for my accident.' So, on the very next day, 5th May 1968, he approached his union and asked them to institute a claim for damages in respect of his accident in 1948. The union still took the view that it was not a case for common law damages at all; it was only a matter for a lump sum settlement under the Workmen's Compensation Act 1925. They put it before British Railways. Eventually, on 30th September 1968, British Railways wrote to the union, saying:

'I have enquired into this case and am prepared to offer your member, on the usual terms, a lump sum of £75 in final settlement of any claim which he may have under the Workmen's Compensation Acts . . .'

Mr Knipe thought that £75 was quite ridiculous. In November 1968 he tried again to get his union to take up the case. He told the union that he rejected the £75 and asked the union for their reasons for turning down the case. He said:

'I would also like to know if the NUR have obtained the opinion of a lawyer in this case.'

But he got no further with the union. In December 1968 the union simply said that he misunderstood the position. They still thought that he had no claim save under the Workmen's Compensation Acts.

Eventually Mr Knipe became so dissatisfied with the union that on about 20th January 1969 he went to solicitors on his own account. They took up the case for him. His solicitors wrote to the union, but got no satisfaction. So his solicitors determined to take action against British Railways. They went to a judge and obtained ex parte leave for purposes of the Limitation Act 1963. Then, on 15th January 1970, they issued a writ against the British Railways Board for damages for personal injuries. The judge found in favour of Mr Knipe. He assessed the damages at £2,134.63. British Railways appeal to this court.

The first point arises under the old Workmen's Compensation Act. In March 1948 the Workmen's Compensation Act 1925 was in force. (The National Insurance (Industrial Injuries) Act 1946 did not come into force until 5th July 1948.) British Railways said that, under s 29 of the 1925 Act, Mr Knipe had an option either to take workmen's compensation or to claim damages at common law. They said that he had received five weeks' workmen's compensation, and thereby exercised his option. I think the answer to this point is afforded by the opinion of the majority of the House of Lords in *Young v Bristol Aeroplane Co Ltd*¹, which was adopted by this court in

¹ [1946] 1 All ER 98, [1946] AC 163

- a* *Leathley v John Fowler & Co Ltd*². It was there held that a man is not to be held to have exercised his option unless he knew that he had an option. If he did not know that he had a claim at common law, he was not to be barred by taking workmen's compensation. The judge has found here that, although Mr Knipe received payments, he did not know they were workmen's compensation payments. He thought they were sickness benefit. In any case, it is plain that he did not know he had an option of claiming one or the other. He is, therefore, not barred by s 29 of the *Workmen's Compensation Act 1925*.

- The second point arises under the Limitation Act 1963. This Act is a jungle of words; but the decisions of this court have trodden out a path through it. We have held that time does not count against a man until he knows, actually or constructively, that he has a worthwhile cause of action. Once he does know it, actually or constructively, he must bring his action within twelve months of knowledge of it.
- c* The proposition was so stated in *Smith v Central Asbestos Co Ltd*³, and Stamp LJ⁴ analysed the section. (Since August 1971 it is sufficient if he brings it within three years of knowledge of it: see the Law Reform (Miscellaneous Provisions) Act 1971.) The present case has a fresh complication. Here we have an intervening time bar. This accident happened in 1948. At that time the Limitation Act 1939 gave six years in which to bring a common law claim. Mr Knipe did not bring an action within those six years. So by March 1954 his common law claim was barred. It remained barred from that time forward, unless and until the bar was removed by the 1963 Act.
- d*

- What is the effect of an intervening time bar? That is to say, what is the position when the man's claim was already statute-barred when the Limitation Act 1963 was passed? Take a simple illustration. Two men are exposed to injurious dust in 1955. It is due to the employer's breach of regulations. One of them is found suffering from pneumoconiosis in 1961. The other man is found suffering from it in 1964. The second man can clearly take advantage of the 1963 Act so as to overcome the time bar. But, cannot the first man do likewise? I am sure that Parliament intended that he should be able to do so. Both men were affected by this insidious disease owing to the employer's breach of duty. The first man should not be deprived of compensation simply because his disease was discovered before the Act was passed.
- e*

- Strangely enough, however, the Act nowhere deals with the position. But I think that it implicitly gives both men a cause of action. Section 1 (3) (a) shows that, even though a claim is barred by the three year period of limitation, nevertheless the plaintiff can bring an action so long as he does so within 12 months of getting to know the material facts. What are the material facts for this purpose? Here I draw on our previous decisions. One of the most material facts is the knowledge that he has a cause of action. Time does not run against a man until he gets to know, actually or constructively, that he has a worthwhile cause of action. The first man in my illustration (although he knew in 1961 that he had the disease) nevertheless he did not get to know that he had a cause of action—he cannot possibly have known it—until the 1963 Act was passed. He must bring his action within 12 months of getting that knowledge. The second man got to know it in 1964 as soon as he found that he had pneumoconiosis. He must bring his action within the next 12 months. So each man gets the benefit of the 1963 Act so as to avoid the time bar. That is as it should be.
- g*
- h*

- Such is the implication in cases coming within the three year period of limitation (after 1954). A like implication arises in cases coming within the six year period of limitation (before 1954). That appears from s 15 of the Limitation Act 1963.
- i*

I turn to apply this interpretation to the present case. The period of limitation was the six years from 1948 to 1954. During that time Mr Knipe did not know the

² [1946] 2 All ER 326, [1946] KB 579

³ [1971] 3 All ER 204 at 210, 211, [1971] 3 WLR 206 at 214, 215

⁴ [1971] 3 All ER at 219, 220, [1971] 3 WLR at 224, 225

material facts. He knew he had hurt his knee, but he thought it was a trivial hurt, a mere sprain. He did not know that it was a serious injury until 1958. He was then told that it was a ruptured tendon, and he had to wear a caliper for the rest of his life. But by that time the period of limitation had passed. Any action was statute-barred. So, he could not, by any possibility, have known that he had a worthwhile cause of action. He could not conceivably have known it until the Limitation Act 1963 was passed. But, by this time he had been to his trade union, and they had told him—reasonably enough—that he would have to wait until he retired. So, he waited until that time. Then, when he did retire in May 1968, he straightaway went to his union again and asked them to make a claim on his behalf. The union put him off, saying that he had no claim at common law but only under the Workmen's Compensation Act 1925. Eventually he was offered £75, which was quite unacceptable. It was only then that he went to his solicitor. I do not think he could reasonably be expected to go to a solicitor any sooner than he did. He went on 20th January 1969. It was only at that time that he knew, actually or constructively, that he had a worthwhile cause of action. And he brought his action on 15th January 1970, that is, within the 12 months permitted by the Act. I think he has satisfied all the requirements. He is not barred by time.

This is a most unusual case, but I think it falls well within the intentions of the legislature. Here is a man who has served the railway company for his lifetime as an engine-driver. Some 23 years ago he was injured at work owing to his employers' negligence. The only compensation that he received was £13 13s 4d for workmen's compensation for the time he was off work—but no wages. Ten years later, the injury turned out to be much worse than anyone thought. He had to wear an iron caliper to support his leg. He was told that he would get compensation when he retired. But he was offered £75 only. It does not seem fair to me that, for so serious an injury, he should be put off with such a trifling sum. I think the 1963 Act does enable the court to hold that his claim is not barred by the statute of limitations.

I would add that the argument before us has ranged far more widely than the argument before the judge. Many of the points were not raised before him. But, in the end, I think his decision was correct. I would dismiss the appeal.

SACHS LJ. A number of questions have been raised in the course of this appeal, and of these it is convenient first to deal with two. In the first place, I am far from being prepared to hold that the trial judge was wrong when he decided that the plaintiff was not at the time he received the relevant payments aware that they were made under the Workmen's Compensation Acts. He said: 'I accept the plaintiff's evidence that he considered the payments he received to be some sort of insurance benefit.' That finding was challenged here, but the challenge fails. Secondly, even if I were wrong in holding that this challenge was unsuccessful, in my judgment the defendants were very far indeed from establishing that the plaintiff had exercised an option under s 29 of the Workmen's Compensation Act 1925 on which they rely. In this behalf I most willingly follow the decision of this court in *Leathley v John Fowler & Co Ltd*⁵, as to the effect of the decision in the House of Lords in *Young v Bristol Aeroplane Co Ltd*⁶.

From there I turn to the points arising under the Limitation Act 1963—points which were very strongly pressed by both parties. With Lord Denning MR and others who have adverted to this matter, I deeply regret that an Act of such importance to so many men who suffer personal injuries should be so difficult to interpret and the subject of so much obscurity that one case after another comes up to these courts.

In the instant case I naturally start any examination of the problems before us by

5 [1946] 2 All ER 326, [1946] KB 579

6 [1946] 1 All ER 98, [1946] AC 163

a adopting the basis laid down in previous decisions of this court as to how one should interpret s 7 (3) (c) and the other relevant provisions of that section. The judgments of Lord Denning MR and Russell LJ in the case of *Pickles v National Coal Board*⁷, as to the meaning of the words 'the fact that the personal injuries . . . were attributable to that negligence' provided the basis of the phraseology adopted by Widgery LJ in *Newton v Cammell Laird & Co (Shipbuilders and Engineers) Ltd*⁸, where he says⁹:

b 'The missing fact which a man in his position could not know without being advised was that those circumstances would point to his having a worthwhile cause of action against the defendants.'

That phrase 'worthwhile cause of action' has been used in more than one subsequent judgment. In *Smith v Central Asbestos Co Ltd*¹⁰ Edmund Davies LJ pinpointed the

c crucial question and the answer of this court as follows¹¹:

'In the result, is it the case that an injured party has 12 months from the time when he first discovers that his injury not only resulted *in fact* from the act or omission of another but also that his injury is or may well be attributable *in law* to the wrongful act or omission of the other party?'

d The answer to that question, according to the decisions of this court is Yes.

Edmund Davies LJ, it is to be observed, said¹¹ that if he had been left in that matter as of breaking entirely fresh ground, he would have come to the opposite conclusion and commented¹² a little later:

e 'Can that [answer] be right? If it is, the Limitation Act 1963, presumably passed in order to deal with a special set of circumstances, has rendered possible the wide evasion of the statutory limitations in a large variety of cases.'

That is a view with which I for my part have some sympathy and it is illustrated in this particular case by the fact that the courts have been asked to try questions of fact that arose as long ago as 1948. That, however, does not, of course, derogate *f* from the need for this court to follow the tests which I have already said have been adopted by it on the question of the construction of s 7 (3) (c).

It is clear that on the law as it at present stands the plaintiff must show that at the material time he had neither knowledge nor constructive knowledge that he had a worthwhile cause of action. The onus of showing that lies on him. He can also *g* seek to establish as an alternative or additional ground for obtaining the benefit of the 1963 Act that he falls within s 7 (3) (b). To succeed he must, of course, establish that he did not at the material time know the extent of the personal injuries resulting from the relevant negligence.

One has accordingly to consider what is the material time in relation to which a plaintiff must establish one or other, or, if he can, both, of the requisite grounds for exemption from the natural results of the older Limitation Act. It is clear to my *h* mind that one must first address oneself to the situation obtaining while the relevant statute of limitations touching the particular cause of action was running before the 1963 Act came into force. That is because the relevant knowledge must, of course, be knowledge that one *has* a cause of action that is worth pursuing, as opposed to knowledge that one once *had* a cause of action that is *not* any longer worth pursuing

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⁷ [1968] 2 All ER 598, [1968] 1 WLR 997

⁸ [1969] 1 All ER 708, [1969] 1 WLR 415

⁹ [1969] 1 All ER at 720, [1969] 1 WLR at 421

¹⁰ [1971] 3 All ER 204, [1971] 3 WLR 206

¹¹ [1971] 3 All ER at 216, [1971] 3 WLR at 221

¹² [1971] 3 All ER at 217, [1971] 3 WLR at 222

because of some statute of limitations. In this particular case one has first to look at the period commencing March 1948 and ending March 1954. a

Here the plaintiff puts forward his case, as he is entitled to do, relying on the grounds both under heads (b) and (c) of s 7 (3). Taking first head (b), which relates to the extent of the injuries—that extent to my judgment means an extent sufficient to give him a worthwhile cause of action. That extent of which he must have knowledge is one which depends on the facts of each case, and the extent known to the plaintiff must be such as would, if properly advised, lead him to take an action. In this particular case there is a complication that the extent would have had to be such that it would be more to his benefit to rely on a common law action rather than on the Workmen's Compensation Act 1925. Approaching the matter on that basis, he has to my mind shown that he did not before March 1954 have the requisite knowledge as to the extent of his injuries, for the reasons already given by Lord Denning MR. b

Turning now to the facts that needed to be established to bring the plaintiff within head (c), the trial judge has evaluated the plaintiff's evidence on both material points, that is to say, the question of knowledge and whether further steps should have been taken by the plaintiff because of the provisions of s 7 (5) (b) and (c), which relate to taking reasonable steps to obtain appropriate advice. So far as knowledge is concerned, the trial judge found that the plaintiff had no actual knowledge of a possible action in negligence before January 1969. Next the learned trial judge found in effect that he had in effect done everything that a reasonable man could have been expected to do—taking account of this particular plaintiff's position. Those findings have been challenged by reference to passages in the cross-examination of the plaintiff, and particular reference has been made to certain passages which one has to look at as a whole. It appears that in successive answers the plaintiff said: 'I was depending on my union'; and next 'I did not disagree with them'; and next 'I was not satisfied'; and next 'I had to believe they were right'. It appears to me that the trial judge had, having regard to those answers and the evidence as a whole, ample material on which, having due regard to the plaintiff's mental capacity (which the judge was able to observe), to his training on the railways, to the fact that he had been a union man since he was 13, to his position on the union, and to his training to depend on the union, he could come to the conclusion which he reached. As regards the suggestion that the plaintiff should have gone earlier to obtain legal aid, counsel for the plaintiff has rightly pointed out that those were early days for legal aid, and that there are provisions in the legal aid regulations which seemed to discourage applications by union men. c

Finally, at the very last moment there was raised a point which was not taken at first instance. It is the point that the plaintiff should some time between October 1968 and before 27th January 1969 have sought to consult a solicitor. It is a point to which no cross-examination of the plaintiff was directed at the trial and a point which had no consideration by the trial judge. It is not to be found in any recognisable form in the notice of appeal, and it was not mentioned in the opening of this case in this court. It would suffice to say that it would be quite impossible to allow that point to prevail so as to upset the judgment of the court below without there being an opportunity for the plaintiff to give his answers about it, and that the notice of appeal does not ask for a new trial. But I would go further; as the matter stands, it seems to me that he was wholly reasonable in the attitude which he took in asking the trade union which had made itself responsible for advising him on this case for further information in order to find out what were the snags which might face him if any claim other than that under the Workmen's Compensation Act 1925 were pursued. If subjected to cross-examination on the point he would I think have answered any questions in the same tenor as the four questions already cited and such answers would have been accepted. d

I have ventured to review the circumstances of this case in some detail, in view of the undoubtedly unusual effects of allowing a man to pursue a claim related to a e

- a single occurrence as long ago as 1948. In the upshot in my judgment the appeal should indeed be dismissed.

STAMP LJ. I agree.

Appeal dismissed. Leave to appeal to the House of Lords granted.

- b Solicitors: *Evan Harding* (for the defendants); *Barlow, Lyde & Gilbert*, agents for *Milburn & Co*, Whitehaven (for the plaintiff).

L J Kovats Esq Barrister.

c **Odeon Associated Theatres Ltd v Jones** (Inspector of Taxes)

COURT OF APPEAL, CIVIL DIVISION

SALMON, BUCKLEY AND ORR LJJ

- d 18th, 19th, 20th OCTOBER, 3rd NOVEMBER 1971

Income tax – Deduction in computing profits – Trade expenses – Repairs – Deferred repairs – Acquisition of cinema in poor repair – Cinema fully capable of commercial use – Vendor's failure to repair before acquisition – Vendor precluded by war time restrictions from carrying out repairs – No diminution in price in respect of disrepair – Deferred repairs begun two years after acquisition – Repairs spread over several years – No indication of extra cost over and above cost of ordinary repairs – Expenditure on deferred repairs charged to revenue account as separate item from expenditure on current repairs – Expert evidence on accountancy practice – Finding that charging to revenue according with accountancy practice – No conflict with statute – Conclusiveness of finding – Whether expenditure on deferred repairs capital or revenue expenditure for income tax purposes – Whether deductible in computing profits – Income Tax Act 1952, s 137.

- f The taxpayer company were members of one of the biggest groups of companies engaged in the cinema industry and carried on a substantial business as exhibitors of films. In 1945 they bought a cinema, one of a large number which they acquired in the immediate post-war period. Owing to war time restrictions it had been impossible for the vendors, in common with other cinema owners, to spend more than comparatively small sums on keeping the cinema in repair. During the previous five years therefore many repairs and replacements which would normally have been effected had been deferred. However at the date of its acquisition the cinema was a fully effective profit earning asset and the price paid by the taxpayer company was not affected by reason of the lack of repair. From 1945 to 1954 the taxpayer company spent substantial sums of money on repairs and renewals at the cinema. For the purposes of excess profits tax the taxpayer company treated part of that expenditure in their accounts as revenue expenditure on current repairs and, from 1947 on, treated the remaining part as revenue expenditure on deferred repairs and renewals, i.e. as constituting the expenditure necessitated by the failure to carry out repairs during the war time period. It was contended by the Crown that the expenditure on deferred repairs and renewals was not revenue but capital expenditure and was therefore not deductible in ascertaining the taxpayer company's profits for income tax purposes. On appeal to the Special Commissioners the taxpayer company called expert evidence of accountants, which the commissioners accepted, that the items were properly chargeable to revenue in accordance with established principles of sound commercial accounting.

Held – (i) The money expended by the taxpayer company on the deferred repairs was

laid out wholly and exclusively for the purposes of the taxpayer company's trade within s 137 (a)^a of the Income Tax Act 1952 and not partly for the purposes of the trade of the company from which the cinema had been acquired; for the same reason the money had been 'actually expended' on repairs for the purposes of the taxpayer company's trade within s 137 (d) (see p 690 b to d, p 696 a and p 697 f, post);

(ii) The expenditure was not capital expenditure within s 137 (f) and (g) for the following reasons—

(a) the expenditure was by nature revenue and not capital expenditure and would have been deductible as such if the original owner of the cinema had remained the owner and had incurred it (see p 688 h, p 692 j to p 693 a and p 698 b, post);

(b) as the commissioners had held that it was in accordance with established principles of sound commercial practice to charge the disputed items to revenue expenditure and not capital and as those principles in no way conflicted with any statute the court would, in the absence of any rule of law to the contrary, adopt and apply those principles in deciding the case (see p 691 b, p 692 a, p 696 g and p 698 h, post);

(c) owing to the inability of the vendors, in common with all other owners, lawfully to execute the repairs in the period before acquisition, the purchase price of the cinema had in no way been affected by its disrepair at the date of acquisition (see p 691 g, p 693 a and p 698 g, post);

(d) the cinema was a profit-earning asset at the date of its acquisition in spite of its disrepair and remained so for several years thereafter although no money was spent (or could be spent) on deferred repairs during some of those years (see p 691 h, p 693 b and p 695 b, post);

(e) (per Buckley and Orr LJ) it had not been established that the taxpayer company had been put to any greater expense in the way of repairs and redecoration by reason of the deferred repairs than would have been the case if there had been no deferred repairs (see p 695 g and h, and p 698 j to p 699 b, post);

Law Shipping Co Ltd v Inland Revenue Comrs (1923) 12 Tax Cas 621 distinguished.

Per Curiam. If the deferred repairs on the cinema had been properly chargeable as capital expenditure, such repairs would have been so chargeable in respect of cinemas acquired (a) from an outside vendor with succession, and (b) as the result of a transfer within the taxpayer company's group of companies without succession or (c) with succession; the source from which the taxpayer company acquired the cinemas, and whether with or without succession, was not relevant to the question (see p 692 d f and g, p 696 g and p 699 e and f, post).

Decision of *Pennycuik V-C* [1971] 2 All ER 407 affirmed.

Notes

For the deduction of trade expenses in computing profits generally, see 20 Halsbury's Laws (3rd Edn) 158-170, paras 277-292, and for cases on the subject, see 28 (1) Digest (Reissue) 141-158, 421-505.

For deductions for the cost of repairs, see 20 Halsbury's Laws (3rd Edn) 173, 174, paras 300-302 and for cases on the subject, see 28 (1) Digest (Reissue) 169-171, 515-520.

For the application of accountancy principles in computing profits, see 20 Halsbury's Laws (3rd Edn) 139, 140, para 247.

For the Income Tax Act 1952, s 137, see 31 Halsbury's Statutes (2nd Edn) 134. Section 137 has been replaced by s 130 of the Income and Corporation Taxes Act 1970.

Cases referred to in judgments

Bidwell v Gardiner (1960) 39 Tax Cas 31, 28 (1) Digest (Reissue) 194, 603.

British Insulated and Helsby Cables Ltd v Atherton [1926] AC 205, [1925] All ER Rep 623, 95 LJKB 336, 134 LT 289, 10 Tax Cas 155; affg CA sub nom *Atherton v British Insulated and Helsby Cables Ltd* [1925] 1 KB 421, 28 (1) Digest (Reissue) 211, 627.

^a Section 137, so far as material, is set out at p 689 h to p 690 b, post

- a* BSC Footwear Ltd (formerly Freeman, Hardy & Willis Ltd) v Ridgway (Inspector of Taxes) [1971] 2 All ER 534, [1971] 2 WLR 1313, Digest Supp.
Comr of Taxes v Nchanga Consolidated Copper Mines Ltd [1964] 1 All ER 208, [1964] AC 948, [1964] 2 WLR 339, 28 (1) Digest (Reissue) 204, *677.
Highland Railway Co v Balderston (Surveyor of Taxes) (1889) 2 Tax Cas 485, 28 (1) Digest (Reissue) 201, *652.
- b* *Inland Revenue Comrs v Granite City Steamship Co Ltd* 1927 SC 705, 13 Tax Cas 1, 28 (1) Digest (Reissue) 202, *658.
Jackson (Inspector of Taxes) v Laskers Home Furnishers Ltd [1956] 3 All ER 891, [1957] 1 WLR 69, 37 Tax Cas 69, 28 (1) Digest (Reissue) 192, 594.
Law Shipping Co Ltd v Inland Revenue Comrs 1924 SC 74, (1923) 12 Tax Cas 621, 28 (1) Digest (Reissue) 599, *1480.
- c* *Lothian Chemical Co Ltd v Rogers (Inspector of Taxes)* (1926) 11 Tax Cas 508, 28 (1) Digest (Reissue) 202, *657.
Ostime (Inspector of Taxes) v Duple Motor Bodies Ltd [1961] 2 All ER 167, [1961] 1 WLR 739, 39 Tax Cas 537; affg CA sub nom *Duple Motor Bodies Ltd v Inland Revenue Comrs* [1960] 2 All ER 110, [1960] 1 WLR 510, 28 (1) Digest (Reissue) 125, 371.
Regent Oil Co Ltd v Strick (Inspector of Taxes) [1965] 3 All ER 174, [1966] AC 295, [1965] 3 WLR 636, 43 Tax Cas 1; affg CA sub nom *Strick (Inspector of Taxes) v Regent Oil Co Ltd* [1964] 3 All ER 23, [1964] 1 WLR 116, 28 (1) Digest (Reissue) 183, 552.
- d* *Roebank Printing Co Ltd v Inland Revenue Comrs* 1928 SC 701, (1927) 13 Tax Cas 864, 28 (1) Digest (Reissue) 207, *685.
Royal Insurance Co v Watson [1897] AC 1, 66 LJQB 1, 75 LT 334, 3 Tax Cas 500, 28 (1) Digest (Reissue) 185, 562.
Stott v Hoddinott (1916) 7 Tax Cas 85, 28 (1) Digest (Reissue) 180, 542.
- e* *Sun Insurance Office v Clark* [1912] AC 443, [1911-13] All ER Rep 495, 81 LJKB 488, 106 LT 438, 6 Tax Cas 69, 28 (1) Digest (Reissue) 134, 398.
United Steel Cos Ltd v Cullington [1940] 2 All ER 170, [1940] AC 812, 109 LJKB 342, 163 LT 42, 23 Tax Cas 91, 28 (1) Digest (Reissue) 460, 1658.
Usher's Wiltshire Brewery Ltd v Bruce [1915] AC 433, 84 LJKB 417, 112 LT 651, 6 Tax Cas 418, 28 (1) Digest (Reissue) 130, 383.
- f*

Appeal

The taxpayer company, Odeon Associated Theatres Ltd, appealed to the Special Commissioners against assessments to income tax made on them as cinema proprietors under Sch D to the Income Tax Acts 1918 and 1952 in the following sums: 1946-47, £75,000; 1947-48, £150,000; 1948-49, £328,000; 1949-50, £587,600; 1950-51, £370,000; 1951-52, £510,000; 1952-53, £340,000; 1953-54, £350,000; 1954-55 £375,000; and 1955-56, £400,000. The grounds of appeal were that in computing for income tax purposes the profits or gains of the taxpayer company for the accounting periods relevant to the assessments there should be allowed as an expense sums expended by the taxpayer company as repairs to certain cinemas owned by them which could be related to the condition of the cinemas at the time of their acquisition by the taxpayer company. The taxpayer company appealed by way of case stated against the commissioners' decision. The following facts are taken from those found by the commissioners in the case stated (the paragraph numbers being those of the case):

- i* '5. Odeon Theatres Limited had achieved its position as the third largest circuit during the 1930's, both by building new theatres and buying existing theatres and theatre owning companies. War time restrictions put an end to building and the only way the circuit could be expanded was by buying theatres and theatre owning companies . . .

'6. Where the directors were considering acquiring a theatre otherwise than from within the Group, the normal procedure was that Mr. Davis would ask the

firm of Messrs. Goddard & Smith to prepare a valuation. Mr. Davis would then have discussions with the partner responsible and in the light of these discussions would subsequently conduct negotiations with the theatre's owner, for its possible acquisition. Mr. Davis understood that a valuation was made as between a willing buyer and a willing seller and related purely to the circumstances affecting the particular theatre. Mr. Davis expected Messrs. Goddard & Smith in making these valuations to take account of the general factors affecting the profitability of the theatre such as its location, capacity and facilities. Although Messrs. Goddard & Smith had acted for the Odeon Group for a considerable number of years and attended meetings at which operating policy decisions were taken on acquisitions, Mr. Davis did not expect them to advise in the light of all the various considerations on which the operating policy was based and indeed they were not in a position to do so. Mr. Davis naturally used the valuation as a base price in the course of negotiations but as a commercial operator he had to take into account those factors which were peculiar to the Group's needs and the overriding factor of the prospective increase in booking strength. The result was that the purchase price was sometimes more and sometimes less than the valuation. In particular, if a capital deduction was made in the valuer's report because of a theatre's poor state of repair, it would not have had a material effect on the price the Group was prepared to pay for the following reasons:—(a) The overall necessity to expand the number of theatres owned, particularly those in London and other urban areas, and consequently to improve the Group's booking strength. (b) During the second world war there was a complete prohibition on building, decorating and repair work of any kind except for essential maintenance and even then the consent of the Ministry of Works was required. Each theatre was granted an annual permit to carry out essential maintenance work up to a stated amount. The amounts varied from as little as £75 to £800 per annum but in any event were totally inadequate to keep the theatres in a proper state of repair. In addition a Supplemental Licence was required to carry out any specific work costing more than £100. Theatres rightly had a low priority in securing Supplemental Licences. The result was that no one in the industry was in a position to carry out work of this type apart from such minor essential repairs as could be covered by the annual permit. If a theatre was in a poor state of repair on acquisition, the effect on public attendance was minimal, since all competing theatres were in a similar state. (c) For the most part the deficiencies were not of a nature requiring immediate remedy. There was no question of danger to the public or of any theatre having to be closed for repairs. (d) Building restrictions continued in force until the early nineteen-fifties. During the war, when negotiations for the acquisition of the Odeons, Accrington and Marble Arch and other theatres were taking place Mr. Davis foresaw this was likely to happen and as a result did not pay so much attention to a theatre's state of repair as might otherwise have been the case. The type of work necessary to put these theatres into a first class state of repair was maintenance and repair work, which in normal circumstances is carried out continuously. Mr. Davis's attitude was that in the normal course the theatres would be redecorated when the restrictions were removed, but that the same work would not be done twice merely because the period since maintenance work was last carried out was much longer than normal. As a result the deduction from purchase price, which might otherwise have been made, was ignored. If the directors had not bought others would have bought on a similar basis . . .

'8. During the immediate post-war period there was a financial rationalisation programme for the Odeon Group . . . It was necessary to approach the market in stages so the theatres owned or controlled by the Odeon Group were divided amongst three companies, Odeon Theatres Limited, Odeon Properties Limited and Odeon Freehold and Ground Rents Limited now called Odeon Associated

a Theatres Limited [“(the taxpayer company”) which was a wholly-owned subsidiary of Odeon Theatres Ltd] . . .

‘12. In the period under review the consideration payable on inter-group transfers was computed by reference to the transferor company’s books of account . . .

b ‘15. Expenditure classified as capital in the Statements of Fact [annexed to the case stated] represented additions or improvements to the condition of the theatre. The whole of such expenditure was charged to capital, no deductions being made from the companies’ profits for tax purposes.

c ‘16. Expenditure classified as current repairs and renewals in the said Statements of Fact were such as could not be treated as attributable to user of the theatre during the E.P.T. [i.e. excess profits tax] period and accordingly no relief was allowed against this tax [i.e. EPT]. These repairs and renewals were charged in their entirety to trading account and were deducted from profits in income tax computations.

d ‘17. All items of expenditure listed in the Statements of Fact as charged to deferred repairs account were to some extent attributable to user of the theatre during the E.P.T. period. Deferred repairs and renewals were treated in the same way as current repairs and renewals and were charged in their entirety to trading account.

e ‘18. According to standard practice of commercial accounting in relation to groups of companies, where a theatre with outstanding deferred repairs is transferred from one member of the group to another the best method would be to take it out of the transferor company’s balance sheet at its written down book value irrespective of the amount of the deferred repairs and to take it into the balance sheet of the transferee company at the same value, thus the consolidated group balance sheet would show no increase in total assets . . .

f ‘19. It was contended on behalf of the [taxpayer company]:—(i) that in computing for income tax purposes the profits or gains of the [taxpayer company] for the accounting periods relevant to the assessments under appeal there should be allowed as an expense sums expended by the [taxpayer company] on repairs (hereinbefore referred to as “deferred repairs”) to cinemas owned by it, notwithstanding that such expenditure could be related to the condition of the cinemas at the time of their acquisition by the [taxpayer company] . . .

g ‘20. It was contended by the [Crown]:—(i) that in computing for income tax purposes the profits or gains of the [taxpayer company] for the accounting periods relevant to the assessments under appeal no allowance fell to be made for sums expended by the [taxpayer company] on repairs (hereinbefore referred to as “deferred repairs”) to cinemas owned by it which related to user prior to the acquisition of such cinemas by the [taxpayer company] . . .

h ‘21. We, the Commissioners who heard the appeal, gave our decision in the following terms:—(1) [Having set out the nature of the appeal they continued:] The grounds of the appeal are that in computing for Income Tax purposes the profits or gains of the [taxpayer company] for the accounting periods relevant to the assessments under appeal, there should be allowed as an expense sums expended by the [taxpayer company] on repairs to certain cinemas owned by it which related to user prior to the acquisition of such cinemas by the [taxpayer company] . . .

i ‘(3) The [taxpayer company] and associated companies owned a large number of cinemas which have been divided for purposes of this appeal into four categories^b . . . After acquisition the [taxpayer company] carried out repairs to each

b Agreed statements of fact annexed to the case stated related to four different cinemas which were taken as examples of the four different categories: (i) an inter-group transaction with succession, (ii) an inter-group transaction without succession, (iii) an outside acquisition with succession, and (iv) an outside acquisition without succession. On appeal no point was taken on the distinction between the four types of case: see p 692 c to e, post.

of these cinemas some of which repairs it is admitted properly related to user prior to the acquisition of the property by the [taxpayer company] and for convenience these are referred to as deferred repairs.

'(4) The evidence given in chief by the witnesses is not really controverted by the Crown and it seems to us, therefore, that there is no real dispute as to the facts in this case. The parties are agreed that in the hands of the vendors there was no capital element in the deferred repairs and so far as the [taxpayer company] was concerned there was no diminution in price on account of the deferred repairs which are in issue in this appeal.

'(5) The real dispute in this appeal seems to us to be whether expenditure on assets which, if it had been incurred by the vendor, would have been allowable in computing the profit or gain of a trade carried on by the vendor for the purpose of arriving at his liability to tax would, if in fact incurred by a purchaser of that asset, be allowed in computing the profit or gain of a trade carried on by the purchaser for the purposes of arriving at his liability to tax and if not, whether it makes any difference if the purchaser in addition to buying the asset, also succeeds to the trade carried on by the vendor in which that asset was used, or that there is no allowance in respect of such expenditure in the purchase price.

'(6) It is not a trade which is assessed to tax, it is a person. If a person carries on a trade, the measure of his liability to tax is the profit or gain derived by him from carrying on such trade. Expenses of a trade which accrued prior to the carrying on of that trade by the person presently to be taxed cannot be taken into account in determining the profit or gain derived by him for the purpose of ascertaining his liability to tax. Such expenses did not accrue in the process of earning his profit or gain and if paid by him they are not revenue expenses, but something over and above, and therefore capital. It is nothing to the point that had such expenses been incurred in earning somebody else's profit or gain they might have been allowed as a revenue expense. It seems to us that this is the proposition which stems from the *Law Shipping* case^c upon which all the judges in the Court of Session were unanimous, and also the *Granite City Steamship Co.* case^d which cases are binding on us. Furthermore, in the light of the cases cited it seems to us that it makes no difference if there is a succession or if there is no allowance from the price of the asset purchased.

'(7) It was also put to us that since the Companies Act of 1948 the consolidated accounts required in the case of a group of companies, by the provisions of Sections 150, 151 and 152 of the Companies Act, 1948, would, if produced on sound commercial principles, necessarily involve that the cost of deferred repairs should be eliminated from the Balance Sheet by charging such cost to revenue accounts. This may be so, but we do not think that a form of accounts required for the purposes of the Companies Act, 1948, is conclusive as to what items may be properly charged to revenue in computing profits or gains for Income Tax purposes.

'(8) Our decision is, therefore, that this appeal fails in principle and we adjourn the appeal for the agreement of the amounts of the assessments between the parties on the basis of our decision set forth above.'

On 26th November 1969 the case was remitted by the Chancery Division to the commissioners as follows:

'THIS COURT ORDERS that the said Case be remitted to the Special Commissioners for them to make and state in a Supplemental Case a finding on the following question, viz:—

^c See *Law Shipping Co Ltd v Inland Revenue Comrs* (1923) 12 Tax Cas 621

^d See *Inland Revenue Comrs v Granite City Steamship Co Ltd* (1927) 13 Tax Cas 1

a 'On the assumption that all theatres with which this Case is concerned were acquired from vendors outside the group but that all other facts were as found in the existing Case Stated, how, in accordance with the principles of sound commercial accounting would the disputed expenditure be dealt with in the purchasers accounts?'

By the supplemental case the commissioners gave the following decision:

b 'Upon consideration of the evidence adduced at the Meeting and the arguments addressed to us on behalf of the parties and the publication "Practical Auditing" by Spicer and Pegler (15th Edition), which was cited to us, we found that on the assumption that all theatres with which this case is concerned were acquired from vendors outside the Group but that all other facts were as found in the principal case stated, in accordance with the principles of sound commercial accounting

c at the present time the disputed expenditure referred to in the principal case as the "deferred repairs" would be dealt with as a charge to revenue in the purchasers accounts.'

On 12th November 1970, as reported at [1971] 2 All ER 407, Pennycuik V-C allowed the taxpayer company's appeal against the commissioners' decision, holding that the taxpayer company were entitled to deduct the cost of the deferred repairs in computing its profits for income tax purposes. The Crown appealed to the Court of Appeal.

d

The Solicitor-General (Sir Geoffrey Howe QC), R A Watson QC and P W Medd for the Crown.

Heyworth Talbot QC, M P Nolan QC and Denis Carey for the taxpayer company.

e *Cur adv vult*
3rd November. The following judgments were read.

SALMON LJ. The relevant extracts from the case stated are all set out in Pennycuik V-C's lucid judgment¹ and I need not repeat them. I wish, however, to draw attention to certain salient facts affecting this appeal. The taxpayer company, Odeon

f Associated Theatres Ltd, carry on business as exhibitors of films. They are, and have been since the 1930's, one of the largest exhibitors of films in England and own very many cinemas throughout the country. They are now members of one of the biggest groups of companies engaged in the cinema industry in England. In the immediate post-war years, the taxpayer company bought a large number of cinemas and cinema-owning companies. The object of these purchases was (a) to prevent this branch of

g the industry from falling under American domination, (b) to strengthen the taxpayer company's negotiating power in booking films, and, of course, (c) to enlarge their profits.

On 8th January 1945 the taxpayer company bought what had formerly been called the Regal Cinema at Marble Arch for £240,000. During the war years, owing to the then current restrictions, it had been impossible to spend more than comparatively

h small sums on keeping cinemas in repair. Accordingly in 1945 the cinema at Marble Arch, like all cinemas in this country, was somewhat run down. During the previous five years many repairs and replacements which would normally have been effected had necessarily been deferred, because it had been impossible to obtain licences to carry them out. Nevertheless, the Marble Arch cinema at the date of its acquisition was a fully effective profit-earning asset, and the price which the taxpayer company

i paid for it had not been diminished nor in any way affected by reason of its lack of repair.

During the period 1945-54 the taxpayer company spent considerable sums of money in making additions to building plant and equipment at this cinema. All these items were charged as capital expenditure by the taxpayer company in their accounts.

¹ [1971] 2 All ER 407, [1971] 1 WLR 442; see pp 683-686, ante

In each year from 1945 to 1954 the taxpayer company also spent substantial sums of money on repairs and renewals at this cinema. Some of this money was charged in their accounts as revenue expenditure spent on current repairs and renewals; it was allowed without question by the Inland Revenue as a charge against the taxpayer company's profits. On the other hand, some of the money spent during this period on repairs and renewals was charged in the taxpayer company's accounts as revenue expenditure spent on deferred repairs and renewals.

The reason for the taxpayer company distinguishing in their accounts between current and deferred repairs and renewals was to avail themselves of the concessions relating to their liability for excess profits tax made by s 37 of the Finance Act 1946. This tax had been in existence from about the middle of 1940 until the end of 1946. Section 37 provided in effect that any money spent after 1946 relating to repairs and renewals which had been necessarily deferred during the period when excess profits tax was exigible should be credited against liability for that tax. Between 1947 and 1954 the taxpayer company charged £17,708 as their expenditure on deferred repairs and renewals. The amount spent during this period on deferred repairs and renewals obviously could not be precisely measured. The Inland Revenue challenged the figure of £17,708. Negotiations took place and the amount attributable to deferred repairs and renewals was eventually agreed with the Inland Revenue at £11,510. It was also agreed that £7,969 of that sum related to the period prior to the acquisition of the cinema by the taxpayer company on 8th January 1945 and the balance of £3,541 to the period from 8th January 1945 until 1st January 1947.

The Crown contends that the several sums amounting in all to £7,969 are not revenue expenditure but capital expenditure and therefore cannot be taken into account in assessing the taxpayer company's liability for income tax in respect of any of the fiscal years in question. It is, I think, worth noting from the case stated how the expenditure of £7,969 was allocated over the years.

	£
1948/49	151
1949/50	752
1950/51	352
1951/52	1,602
1952/53	1,118
1953/54	2,701
1954/55	317
1955/56	976
	<hr/>
Total	<u>£7,969</u>

It is also perhaps worth noting that the work comprised in these items includes, for example, renewing carpets, decorating, rewiring, etc. It does not seem to me that any of this expenditure can, *prima facie*, properly be regarded as being in the nature of capital expenditure. It appears to me to be obviously revenue expenditure. Moreover, the first item of this expenditure was not incurred until two years after the acquisition of the cinema and the last not less than nine years after the acquisition. £7,969 may be a comparatively small sum of money, but the group of which the taxpayer company is a member owns 564 cinemas. In many of these, the same questions arise as in the present case. The total amount of tax liability depending on the result of this appeal is accordingly very large.

The evidence of a number of exceptionally distinguished accountants, accepted by the Special Commissioners, was that in accordance with the established principles of sound commercial accounting the disputed items of expenditure were a charge to

a revenue. Pennycuik V-C² held that in law these items were properly chargeable to revenue and that the profits for the years in question should be assessed for tax on that basis. Against that judgment² the Crown now appeals.

b Few commercial questions have been responsible for so much litigation as: what is the true profit in a particular year? Sometimes this question depends, as in *Ostime (Inspector of Taxes) v Duple Motor Bodies Ltd*³, on the correct method of assessing work in progress; sometimes, as in *BSC Footwear Ltd v Ridgway (Inspector of Taxes)*⁴, on the correct method of assessing stock in trade; and sometimes, as in the present case and many others, on deciding which items of expenditure are to be attributed to capital and which to revenue. In solving this question as to what is the true profit—

c ‘... first, ... the ordinary principles of commercial accounting must, as far as practicable, be observed and, secondly, ... the law relating to income tax must not be violated ... that is to say, by one means or another the full amount of the profits or gains of the trade must be determined.’

See Viscount Simonds’s speech in the *Duple Motor Bodies* case⁵. In *Lothian Chemical Co Ltd v Rogers (Inspector of Taxes)*⁶, Lord Clyde observed:

d ‘My Lords, it has been said time without number ... you deal in the main with ordinary principles of commercial accounting. They do expressly exclude a number of deductions and allowances, some of which according to the ordinary principles of commercial accounting might be allowable. But where these ordinary principles are not invaded by Statute they must be allowed to prevail. It is according to the legitimate principles of commercial practice to draw distinctions, and sharp distinctions, between capital and revenue expenditure, and it is e no use criticising these, as it is easy to do, upon the ground that if you apply logic to them they become more or less indefensible. They are matters of practical convenience, but practical convenience which is undoubtedly embodied in the generally understood principles of commercial accounting.’

f I confess that in the present case I find it difficult to discern any conflict between logic and the established principles of sound commercial accounting. Lord Clyde was merely restating a principle of law which has been laid down in countless other authorities: see, for example, *Stott v Hoddinot*⁷ per Atkin J; *Sun Insurance Office v Clark*⁸ per Viscount Haldane and *Roebank Printing Co v Inland Revenue Comrs*⁹ per Lord Clyde. In my judgment, the true proposition of law is well established, namely that in determining what is capital expenditure and what is revenue expenditure in g order to arrive at the profit for tax purposes in any particular year, the courts will follow the established principles of sound commercial accounting unless they conflict with the law as laid down in any statute.

In the present case, it is argued on behalf of the Crown that to charge the items in question to revenue is contrary to the following provisions of s 137 of the Income Tax Act 1952:

h ‘Subject to the provisions of this Act, in computing the amount of the profits or gains to be charged under Case I or Case II of Schedule D, no sum shall be deducted in respect of—(a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade,

j 2 [1971] 2 All ER 407, [1971] 1 WLR 442

3 [1961] 2 All ER 167, [1961] 1 WLR 739

4 [1971] 2 All ER 534, [1971] 2 WLR 1313

5 [1961] 2 All ER at 169, [1961] 1 WLR at 746, 747

6 (1926) 11 Tax Cas 508 at 520, 521

7 (1916) 7 Tax Cas 85 at 91

8 [1912] AC 443 at 455, [1911-13] All ER Rep 495 at 499

9 (1927) 13 Tax Cas 864 at 874

profession or vocation . . . (d) any sum expended for repairs of premises occupied, or for the supply, repairs or alterations of any implements, utensils or articles employed, for the purposes of the trade, profession or vocation, beyond the sum actually expended for those purposes . . . (f) any capital withdrawn from, or any sum employed or intended to be employed as capital in, such trade, profession or vocation; (g) any capital employed in improvements of premises occupied for the purposes of the trade, profession or vocation.'

In my view, the money laid out in respect of the disputed items was indubitably laid out by the taxpayer company wholly and exclusively for the purposes of their trade. I certainly cannot think of any other purpose for which the money was in reality expended. It was argued that this money was being laid out in the years 1947-54 partly for the purpose of a trade which had been carried on prior to 8th January 1945 by the company from which the taxpayer company bought the cinema. I am afraid that I cannot accept this argument. It seems to me to be unreal on the facts and to involve an altogether too artificial construction of s 137 (a). For the same reasons, I am equally satisfied that all the sums expended for repairs of the cinema occupied by the taxpayer company or for the supply, repairs or alterations of any implements, utensils or articles for the purposes of the taxpayer company's trade were actually expended for those purposes and therefore are not excluded by s 137 (d).

I of course accept that if any of the disputed items in truth constituted capital expenditure they would be excluded by s 137 (f) and (g). But no help can be derived from the Act in deciding the question of what is capital expenditure. The Act does not give even the faintest hint as to how this question should be answered. I am therefore wholly unable to accept the argument that the established commercial accounting practice (found by the Special Commissioners) of charging the disputed items to revenue and not to capital is in any way in conflict with the Act.

That, in my view, really disposes of this appeal. I must, however, deal with *Law Shipping Co Ltd v Inland Revenue Comrs*¹⁰, out of respect for the interesting arguments which have been addressed to us on it. In this connection, it must be remembered that in the present case the commissioners have found on ample evidence an established practice of sound commercial accounting. Sometimes, however there is no evidence of such a practice; sometimes there is conflicting evidence; and sometimes there is evidence of two parallel but conflicting principles of commercial accounting. In such cases, the courts must do the best they can without evidence, or choose between the conflicting evidence or decide which is the most appropriate principle of commercial accounting to adopt. Even in cases such as these, of which the *Law Shipping* case¹⁰ was one, the courts have never attempted to define 'capital expenditure' or 'revenue expenditure'. Such is the complexity of commerce and accountancy that no definition could be devised which would be appropriate in every case.

In the many cases in which the courts have had to determine 'What are the profits and gains?', they have often had to consider whether a certain item of expenditure is properly chargeable against capital or revenue without any evidence or with conflicting evidence of established commercial accounting practice. In such cases the courts have used illustrations or phrases which seemed helpful in solving the problem confronting them in the light of the particular facts being considered. As Viscount Radcliffe observed, in giving the judgment of the Board in *Comr of Taxes v Nchanga Consolidated Copper Mines Ltd*¹¹:

'... it has to be remembered that all these phrases ... are essentially descriptive rather than definitive, and, as each new case arises for adjudication and it is sought to reason by analogy from its facts to those of one previously decided,

¹⁰ (1923) 12 Tax Cas 621

¹¹ [1964] 1 All ER 208 at 212, [1964] AC 948 at 959

- a a court's primary duty is to inquire how far a description that was both relevant and significant in one set of circumstances is either significant or relevant in those which are presently before it.'

Where, however, there is evidence which is accepted by the court as establishing a sound commercial accounting practice conflicting with no Act, that normally is the end of the matter. The court adopts the practice, applies it and decides the case accordingly.

- b It seems to me important to keep these considerations well in mind when considering the *Law Shipping* case¹², which was the sheet anchor of the Crown's case in this court and which appeared to the Special Commissioners to be conclusive in the Crown's favour. In that case, the taxpayers had bought a ship for £97,000 which at the time of purchase was ready to sail with freight booked. The periodical Lloyd's survey was then considerably overdue. As a matter of grace, an exemption from survey was obtained until the completion of the voyage which the vessel was then about to commence. At the conclusion of the voyage about six months later £51,558 had to be spent on repairs in order for the vessel to pass its survey. £12,000 of this sum was in respect of repairs caused by deterioration during the voyage. The balance of £39,558 was spent to remedy the state of disrepair in which the vessel had been at the time of purchase. It was held that this latter sum was capital expenditure by the taxpayers and could not be charged against their profits. Before the taxpayers purchased the vessel they must have been aware that a large sum of money would have to be spent on repairs before the Lloyd's certificate could be renewed. It must have been apparent, as Lord Clyde pointed out, that if the vessel had been in a fit state of repair to pass survey at the time of purchase, its capital value, and therefore the price which the taxpayers would have had to pay, would have far exceeded the purchase price of £97,000.

- c There seem to me to be many important distinctions between that case and the present case. (1) In the *Law Shipping* case¹² the purchase price was substantially less than it would have been had the vessel been in a fit state of repair to pass the Lloyd's survey at the date of purchase. Lord Skerrington stressed¹³ that the taxpayers had bought a vessel which was out of repair to the extent of £39,558 and that they made good this defect at the first opportunity. He added¹³:

'The cost of these repairs was in my opinion just as much a capital expenditure from the point of view of the Appellants' business as it would have been if the work had been executed by the seller before the sale and the cost had been added by him to the price of the ship.'

- g In the present case, the purchase price paid by the taxpayer company was in no way affected by the fact that the cinema was in disrepair at the date of its acquisition. The sellers could not lawfully have executed the repairs prior to the acquisition since no licence to execute such work was then obtainable. (2) In the *Law Shipping* case¹² the vessel was not in a state to pass survey at the time of purchase, and in order to obtain a Lloyd's certificate and turn it into a profit-earning asset after the voyage on which it was then embarking it was necessary to spend a very large sum on deferred repairs immediately after the conclusion of that voyage. In the present case, the cinema was a profit-earning asset at the date of its acquisition in spite of its state of disrepair. It remained so, although no money was spent on deferred repairs for a number of years after its acquisition. (3) In the *Law Shipping* case¹² there was no evidence that on established principles of sound commercial accounting the £39,558 could properly be charged by the taxpayer as revenue expenditure. And I should have been very surprised if there had been any such evidence. Lord Clyde thought it would have been abnormal to charge this outlay against the taxpayers' revenue

12 (1923) 12 Tax Cas 621

13 (1923) 12 Tax Cas at 627

expenditure. Lord Sands said¹⁴: 'Upon ordinary business principles this outlay appears to me to be properly a capital charge.' In the present case, however, the commissioners held, on ample evidence, that it was in accordance with the established principles of sound commercial accounting to charge the disputed items to revenue expenditure, and these principles in no way conflict with any statute.

To my mind, the facts of the *Law Shipping* case¹⁵ are so far removed from those of the present case that in spite of the most skilful arguments advanced on behalf of the Crown I am altogether unpersuaded that there is anything in that authority or any other which would make it permissible for us to hold in the present case that the sums spent on deferred repairs should be charged to capital expenditure in the teeth of sound commercial accountancy practice which conflicts with no statute. I would accordingly dismiss the appeal.

Before parting with this case, I should mention, however, that when this case came before the commissioners and *Pennycuik V-C*¹⁶, the Marble Arch cinema was selected as an example of a class of transaction in which a cinema was acquired by the taxpayer company from an outside source without succession. Examples of three other classes of transaction were also considered, namely transactions in which a cinema was acquired from (a) an outside source with succession, (b) as the result of a transfer within the group without succession, and (c) as the result of a transfer within the group with succession. It was conceded that if deferred repairs in respect of the Marble Arch cinema were properly chargeable as revenue expenditure then they should also properly be so charged in respect of each of the other three classes of transaction. This no doubt was because the three other classes of transaction were even further away from the *Law Shipping* case¹⁵ than the Marble Arch transaction—if that be possible. Accordingly since I have come to the conclusion at which I have arrived in respect of the Marble Arch cinema, I find it unnecessary, as did *Pennycuik V-C*¹⁶, to deal with the other classes of transaction. I would only add that had I considered that deferred repairs in respect of the Marble Arch cinema were properly chargeable against capital I think, although I am expressing no concluded view on this point, that I should probably have held that they were equally chargeable against capital in the case of all the other three classes of transaction to which I have referred. The question in each type of transaction must always be the same: what were the profits earned by the taxpayer company for the fiscal years in question? The source from which the taxpayer company acquired the cinemas with which they earned their profits does not seem to me, as at present advised, to be relevant to this question. Nor does it seem to me to be relevant whether the taxpayer company acquired the cinemas with or without succession to the trade of the sellers or transferors.

BUCKLEY LJ. The question for decision in this case is whether substantial sums expended by the taxpayer company, Odeon Associated Theatres Ltd, in the accounting periods relevant to its assessment to income tax for the fiscal years 1946-47 to 1955-56, inclusive, which sums were expended in effecting repairs, redecoration and refurnishing of a number of cinema theatres acquired by the taxpayer company during and soon after the second world war, should, in computing for income tax purposes the profits of the taxpayer company for the relevant periods, be allowed as revenue expenditure, or whether so much of such expenditure as was attributable to dilapidations which occurred before the acquisition of those theatres respectively should be treated as capital expenditure.

I need not restate the facts, but these points need to be stressed. First, all the disputed expenditure was of a kind which, if the theatres had remained in the ownership of the owners from whom they were acquired by the taxpayer company and the

¹⁴ (1923) 12 Tax Cas at 629

¹⁵ (1923) 12 Tax Cas 621

¹⁶ [1971] 2 All ER 407, [1971] 1 WLR 442

a expenditure had been incurred by those owners, would have been deductible as revenue expenditure. Secondly, the amount of dilapidation which occurred before the acquisition by the taxpayer company of a theatre (in the case stated called 'deferred repairs') did not in any case significantly affect the price paid by the taxpayer company for the theatre. Thirdly, the deferred repairs were not for the most part such as to require immediate remedy, and there was no question of danger to the public or of
b any theatre having to be closed for repairs. Fourthly, all cinema theatre owners were in a like position of being unable, on account of war time restrictions, to carry out any but the most urgent repairs, redecorations or refurnishing of their theatres; there was no competition in this respect; this state of affairs continued until the early 1950s.

c The cost of acquiring or creating a physical capital asset for use in a trade or business is clearly capital expenditure. The cost of improving such an asset by adding to it or modifying it may well be capital expenditure. On the other hand, the cost of works of recurrent repair or maintenance of such an asset attributable to the wear and tear occurring in the course of use of the asset in his trade or business by the person carrying out the works is revenue expenditure, and so constitutes a proper debit item in the profit and loss account of the business. Whether, where there has been a change of
d ownership, the cost of works of repair or maintenance attributable to wear and tear which occurred before the change of ownership should be regarded as revenue expenditure or capital expenditure is a question the answer to which must, in my opinion, depend on the particular facts of each case. Counsel for the Crown has argued that any repair must improve the article repaired and, avoiding undue cynicism, I think that that proposition must be accepted. He says further that if the
e state of the article, when repaired, is better than its state was when it was acquired by the person carrying out the repairs, the cost of repairs should pro tanto be regarded as capital expenditure. A tradesman, for example, who acquires a dilapidated shop in which to carry on his business, and, either before he commences business or as soon thereafter as he can afford to do so, put the shop into a state of repair and decoration suitable for his business, has incurred the cost not only of acquiring the shop but
f also of repairing and decorating it in a suitable manner in order to provide himself with a capital asset of a character which he regards as appropriate to his business. The whole of this expenditure, it is said, is capital expenditure because it constitutes the cost of acquiring such a capital asset as the trader requires for the purpose of his business. The argument is an attractive one, but should not, in my opinion, be accepted without careful consideration.

g Counsel for the Crown contends that the expenditure on deferred repairs was what he described as 'a once for all jacking-up of the value of the principal asset', and so was non-recurrent expenditure by the taxpayer company for the enduring benefit of its trade. He says that the fact that the prices paid for theatres took no account of the circumstance that at the dates of purchase repairs had already been deferred is of no importance. He contends that the cost of doing the deferred repairs was an additional
h cost to the taxpayer company of acquiring the capital assets, i.e. the theatres. Such expenditure, he says, should be regarded as capital expenditure. As Lord Reid observed in *Regent Oil Co Ltd v Strick (Inspector of Taxes)*¹⁷:

j 'The question [whether a particular outlay can be set against income or must be regarded as a capital outlay] is ultimately a question of law for the court, but it is a question which must be answered in light of all the circumstances which it is reasonable to take into account, and the weight which must be given to a particular circumstance in a particular case must depend rather on common sense than on a strict application of any single legal principle.'

In answering that question of law it is right that the court should pay regard to the

ordinary principles of commercial accounting so far as applicable. Accountants are, after all, the persons best qualified by training and practical experience to suggest answers to the many difficult problems that can arise in this field. Nevertheless the question remains ultimately a question of law. a

No one, I think, would dispute that the cost of ordinary current repairs in the normal course of maintenance of a fixed capital asset employed in a business is revenue expenditure. Such cost arises out of the wear and tear of the asset in the course of earning the profits of the business and so is a proper debit to be set against the revenue of the business in its profit and loss account. I would myself think that, save in exceptional circumstances, this is true even in the case of the first repairs in the normal course of maintenance of an asset acquired in a part worn condition. A tradesman who acquires a shop, the outside painting of which was last done two years before his purchase, will have to repaint the shop earlier than if it had been redecorated immediately before acquisition, but this, I think, is something which, as a commercial matter, he will take into account in considering the prospective profitability of the shop during the early years of his ownership. In other words, he will regard it as a revenue expense. He will not say to himself: 'When I have to repaint the outside of the shop perhaps three years hence, only three-fifths of the cost will be chargeable against revenue in my profit and loss account: the balance will be a capital investment in my business.' This view is, I think, borne out by the finding of fact contained in the supplemental case stated by the Special Commissioners in the present proceedings. Any other view would lead to great difficulty and confusion. Whenever a taxpayer made a capital investment in the acquisition of a part worn capital asset for the purposes of his business it would be necessary to record the state of dilapidation of the asset at the date of acquisition in order to determine, when repairs were carried out at a later date, what proportion of the cost should be attributed to improvement on the state of repair at the date of acquisition. Although maybe in practice such a principle would be applied for fiscal purposes in relatively few cases, logically it would apply to every case of the acquisition for business purposes of a part worn capital asset, however long or short the time before any repairs came to be done to it. b
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Such a principle should not, in my judgment, be accepted as of general application unless logic or law demand this. It is said that *Law Shipping Co Ltd v Inland Revenue Comrs*¹⁸ demonstrates that in Scotland the law has adopted and applied this principle. In my judgment, that case does not indicate that the Court of Session considered that there was any such principle of general application. The appellant company in that case had purchased a secondhand ship at a date when her periodical Lloyd's survey was overdue but had been deferred pending the completion of a voyage then in contemplation. On her return six months later the survey was made and the company was obliged to spend a large sum on repairs. The court held that except for such part of the cost of the repairs as was attributable to the period during which the ship was employed in the appellant company's trade the expenditure in question was in the nature of capital expenditure and was not an admissible deduction in computing the company's profits. In that case the capital asset which the appellant company acquired (i.e. the ship) was at the time of purchase burdened with the necessity for its owners to carry out at the earliest practicable moment the repairs required to satisfy the Lloyd's survey. Unless and until such repairs were done the ship could not be further used in the owner's business after the termination of the one voyage. It may be that those repairs could have been said to have been of a routine maintenance character, but, in my judgment, the case is clearly distinguishable on its facts from a case in which someone has acquired an asset which, although part worn at the date of acquisition, is not burdened with the necessity to carry out immediate or nearly immediate works of renovation. The *Law Shipping* case¹⁸ is, in my view, more nearly analogous to the case of a trader who has bought a capital asset which at the date f
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a of acquisition was not in working order and has to put it into working order before being able to use it in his business. When the Law Shipping Co Ltd bought the ship they knew that in order to be able to use her in their business beyond the one voyage they would need to spend not only the purchase price of the ship but also the cost of the necessary repairs. The facts of the present case are quite different. All the theatres acquired by the taxpayer company were, when they were acquired, in a condition fully suitable for immediate profitable use in the taxpayer company's business and capable of continuing to be so used in the conditions then existing for some years.

b *Jackson (Inspector of Taxes) v Laskers Home Furnishers Ltd*¹⁹ is a case in which expenditure on repairs by a tenant of a building was, in my judgment, properly held to constitute capital expenditure. In that case the respondent company obtained a lease of the building which contained a covenant on their part to reinstate the demised property in a good state of repair. The cost of carrying out the repairs was part of the consideration for the grant of the lease; it was in truth part of the price paid by the company for the lease, notwithstanding that the expenditure was expenditure purely on repairs. *Royal Insurance Co v Watson*²⁰ was another case in which the sum under consideration was held to be a capital expenditure on the ground that it formed part of the consideration for the acquisition of an asset. Of the other authorities relied on c by the Crown on this appeal, it is perhaps sufficient if I say that *Highland Railway Co v Balderston (Surveyor of Taxes)*¹ was a case in which the expenditure there under consideration was clearly incurred in making physical alterations to and improvements to the assets of the appellant company, and that *Inland Revenue Comrs v Granite City Steamship Co Ltd*² was a case in which the expenditure there under consideration was incurred in making good damage suffered by a capital asset of the respondent company which had resulted during the respondent company's ownership from matters entirely foreign to the carrying on of that company's business. Neither of these cases appears to me to assist the Crown on this appeal.

d In consequence of the state of affairs existing during and immediately following the war, the taxpayer company's theatres remained unrepaired and unreddecorated for much longer than would have otherwise been the case, but the disputed expenditure, when it came to be made in the years 1947 to 1954, was all expenditure on works and matters of a kind which can properly be described as maintenance, and which would be bound to recur in later years. It seems to me to be misleading to describe this expenditure as 'once for all'. It was expenditure on maintenance which had then for the first time become possible and worthwhile for the taxpayer company to carry out. It was expenditure which, in the then existing altered conditions, was necessary to e preserve the profitability of the theatres. There is no indication in the case that the cost was greater than it would have been, having regard to the passage of time, if the theatres had been in a good state of decoration and repair when the taxpayer company acquired them. The facts as found do not, in my judgment, establish that the taxpayer company was put to any greater expense in the way of repairs and re-decoration by reason of the deferred repairs than would have been the case if there had been no deferred repairs.

f The taxpayer company did not, as the result of some non-recurring payment, acquire some new asset or benefit, and the present case appears to me to be distinguishable from *British Insulated and Helsby Cables Ltd v Atherton*³ relied on by the Crown.

g In my judgment, *Pennycuik V*-C⁴ was right in reaching the conclusion that, apart

i 19 [1956] 3 All ER 891, [1957] 1 WLR 69

20 [1897] AC 1, 3 Tax Cas 500

1 (1889) 2 Tax Cas 485

2 (1927) 13 Tax Cas 1

3 [1926] AC 205, [1925] All ER Rep 623

4 [1971] 2 All ER 407, [1971] 1 WLR 442

from the statutory prohibitions contained in the Income Tax Act 1952, s 137, the disputed expenditure was proper to be taken into consideration as a debit against revenue in arriving at the taxpayer company's profits in the relevant years. In my judgment, there is nothing in that section which requires any of the disputed expenditure to be excluded in the computation of the taxpayer company's profits. The expenditure was incurred wholly and exclusively for the purposes of the taxpayer company's trade, so that s 137 (a) and (d) do not apply. No capital was withdrawn from the taxpayer company's trade, nor, in my judgment, for reasons already indicated, was any part of the expenditure employed or intended to be employed as capital in the taxpayer company's trade, so that s 137 (f) does not apply. Nor, in my judgment, for reasons already given, can any part of the expenditure be said to constitute capital employed in the improvement of any premises occupied for the purposes of the taxpayer company's trade, so that s 137 (g) does not apply. It has not been suggested that any other paragraph could apply in the present case.

The Special Commissioners in their decision treated the disputed expenditure as expenses of operating the theatres which 'accrued' before the taxpayer company began to operate them. This is perhaps elliptical language. The deferred repairs—i.e. the pre-acquisition dilapidations—occurred before the taxpayer company acquired the theatres. No expenses were incurred or, in my opinion, can be accurately said to have accrued until the repairs were carried out. When those expenses were incurred, they were incurred by the taxpayer company in the course of carrying on its business and for the purposes of that business. The question whether they should be regarded as a proper charge against the taxpayer company's capital account or its revenue account cannot, in my judgment, be answered merely by saying that 'such expenses did not accrue in the process of earning the taxpayer company's profit or gain'. If this language means, as I think it must, that the expenditure was not occasioned by anything which happened in the process of earning the taxpayer company's profits, I would make two observations about this. First, this is not, I think, a satisfactory test. Many kinds of expenditure—for example, insurance premiums—are properly to be regarded as revenue expenditure without their having been occasioned by anything which has occurred in the process of earning profits. Secondly, as I have already pointed out, the case does not establish that the expenditure was any greater in consequence of the deferred repairs than it would have been if there had been none.

I find no reason in law for dissenting from the finding of fact in the supplemental case that on the assumption made for the purposes of that finding, namely, that all the theatres were acquired from vendors outside the Odeon Group but that all other facts were as found in the case, the disputed expenditure would, in accordance with principles of sound commercial accounting, be dealt with as a charge to revenue in the taxpayer company's accounts. No distinction, I think, is to be drawn in this respect between transfers of theatres within the group and purchases from vendors outside the group. Accordingly, I am of opinion that all the disputed expenditure was properly deductible in computing the taxpayer company's profits for income tax purposes in the relevant years.

For these reasons, which make it unnecessary to consider the point referred to in the taxpayer company's cross-notice relating only to acquisitions which involved succession to a trade, I would dismiss this appeal.

ORR LJ. In this appeal it has been common ground that, although the expenditure in question, if incurred by the previous owners of the theatres, would have been deductible in computing their profits for income tax purposes, it would have fallen to be treated as capital if incurred by the taxpayer company immediately after acquisition of the theatres, and it has been simply and attractively argued for the Crown that delay by the taxpayer company in incurring the expenditure cannot alter its essential character. The proposition advanced for the Crown is that, where a capital asset acquired by a trader for use in his trade was at the time of its acquisition

a in need of repairs, any expenditure subsequently incurred by the trader which has the effect of improving the asset beyond the state in which it was at its acquisition is of necessity a capital expenditure. We are concerned with the application of this proposition, if it be correct, to the facts of the present case, but the proposition as formulated would, as I understand it, apply to expenditure incurred at whatever interval of time after the acquisition, and in whatever circumstances, and would apply not only, as in this case, to premises and their furnishings, but also to such capital assets of b a trader as lorries and cars and items of plant of all kinds. In the present case the information and material necessary to support the Crown's argument became available to the Revenue in a convenient form as a result of a claim made by the taxpayer company under s 37 of the Finance Act 1946 which relates to 'terminal expenses' for the purpose of excess profits tax. In other cases the application of the c Crown's proposition, if it be correct, would involve detailed investigation of the condition of the premises or other asset at the time of acquisition and thereafter a detailed comparison of that condition with items of expenditure subsequently incurred, and it seems to me that these difficulties would in many cases make it impossible to apply the proposition save perhaps on a very arbitrary basis, but the Crown are entitled to say that this is not an answer to their case if it is on principle and authority well founded.

d It has been sought for the Crown to support the proposition, as applied to the expenditure in question in this case, on the three grounds, first, that the expenditure was by its nature capital; secondly, that its deduction is expressly prohibited by one or other of the paras (a), (d), (f) and (g) of s 137 of the Income Tax Act 1952; and thirdly, that it is not a 'proper debit item' for the purpose of computing the income tax profits of the trade; but in my judgment the Crown's case must stand or fall on the e first of these grounds.

f As to s 137 (a), there is clear authority in all the speeches in the House of Lords in *British Insulated and Helsby Cables Ltd v Atherton*⁵ (a case in which the expenditure in question was held to be capital by a majority of three to two) for the proposition that expenditure does not, by reason of its being capital, fall within the prohibition contained in that paragraph, and the same reasoning, in my judgment, applies equally to para (d). As to paras (f) and (g), the position plainly is that if the expenditure in question was on general principles capital the Crown does not need to rely on these paragraphs, and if it was not capital they do not help the Crown. In my judgment, therefore, the Crown's case cannot derive any assistance from the express prohibitions contained in s 137.

g As to the third ground, it was argued for the Crown that, even if the expenditure was on general principles of a revenue nature, it is to be disallowed on the basis of the test laid down by Lord Sumner in *Usher's Wiltshire Brewery Ltd v Bruce*⁶ that a deduction—

h 'is to be made or not to be made according as it is or is not, on the facts of the case, a proper debit item to be charged against incomings of the trade . . .'

i But this reference to a 'proper debit item' was in the context of an issue between capital and revenue expenditure. In my judgment it means no more than that, to be deductible, the expenditure must be of a revenue nature, and the passage was so understood by Lord Cave in the *Atherton* case⁷.

In support of this argument, however, the Crown also relied on a passage in the *Law Shipping* case⁸ in which Lord Clyde, before holding that the expenditure in question was by its nature capital, and alone amongst the members of the court, expressed

5 [1926] AC 205, [1925] All ER Rep 623

6 [1915] AC 433 at 468

7 [1926] AC at 211, [1925] All ER Rep at 628

8 (1923) 12 Tax Cas at 625

the view that the expenditure appeared to be prohibited by what is now para (a) of s 137 of the Income Tax Act 1952; and reliance is further placed on certain passages in the judgments in *Inland Revenue Comrs v Granite City Steamship Co Ltd*⁹, *Jackson (Inspector of Taxes) v Laskers Home Furnishers Ltd*¹⁰, and *Bidwell v Gardiner*¹¹. But in all these cases, save the last, the expenditure in question was clearly of a capital nature, and in the last, which involved expenditure in the first year after acquisition, and in which the argument was mainly on the 'succession' point, the question for the judge was whether the commissioners were entitled, on their view of the facts, to hold the expenditure to have been in part capital. If the Crown's proposition in the present case cannot be derived from general principles, the passages in these cases relied on by the Crown seem to me to provide too slender a basis to support it. I would add that if, as seems possible, Lord Clyde in the *Law Shipping* case¹² was taking the view that the expenditure was prohibited by what is now para (a) of s 137, on the ground that it was capital, his view was inconsistent with that taken in the House of Lords in the *Atherton* case¹³.

Finally, as regards this argument, the Crown's case involves that there is some third test of deductibility, additional to that of capital or revenue expenditure, and additional to that of specific statutory prohibition, but in my judgment the existence of any such third test would be inconsistent with the proposition contained in more than one decided case, and most recently repeated by Lord Reid in *BSC Footwear Ltd (formerly Freeman, Hardy & Willis Ltd) v Ridgway (Inspector of Taxes)*¹⁴, that in the framing of a profit and loss account for the purposes of income tax—

'it is well settled that the ordinary principles of commercial accounting must be used except insofar as any specific statutory provision requires otherwise.'

For all these reasons, I agree with the learned judge that there is no such third test.

If I am right in the above conclusions the question in this case is whether on general principles and on authority the expenditure in question was a capital or a revenue one. The Crown rely strongly on the *Law Shipping* case¹⁵. Counsel for the taxpayer company accepts the validity of that decision on its own particular facts, but claims that the present facts are distinguishable. In my judgment, there are a number of important differences between that case and this. One is that in that case the purchaser knew at the time of acquisition of the ship that after one further voyage a Lloyd's survey would be required and would involve very substantial expenditure if the ship were to continue to be used in the trade, whereas here what was in the purchaser's contemplation was that the theatres could be used profitably (as in the event they were) without making good the deferred repairs, and that substantial expenditure in making them good could not be lawfully incurred for an indefinite period of time. A second difference is that in the *Law Shipping* case¹⁵ the court drew, and in my judgment correctly drew, the inference that if the Lloyd's survey had not been overdue the seller would have exacted and the buyer would have paid a larger price, whereas here it has been found as a fact that the dilapidated state of the theatres did not materially affect the price. A third difference is that there was not in the *Law Shipping* case¹⁵ any accountancy evidence, whereas in the present case there was such evidence which was accepted by the commissioners.

A fourth difference is that in the *Law Shipping* case¹⁵ the repairs or replacements necessary to satisfy the Lloyd's survey were carried out after the first voyage of the ship, whereas in the present case the repairs and replacements in question were

9 (1927) 13 Tax Cas 1

10 [1956] 3 All ER 891, [1957] 1 WLR 69

11 (1960) 39 Tax Cas 31

12 (1923) 12 Tax Cas at 625

13 [1926] AC 205, [1925] All ER Rep 623

14 [1971] 2 All ER 534 at 536, [1971] 2 WLR 1313 at 1315

15 (1923) 12 Tax Cas 621

a carried out over a period beginning two years and ending ten years after the acquisition, and there is no evidence to indicate that (apart from inflation, which was taken into account in the percentage calculation or estimate) they cost any more than would have been incurred if the theatres had been acquired in good repair and subsequent dilapidations had been made good in the ordinary course of prudent maintenance. It has been pointed out to us, and is not in dispute, that the main items of the expenditure in question were carpets, decoration and upholstery, and that 60 per cent of the overall total of £17,000 represents carpets. In my judgment, it is a reasonable supposition that if dilapidations under these headings had been made good in 1945 they would in all probability have required further repair and replacement before the end of 1954. These facts pose the question why, if a trader has acquired capital assets for use in his trade and is commercially able, and desires, to continue to use these assets in a dilapidated state up to a time when, if he had acquired them new, c they would in any event have required repair or replacement, he is to be deemed, when he does effect repair or replacement, to have done so by way of capital rather than revenue expenditure; and if, as here, the position is that the trader is prohibited by law from effecting the repairs or replacements, why he should be treated as if he had elected to carry them out immediately.

d Because of these differences, which in my judgment are crucial and compelling, between the facts of the *Law Shipping* case¹⁶ and those of the present case, I would uphold the decision of the learned judge¹⁷ as to the expenditure incurred in relation to the Odeon Theatre, Marble Arch.

e Before this court additional points were taken on behalf of the taxpayer company as to the expenditure incurred in relation to certain other theatres on the ground that they were acquired from within the taxpayer company's group of companies, and/or that there was a succession to the trade carried on by the previous owner. These points do not arise in the light of the conclusion which this court has reached, but if that conclusion is wrong I would not have acceded to the argument of counsel for the taxpayer company on either of these points. As to the first, I cannot accept that the group accounts would present any insuperable difficulty. As to the second, counsel f for the taxpayer company based his argument on a difference between the wording in r 11 of Cases I and II of Sch D to the Income Tax Act 1918, as amended by s 32 of the Finance Act 1926, and the wording in the subsequent s 19 of the Finance Act 1953; but in my judgment the wording of r 11 as amended:

‘... the tax payable for all years of assessment by the person succeeding... shall be computed as if he had set up and commenced the trade at that time...’

g is amply wide enough to exclude deduction of the expenditure in question if, contrary to our conclusion, the corresponding expenditure incurred in respect of the Odeon Theatre, Marble Arch, is not deductible. I consider that this point is covered, adversely to the taxpayer company, by the reasoning of the House of Lords in *United Steel Cos Ltd v Cullington*¹⁸, although the particular subject-matter of that case was wear and tear allowances and the carry forward of losses, and not deduction of trade expenses. h

For these reasons, and those given by Salmon and Buckley LJJ, I agree that this appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: Solicitor of Inland Revenue; Richards, Butler & Co (for the taxpayer company).

F A Amies Esq Barrister.

16 (1923) 12 Tax Cas 621

17 [1971] 2 All ER 407, [1971] 1 WLR 442

18 [1940] 2 All ER 170, [1940] AC 812

Crisp Malting Ltd v Bourne (Inspector of Taxes) ^a

CHANCERY DIVISION

MEGARRY J

24th, 25th NOVEMBER 1971

Income tax – Discontinuance of trade – Company – Sale of business by company to limited partnership consisting of individuals – Resale of business by individuals to same company and one individual – First sale before 6th April 1966 – Second sale after that date – No permanent discontinuance of trade after first sale – Statutory provision saving ‘subsequent change’ from effect of permanent discontinuance ceasing to have effect except as respects any relevant change occurring before 6th April 1966 – Whether permanent discontinuance of trade after second sale – Finance Act 1954, s 17 (1), (2) – Finance Act 1965, s 61 (9). ^b ^c

The taxpayer company was incorporated in 1952 and carried on business as maltsters and merchants until 31st March 1966 when it sold its business to a limited partnership consisting of C and E (the first change). On 12th April 1966 the limited partnership sold the business to another limited partnership consisting of the taxpayer company and E (the second change), the taxpayer company being the general partner and its interest in the trade exceeding a three-fourths share. For all relevant purposes the effect was the same as if the second change had restored the business to the taxpayer company alone. The reason for the two changes was that the change-over for companies from income tax to corporation tax brought about by the Finance Act 1965 was thought by some (however erroneously) to involve an element of double taxation and the object of the changes of ownership was to avoid this. Under the provisions of s 17 (1) and (2)^a of the Finance Act 1954 neither the first nor the second change would have operated as a discontinuance of the taxpayer company's trade since, immediately before the first change, the taxpayer company was engaged in carrying on the trade and, following the second change, which occurred within two years of the first change, the taxpayer company owned an interest in the trade exceeding a three-fourths share in it. However, by the Finance Act 1965, s 95 (7) and Sch 22, the relevant parts of s 17 were repealed ‘except as respects any relevant change occurring before the year 1966-67’. Section 61 (9) of the 1965 Act also provided that the relevant provisions of s 17 were to ‘cease to have effect’ with the same exception for ‘any relevant change occurring before the year 1966-67’. It was common ground that the first change, being a ‘relevant change’ which occurred before the year 1966-67, was prevented by s 17 (1) of the 1954 Act from operating as a permanent discontinuance and that the 1965 Act did not alter this. It was contended by the taxpayer company that the second change, although occurring after the beginning of the year 1966-67, was also prevented from operating as a permanent discontinuance; the taxpayer company's argument was that since s 17 (1) and (2) continued to have effect as regards the first change and since s 17 (2) related in terms to ‘some subsequent change’ occurring after ‘the first-mentioned change’, it followed that the effect of s 17 on the second change was also preserved. ^d ^e ^f ^g ^h

Held – Since s 17 of the 1954 Act had, for all relevant purposes, ceased to have effect and been repealed, it could not save the second change from operating as a permanent discontinuance of the trade. The second change in no way inevitably followed on the first change; the second change was one which might or might not have been made according to the volition of those concerned. The reference to the ‘first-mentioned’ change in s 17 (2) was merely part of the conditions which had to be satisfied if the subsequent change was to be saved from effecting a permanent discontinuance by virtue of s 17 (2); the status of the first change as one which satisfied the still ⁱ

^a Section 17, so far as material, is set out at p 704 f to h, post

- a effective s 17 (1) did not mean that the mere reference to it in s 17 (2) would keep that subsection alive in its application to a subsequent change (see p 703 h and p 701 a to c, post).

Notes

- b For succession to a trade for income tax purposes, see 20 Halsbury's Laws (3rd Edn) 130-132, para 231; for company reconstructions not treated as a discontinuance, see *ibid*, pp 135, 136, para 238, and for cases on the subject, see 28 (1) Digest (Reissue) 110-114, 312-329.

For the Finance Act 1954, s 17, see 34 Halsbury's Statutes (2nd Edn) 296, and for the Finance Act 1965, ss 61, 97 and Sch 22, see 45 Halsbury's Statutes (2nd Edn) 595, 648, 748.

- c For 1970-71 and subsequent years of assessment, the Finance Act 1954, s 17, so far as unrepealed, and the Finance Act 1965, s 61, have been repealed by the Income and Corporation Taxes Act 1970, s 538 (1) and Sch 16 and replaced by ss 252, 253 of that Act.

Case stated

- d At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 16th and 17th October 1969 Crisp Malting Ltd ('the company') appealed against an assessment to income tax under Case I of Sch D for the year 1965-66 in an amount of £70,000 (less £70,000 capital allowances). The question for determination by the commissioners was whether the profits assessed should be computed on the basis that the trade had been permanently discontinued.

- e The company was incorporated in 1952 and carried on trade as maltsters and merchants until 31st March 1966, its accounts being made up to 30th September in each year. On 31st March 1966 the company sold its business as a going concern to a partnership firm ('Crisp Malting no 1'). Crisp Malting no 1 was a limited partnership formed by a partnership deed dated 30th March 1966 consisting of Mr J W M Crisp and Mr T C Eaton, OBE, TD. Crisp Malting no 1 carried on the business until 12th April 1966 when the partners sold the business as a going concern to a partnership firm ('Crisp Malting no 2'). Crisp Malting no 2 was a limited partnership formed by a partnership deed dated 12th April 1966 consisting of the company and Mr Eaton. The company was the general partner and it was not disputed that its interest in the trade exceeded a three-fourths share.

- g (1) The question in dispute was whether (as the Crown contended) the profits assessed should be computed on the basis that the trade was permanently discontinued and a new trade set up and commenced by reason of the changes in the persons carrying it on occurring on 31st March 1966 (the first change) or on 12th April 1966 (the second change) or either of them. This question turned on the interpretation of s 17 of the Finance Act 1954 as affected by s 61 of the Finance Act 1965 which, broadly, replaced s 17. Section 61 (9), after enacting that certain parts of s 17 should apply for certain purposes, continued 'but that section . . . shall cease to have effect for any other purpose, except as respects any relevant change occurring before the year 1966-67'. (2) It was common ground in the arguments addressed to the commissioners: (a) that for the purpose of s 61 (9) 'relevant change' had the meaning assigned to it in para 1 (1) (b) of Sch 3 to the Finance Act 1954, i.e. (briefly) a change to which sub-s (1) or (2) of s 17 applied; (b) that the first change was a relevant change occurring before 1966-67; that s 17 remained effective as respects it, and that a permanent discontinuance did not result from it; (c) that if the second change was a relevant change, the concluding words of s 17 (2) (i.e. 'the trade shall not be treated . . . as permanently discontinued, nor a new trade as set up and commenced, by reason of that subsequent change') would have no effect as respects it, by reason of s 61 (9), because it did not occur before the year 1966-67. In that event (by reason of various other provisions which were not in dispute) the trade would have to be

treated as discontinued on the occasion of the second change, and the profits computed accordingly. a

As the matter was argued before the commissioners, the issue was whether the second change was a relevant change as defined in para 1 (1) (b) of Sch 3.

It was contended on behalf of the company: (1) that inasmuch as, by virtue of s 61 (9), s 17 continued to have effect as respects the first change, effect must be given to all the provisions of s 17, including the whole of sub-s (2) as respects that first change, unless the second change was itself a 'relevant change' for the purpose of s 61 (9); (2) that the second change was not a 'relevant change' for the purpose of s 61 (9); (3) that the trade did not fall to be treated as permanently discontinued by reason of either the first change or of the second change, and that the assessment should be adjusted accordingly. b

It was contended for the Crown: (1) that the second change was a 'relevant change' within the meaning of that expression in s 61 (9), which occurred after the beginning of the year 1966-67; (2) that accordingly the provision in s 17 (2) had no effect as respects the second change; (3) that by reason of the second change the trade fell to be treated as permanently discontinued on 12th April 1966. c

The commissioners gave their decision as follows:

'The question for our determination appears to be whether Section 17 (2) of the Finance Act 1954 applies to the change in the persons carrying on the business occurring on 12th April, 1966. It was not disputed that if Section 17 had not been affected by the Finance Act 1965, Section 17 (2) would have applied to that change, and the result would have been that it would not have been treated as giving rise to a permanent discontinuance. However, Section 61 (9) of the Finance Act 1965, after enacting that certain parts of Section 17 should apply for certain purposes, goes on to say that Section 17 shall cease to have effect for any other purpose, except as respects any relevant change occurring before the year 1966/67. As the matter was argued, if the change which occurred on 12th April, 1966, was a "relevant change", Section 17 (2) would not apply to it and the appeal would fail. d

'The expression "relevant change" is defined in paragraph 1 (1) (b) of the 3rd Schedule to the Finance Act, 1954. This refers to a change to which sub-section (1) or (2) of Section 17 applies. What is contemplated by a change to which sub-section (2) alone applies? Test it this way: if the paragraph had referred only to a change to which sub-section (1) applied we would have had no doubt that the change on 31st March would be a "relevant change"; sub-section (1) clearly applies to it and what sub-section (2) does in relation to it is to identify certain circumstances which result in sub-section (1) applying; where (as here) those circumstances exist the change is one to which sub-section (1) applies and in our view it would be wrong to say that it is a change to which sub-section (2) applies. e

'What, then, is a change to which sub-section (2) only applies, unless it be a subsequent change? A subsequent change is the only change as regards which it could be said that sub-section (2) could ever have had a positive application. In our view the change on 12th April is a "relevant change" within the definition in the Schedule, and as it did not occur before the year 1966/67, Section 17 has no effect in relation to it. f

'The appeal therefore fails in principle, and we leave the figures to be agreed.' g

Agreement of the figures being later reported to the commissioners, on 28th July 1970, they increased the assessment accordingly to £189,564 (subject to capital allowances of £137,865 and losses of £42,312). The company immediately after the determination of the appeal declared its dissatisfaction therewith as being erroneous in point of law and on 30th July 1970 required the commissioners to state a case for the opinion of the High Court pursuant to the Taxes Management Act 1970, s 56. h

- a* *H Major Allen QC and A L Potez for the company.*
L J Bromley QC and P W Medd for the Crown.

b **MEGARRY J.** I have before me a short point on the permanent discontinuance of a trade for income tax purposes. It takes a little while to get to the point, but, once there, I feel no doubt, and so I do not think I need reserve my judgment. The point arises on a case stated by the Special Commissioners, and the facts lie in a narrow compass. A company called Crisp Malting Ltd, which I shall refer to as 'the company', was incorporated in 1952, and traded as maltsters and merchants until 31st March 1966. On that date the company sold its business to a limited partnership: I shall call that change 'change no 1'. A few days later, the fiscal year 1965-66 came to an end; and after the end of that fiscal year, on 12th April 1966, change no 2 occurred. This consisted of the partnership selling the business to another partnership. This second partnership consisted of the company and one of the existing partners, with the company's interest in the trade exceeding a three-quarters share. For all practical purposes in respect of the point that I have to consider, the effect was the same as if change no 2 had restored the business to the company alone. No question of any subsequent change arises. There was thus within a fortnight a change from the company to the partnership and back to the company, with the end of the fiscal year coming between change no 1 and change no 2. Counsel for the company told me that the reason for these changes was that the change-over for companies from income tax to corporation tax which the Finance Act 1965 brought about was thought by some (however erroneously) to involve an element of double taxation. The object was to avoid this.

c The contention of counsel for the Crown is that the second change, on 12th April 1966, brought about a permanent discontinuance of the trade for income tax purposes. On the other hand, the company contends that it did not. It is common ground that the first change was prevented from bringing about a permanent discontinuance of the trade by reason of the operation of the Finance Act 1954, s 17 (1). However, by the Finance Act 1965, with a limited exception all the relevant parts of s 17 of the Finance Act 1954 not only ceased to have effect but also were repealed: see the Finance Act 1965, ss 61 (9), 97 (5), and Sch 22, Part IV. Both forms of statutory death were subject to identical words of exception, namely, 'except as respects any relevant change occurring before the year 1966-67'; and that, of course, leads to the date 6th April 1966.

d Now, change no 1 occurred before that date, and change no 2 occurred after that date. Change no 1 therefore satisfied one of the requisite conditions, and if it satisfied the other condition by being a 'relevant change' (and there is no suggestion that it did not), then in relation to that change s 17 of the Finance Act 1954 continued to have effect and remained unrepealed. On the other hand, change no 2 was patently incapable of satisfying both conditions, in that it occurred on 12th April 1966 and that date is not before 6th April 1966 but after. Accordingly, it matters not to discover whether or not that change ranked as a 'relevant change'; for even if it did, the saving in the 1965 Act could not, by reason of the date, have any application to it.

e Before the commissioners there seems to have been a substantial argument whether or not the second change was a 'relevant change'. Indeed the commissioners said that:

f 'As the matter was argued before us, the issue was whether the second change was a "relevant change" as defined in Paragraph 1 (1) (b) of the said 3rd Schedule',

that is, of the Finance Act 1954. The statement of the contentions of the parties displays, inter alia, the Crown as contending that the second change was a relevant change for the purpose of the saving words in the Finance Act 1965, s 61 (9), and the company on the other hand contending that it was not. The concluding words of the decision of the commissioners were as follows:

'In our view the change on 12th April is a "relevant change" within the definition in the Schedule, and as it did not occur before the year 1966/67, Section 17 has no effect in relation to it. The appeal therefore fails in principle, and we leave the figures to be agreed.'

The assessment, I may say, was under Case I of Sch D for 1965-66 in the amount of £70,000, less £70,000 capital allowance; and when the figures were subsequently agreed, they were substantially greater than the figures that I have mentioned.

Throughout the argument I remained unable to perceive why any question whether the second change was or was not a 'relevant change' needed to be argued or decided. Counsel for the Crown in terms accepted that it need not, and I think that in the end counsel for the company, at least in some respects, was not far from saying 'Nolo contendere'. I am not surprised that the commissioners should have decided the point, since it appears to have been strenuously argued before them; but in their phrase 'as the matter was argued before us' (a phrase in substance repeated in their decision) may perhaps be detected supervening doubts on this point. However that may be, I may mention that I was taken on a guided tour of a number of statutory provisions which included the Finance Act 1954, Sch 3, para 1; and this states what 'relevant change' means in that schedule to that Act. The phrase as it occurs in the saving words of the Finance Act 1965, s 61 (9), does not seem to be defined. It may indeed be that the definition in Sch 3 to the Finance Act 1954 applies to the later Act, *faute de mieux*, but I see no reason to decide more than is necessary for the proper disposal of the case before me. I therefore leave to others the pleasure of examining what is or is not a 'relevant change' in the Finance Act 1965, s 61 (9), pausing merely to wish them joy.

What I must turn to is the point which does arise for decision. This in the main depends on the language of the Finance Act 1954, s 17 (1) and (2). I shall read these subsections:

'(1) A trade carried on by a company, whether alone or in partnership, shall not be treated for any of the purposes of the Income Tax Acts as permanently discontinued, nor a new trade as set up and commenced, by reason of a change in the year 1954-55 or any subsequent year of assessment in the persons engaged in carrying on the trade, if the company is the person or one of the persons so engaged immediately before the change and on or at any time within two years after the change the trade or an interest amounting to not less than a three-fourths share in it belongs to the same persons as the trade or such an interest belonged to at some time within a year before the change.

'(2) The conditions for the foregoing subsection to apply to a change may be satisfied notwithstanding that some other change, prior or subsequent to the first-mentioned change, intervenes between the times taken for the comparison under that subsection, and if they are (or continue to be) satisfied by reference to a time after some subsequent change (but still within two years after the first-mentioned change) the trade shall not be treated for any of the purposes of the Income Tax Acts as permanently discontinued, nor a new trade as set up and commenced, by reason of that subsequent change.'

The subsections can hardly be said to yield their full sweetness at a reading; and I propose to apply the precept 'divide and conquer', a precept which has its lessons for lawyers (and not least draftsmen) as well as for soldiers and politicians. Put generally, s 17 (1) makes certain provisions for a trade carried on by a company. The subsection prevents that trade from being treated for any income tax purposes as being permanently discontinued (or a new trade set up and commenced) by reason of certain changes in that trade. This applies if specified conditions are satisfied; and I will set out the substance of these in tabular form. The conditions may be expressed as follows:

- a (a) The change is made in the year 1954-55 or any subsequent year of assessment.
(b) The change is in the persons engaged in carrying on the trade.
(c) The company is the person (or one of the persons) thus engaged immediately before the change.
(d) On the change, or at any time within two years after it, the trade (or an interest amounting to at least a three-fourths share in it) belongs to the same persons as the trade (or such an interest) belonged at some time within a year before the change.

- I pause merely for emphasis on two points. First, although I need not mention paras (a) and (b) further, para (c) is important; for it confines the subsection to cases where, immediately before the change, the company, with or without others, is the person carrying on the trade. A change from individuals to a company can never be within the subsection, whereas a change from a company to individuals may fall within it. Second, the question of an identity sufficient to invoke para (d) has to be resolved by a comparison of the states of affairs existing at two periods in time. One takes one's standpoint immediately before the moment of change and then looks backward for a year and forward for two years. If at any time during the one-year period there was any state of the trade belonging to persons which has a sufficient identity with any state of the trade belonging to persons existing at any time during the two years, condition (d) is satisfied. The process of looking backward can, of course, be done *instanter* when the change is made; but the process of looking forward, although it may yield a sufficient identity at once, may instead yield none until some or all of the two years has run. To its inherent Janus-like quality the subsection thus adds Mr Asquith's famous monition 'Wait and see'.
- e I turn to sub-s (2). This really falls into two somewhat disparate parts. The first part seems to me to do little or nothing more than make explicit what is already inherent in sub-s (1). There is nothing in sub-s (1) to suggest that its application will be affected by the occurrence of any other changes in addition to the changes being considered. If all the conditions are satisfied, there is nothing in para (d) in particular which implies that, when sufficient identity has been shown between a state of affairs in the one-year period and the state of affairs in the two-year period, the effect of that identity will or can be negated by other changes having also occurred. Every change is to be examined to see whether it satisfies the conditions of the subsection; and if it does, it has the effect of negating any permanent discontinuance attributed to it. The opening limb of sub-s (2) seems to me to do no more than spell out the irrelevance of any other changes when considering whether a particular change satisfied sub-s (1). The words are:

'The conditions for the foregoing subsection to apply to a change may be satisfied notwithstanding that some other change, prior or subsequent to the first-mentioned change, intervenes between the times taken for the comparison under that subsection'.

- h The second limb, however, is quite different. It is dealing not with the change that is under examination for compliance with sub-s (1), but with some subsequent change; and the subsection makes the substantive provision that where it applies—

- j 'the trade shall not be treated for any of the purposes of the Income Tax Acts as permanently discontinued, nor a new trade as set up and commenced, by reason of that subsequent change.'

To this extent the language is identical with that of sub-s (1). In other words, a change may take either of the two routes to the status of not bringing about a permanent discontinuance of a trade or the setting up of a new trade, one route under sub-s (1) and the other under the second limb of sub-s (2). For the latter to apply, only two conditions have to be satisfied. They may be expressed as follows:

- (i) The conditions for sub-s (1) to apply to a change are satisfied (or continue to be satisfied) by reference to a time after some subsequent change. a
- (ii) That time is still within two years after the change which satisfies sub-s (1).

It is implicit in para (i) that there have been two changes, an earlier change that satisfies sub-s (1) and a subsequent change.

Let me take an example. Suppose a first change from company to partnership; and suppose a second change within two years from partnership back to the same company. The first change satisfies sub-s (1), and so is prevented from working a permanent discontinuance. The second change, however, is incapable of satisfying sub-s (1), for the persons engaged in carrying on the trade immediately before the change were not the company but the partnership. Condition (c) is therefore not satisfied. However, the conditions for the second limb of sub-s (2) to apply are satisfied, and so, by force of that limb, the second change, too, is prevented from working any permanent discontinuance. b

Now in the case before me, the two changes there made are in essence the same as the two changes in the example which I have just mentioned. If the Finance Act 1954 had remained unaffected by the Finance Act 1965, the combined effect of sub-ss (1) and (2) of s 17 of the Finance Act 1954 would have been that each change would have been prevented from effecting any permanent discontinuance. However, the Finance Act 1965 was, of course, enacted, and the question is the effect of s 61 (9) on the second change. It is common ground that the first change, which occurred before the year 1966-67, was prevented by s 17 (1) from operating as a permanent discontinuance and that s 61 (9) of the Finance Act 1965 did not alter this. But the second change did not occur 'before the year 1966-67'; it occurred after that year had begun to run. Accordingly, apart from some subsections irrelevant to the case, s 17 of the Finance Act 1954 'ceased to have effect for any other purpose', and was repealed. No point, I may say, was taken on the date when the Finance Act 1965 was passed (it was 5th August 1965). Since s 17 thus has no effect and is repealed, how can it save the second change from operating as a permanent discontinuance? c

The essence of the company's argument, stripped of any irrelevant foliage relating to 'relevant change', was on the following lines. As s 17 continued to have effect as regards the first change, this meant that, quoad that change, both sub-s (1) and sub-s (2) continued to have effect. The second limb of sub-s (2) relates to 'some subsequent change' (that is, a change subsequent to the first change), and as a sort of appendage to the effect that s 17 had on the first change, its effect on the second change must be preserved. Where s 17 is brought into play by a change before 6th April 1966 the section must operate not only on that change, but also on any subsequent change that may have been made in consequence of that initial change. It would be unreasonable to read the Finance Act 1965 as permitting s 17 to apply to the first change and then, when that change plainly fell within the words 'first-mentioned change' in sub-s (2), preventing the reference in sub-s (2) to the 'subsequent change' from operating in respect of that change. d

Counsel for the company also put some emphasis on the Finance Act 1954, Sch 3, para 7 (3). In this, there is the phrase 'a relevant change to which subsection (1) of the principal section applies (whether or not by virtue of subsection (3))'. 'The principal section' is s 17, and for counsel for the company the significant feature of the phrase was the omission of any reference to sub-s (2). The result, he said, was that the reference to sub-s (1) must by implication embrace the first limb of sub-s (2), although not the second limb, since that took effect only for changes that were not 'relevant changes'. The result, he contended, was to emphasise that the first limb of sub-s (2) was really an appendage to sub-s (1), removing doubt, and that the second limb was needed to make the amplified sub-s (1) effective. In this way, sub-s (2) was to be regarded as continuing to operate in all cases in which sub-s (1) operated. e

a I hope that I have not done counsel for the company any injustice in this attempt to state the general lines of his argument. In my judgment, such an argument must fail. The second change in no way inevitably followed on the first change; the second change was one which might or might not have been made, according to the volition of those concerned. The reference in the second limb of s 17 (2) to the 'first-mentioned change' is merely a part of the conditions which have to be satisfied if
b the subsequent change is to receive its salvation from permanent discontinuance by virtue of the subsection; and I cannot see how the status of the first change as a change which satisfied the still effective s 17 (1) can mean that the mere reference to it in s 17 (2) will keep alive sub-s (2) in its application to a subsequent change. For all purposes relating to the first change, s 17 stays alive; but when it is sought to apply s 17 (2) to the second change, the Finance Act 1965 states that as respects that second change, s 17 (2) is no more. The second change can thus derive no comfort
c from any argument that s 17 (2) can be treated as still alive in its reference to the first change; for in relation to the second change at least, the rest of the subsection is dead, including the operative words which negative a permanent discontinuance.

I should add that the argument based on Sch 3, para 7 (3), to the Finance Act 1954 had subtleties which I fear I may not have savoured to the full; but I am far from convinced that Parliament can have intended any such inferential incorporation as
d counsel for the company's argument involved, even if (which I doubt) it produced the beneficial results for which he contended. Expressum facit cessare tacitum; and a draftsman who refers to a change to which sub-s (1) applies 'whether or not by virtue of subsection (3)' can hardly be pictured as having refrained from using the words 'subsections (2) or (3)' in place of 'subsection (3)' in this phrase merely because in his
e view it is so obvious that a reference to sub-s (1) must silently include sub-s (2), or, worse still, part but not all of sub-s (2).

It follows that I have reached the same result as the commissioners, although by a somewhat different process of reasoning. Counsel for the company was critical of the grounds on which the commissioners had decided the case; and there seemed to be force in at least part of his criticism. However, I do not need to go into that. All
f that I need say is that I dismiss the appeal; and this I do.

Appeal dismissed.

Solicitors: *Cripps, Harries, Willis & Willis* (for the company); *Solicitor of Inland Revenue.*

K Buckley Edwards Esq Barrister.

Re Armitage's Will Trusts Ellam and another v City and County of Norwich and others

CHANCERY DIVISION

GOULDING J

26th, 27th, 28th OCTOBER 1971

Charity – Charitable trust – Eleemosynary charity – Local authority – Power of authority to accept gifts of property – No power to accept property to be held in trust for an eleemosynary charity – Meaning of eleemosynary charity – Gift by will to local authority on trust to make payments to nursing homes for elderly women – Whether constituting a trust for an eleemosynary charity – Local Government Act 1933, s 268 (1), (3).

By her will the testatrix bequeathed her residuary estate to Sheringham Urban District Council ('the council') and Norwich Corporation instructing her executors to give to those bodies 'equal annual payments of £200 or £300 to nursing homes for elderly women. Preference to be given to those who can prove they saved for old age, but lost savings through natural catastrophes or national affairs beyond their control. Payments to continue as long as capital lasts'. The power of the council to accept and administer gifts of property was contained in s 268 (1)^a of the Local Government Act 1933. That power was however subject to the provision in s 268 (3)^a that the section 'shall not authorise the acceptance by a local authority of property which, when accepted, would be held in trust...for an eleemosynary charity'. It was contended that the council had power to receive the gift since it was not a gift for the relief of poverty and therefore did not constitute an eleemosynary charity within the meaning of s 268 (3).

Held – The expression 'eleemosynary charity' covered all charities directed to the relief of individual distress, whether due to poverty, age, sickness or other similar afflictions; accordingly the council had no power to accept the gift (see p 711 g, post).

Notes

For gifts of property to local authorities, see 18 Halsbury's Laws (3rd Edn) 373, 374, para 711.

For the Local Government Act 1933, s 268, see 19 Halsbury's Statutes (3rd Edn) 551.

Cases referred to in judgment

A-G v Calvert (1857) 23 Beav 248, 26 LJCh 682, 29 LTOS 61, 21 JP 371, 8 Digest (Repl) 423, 1135.

A-G v St John's Hospital, Bath (1876) 2 ChD 554, 45 LJCh 420, 34 LT 563, 8 Digest (Repl) 490, 2021.

Re Lawton, Gartside v A-G [1936] 3 All ER 378, 8 Digest (Repl) 451, 1471.

Re Lysaght (decd), *Hill v Royal College of Surgeons of England* [1965] 2 All ER 888, [1966] Ch 191, [1965] 3 WLR 391, Digest (Cont Vol B) 77, 1240a.

Re Perry Almshouses, Re Ross' Charity [1899] 1 Ch 21, 68 LJCh 66, 79 LT 366, 8 Digest (Repl) 490, 2029.

Adjourned summons

By a summons dated 16th September 1969 the plaintiffs, Frank Edgar Armitage Ellam and Emily Rita Ellam, the executors of Lilian Armitage, deceased, sought, inter alia, the determination of the court, inter alia, whether, on the true construction of two paper writings marked 'A' and 'B' as admitted to probate ('the will') the first and

^a Section 268 is set out at p 710 g to j, post

- a* second defendants, the City and County of Norwich ('the corporation') and Sheringham Urban District Council respectively, were entitled to annuities under the provisions of the will and, if so, whether the corporation or the council had any statutory or other authority to hold and/or apply moneys on charitable trusts, and whether the trusts of the will constituted the trusts of an 'eleemosynary charity' within s 268 of the Local Government Act 1933. There were also joined, May Ellam, as third defendant, the next-of-kin entitled on intestacy, and the Attorney-General. The facts are set out in the judgment.

J H G Sunnucks for the plaintiffs.

Gavin Lightman for the corporation.

G C Raffety for the council.

C H McCall for the third defendant.

- c* *N C H Browne-Wilkinson* for the Attorney-General.

GOULDING J. I have previously given part of my judgment on the will of this testatrix, Lilian Armitage. The effect of what I have already said is that the whole residuary estate of the testatrix is bequeathed for the purposes set out in the following terms:

- d* 'From what money remains, my executors will give to Norwich and Sheringham Town Councils, equal annual payments of £200 or £300 to nursing homes for elderly women. Preference to be given to those who can prove they saved for old age, but lost savings through natural catastrophes or national affairs beyond their control. Payments to continue as long as capital lasts.'

- e* It is not disputed that the provision of nursing homes, or places in nursing homes, for elderly women is a charitable purpose in law.

As to the machinery of the gift, it is in my judgment clear that the testatrix did not intend the town councils to receive the whole capital of her residuary estate at once. She contemplated what she calls 'equal annual payments of £200 or £300' to them. Whether the word 'equal' is intended to indicate equality between the two

f councils or equality as between one annual payment and that in the next or preceding year, or equality of grants for the benefit of individual elderly women is obscure.

I do not propose to attempt a choice between the possible expositions of the detailed intention of the testatrix. I think myself that she intended her executors to have some discretion as to the amounts of payments out of income, supplemented if necessary by capital. All this is very uncertain, but as the purpose is charitable

g any uncertainty of machinery can if necessary be cured by a scheme.

- Questions arise, however, as to the power of the two councils to play the part assigned to them by the testatrix. I will take Norwich first. The expression 'Norwich Town Council' has been tacitly accepted by all parties as designating the Norwich Corp'n ('the corporation'). That body claims the necessary power to take and administer the annual payments given to it, first as a corporation incorporated by charter, and alternatively under the Norwich Corporation Act 1933, s 115. It will be convenient to read that section at once. It stands alone between sections dealing with quite different matters. It contains three subsections. The section reads:
- h*

- j* '(1) Subject to the provisions of this section the Corporation may accept hold and administer any gift of property whether real or personal for any public purpose connected with the city and may execute any works (including works of maintenance or improvement) incidental to or consequential on the exercise of the powers conferred by this section and where the purposes of the gift are purposes for which the Corporation are empowered to expend money out of the general rate fund or the general rate they may subject to any condition or restriction attaching to such power expend money out of the general rate fund or the general rate in the execution of such works in relation to the subject-matter of the gift.'

'(2) This section shall not extend to property relating to affairs of the church within the meaning of the Local Government Act 1894 or to an ecclesiastical charity within the meaning of that Act. a

'(3) Accounts of the income and expenditure of the Corporation under this section shall be kept by the chief financial officer and shall be made up and audited as part of the general accounts of the Corporation.'

As I have said, the corporation submits that it has power to accept and administer the gift of the testatrix either by virtue of its capacity as a chartered corporation or under the section which I have just read. b

The answer made by counsel for the third defendant is first of all that if the corporation had at common law unrestricted power to hold and administer trust property, most of the section in the local Act would not have been necessary. I do not think that he can say that the whole section would have been unnecessary because of the later part of sub-s (1) dealing with subventions from the general rate fund or the general rate. In relation to that contention of counsel it is important to remember that the preamble to the Act contains the recitals usually placed in local Acts. After dealing with a number of specific matters which do not affect s 115 the preamble continues: 'And whereas it is expedient that the other provisions contained in this Act be enacted: And whereas the purposes of this Act cannot be effected without the authority of Parliament . . .' So, says counsel, the Act itself makes one wonder very much whether the corporation previously had the powers given by s 115. c

Then as to the section itself, it is, counsel for the third defendant submits, that the purposes of the will of the testatrix are not within the phrase any public purpose connected with the city' contained in s 115. The testatrix's objects, it is submitted, are in the nature of a private charity and do not fall within the language of the local Act. I reject the latter contention. In my judgment a bequest by a testator for the benefit of a class of the inhabitants of the city, such as elderly women, at any rate if it is legally charitable, constitutes a public purpose within the meaning of the section. The corporation therefore has under the local Act of 1933 the necessary power to do what the testatrix contemplated, and it is unnecessary for me to pursue the question regarding its powers apart from statute. d

The Urban District Council of Sheringham ('the council') is in a more difficult position. Its powers can only be statutory, and it has found only one enactment at all in point, that is s 268 of the Local Government Act 1933. It contains four subsections. The section provides: e

'(1) Subject to the provisions of this section a local authority may accept, hold and administer any gift of property, whether real or personal, for any local public purpose, or for the benefit of the inhabitants of the area or of some part thereof, and may execute any works (including works of maintenance or improvement) incidental to or consequential on the exercise of the powers conferred by this section. f

'(2) Where the purposes of the gift are purposes for which the local authority are empowered to expend money raised from a rate, they may, subject to any condition or restriction attaching to the exercise of that power, defray expenditure incurred in the exercise of the powers conferred by the last preceding subsection out of money so raised. g

'(3) This section shall not authorise the acceptance by a local authority of property which, when accepted, would be held in trust for an ecclesiastical charity or for an eleemosynary charity. h

'(4) Nothing in this section shall affect any powers exercisable by a local authority under or by virtue of the Education Acts, 1921 to 1933.' i

As far as sub-s (1) goes, that subsection would in my judgment if it stood alone empower an urban district council to accept a gift of the character here in question.

a The council relies on that subsection and says that the powers conferred by sub-s (1) are not taken away by sub-s (3). On the latter point two alternative arguments have been presented. First, it is submitted that sub-s (3) when it speaks of property which would be held in trust for certain types of charity is concerned only with the holding of permanent endowments and does not forbid the receipt and administration of annual payments intended for immediate or early application. That contention is in my judgment inconsistent with the literal meaning of the words employed by b Parliament and I find nothing in the context to justify a modified interpretation.

Secondly, counsel for the council says, with the vigorous support of counsel for the Attorney-General, that the trust in the present case is not an 'eleemosynary charity'. I have heard a great deal of able argument on the word 'eleemosynary'. As counsel have shown, that adjective has been used with a variety of meanings in different legal contexts. The particular term 'eleemosynary charity' is not a term of art with c a judicially established definition. Nor has any earlier legislation been discovered that might help to explain its meaning in the Local Government Act 1933.

I am urged to give the word the narrowest possible meaning because it is said s 268 (3) is a disabling subsection. The suggested narrowest meaning is charities for the relief of poverty. However, s 268 as a whole is an enabling not a disabling section d and I do not think I ought to strain the language of a particular subsection in either direction. It appears to me that the correct principle of construction is to read the whole of s 268 and then see what, on a fair interpretation of the language without pressing it either way, was the intention of Parliament. Subsection (3) itself shows that for the purposes of the Act not all charities are eleemosynary, nor in general are ecclesiastical charities, which are defined by the Act, eleemosynary, although e possibly some charities may have both attributes. However, the context does not help further towards the definition of eleemosynary.

How then am I to ascertain the proper and natural meaning of the adjective in its place? I must have regard to the etymological origin of the word. It is an adjective derived from the Greek word which, through Latin, has come into our language as 'alms'. I also have regard to the use of the word by learned judges in certain f charity cases which have been cited, namely, *A-G v Calvert*¹, *A-G v St John's Hospital, Bath*², and *Re Perry Almshouses*³. Can I also derive any assistance from the known or presumed intention of the legislature in inserting the words in the 1933 Act? Nothing has been adduced before me to show what the mischief to be corrected was. It is submitted that I am not at liberty to speculate on the point, and I do not propose to do so.

g Having, as I have said, had regard to the derivation of the word and to the way in which it has been used in the judgments that have been cited, and looking at the context, I come to the conclusion that the term 'eleemosynary charity' covers all charities directed to the relief of individual distress, whether due to poverty, age, sickness or other similar individual afflictions. Whether the term extends further it is not necessary for me to decide, and I express no opinion on the point.

h Even if I had agreed with counsel for the Attorney-General in confining the term to the relief of poverty, I should still have doubted his conclusion, for it seems to me that the gift as a whole, including the preference expressed, for women 'who can prove they saved for old age, but lost savings through' causes beyond their control, shows that the purpose of the testatrix was not merely to benefit elderly women but to help elderly women who need financial help. Even if the preference is merely i a preference and there is no implied requirement of poverty as regards candidates who do not get in under the preference, it would still seem to me that the object if not purely for the relief of poverty is at least in part for the relief of poverty, and

1 (1857) 23 Beav 248

2 (1876) 2 Ch D 554

3 [1899] 1 Ch D 21

therefore eleemosynary even on the construction adopted by counsel for the Attorney-General. Both on etymological grounds and on judicial authority an almshouse is an eleemosynary charity par excellence, and I think it would be arbitrary and fanciful to draw a line between an almshouse and the particular scheme of this testatrix. a

What then is the consequence of the inability of the council to receive the payments intended by the testatrix and deal with them in accordance with her wishes? Counsel for the third defendant says with truth that in certain cases the personality of the chosen trustee is essential to a donor's charitable intention. In such cases if the trustee is dead, or disclaims the gift, or is incapable for any reason of acting, the gift fails, since there is no general, or no more general, charitable intention to justify application of the subject-matter *cy-près*. For that proposition counsel relied on *Re Lawton*⁴, and *Re Lysaght (decd)*⁵. I suppose, however, that so narrowly circumscribed an intention is unusual. Even in *Re Lysaght (decd)*⁵, where the facts were very strong, it was apparently only the existence of a special recital in the will which led the learned judge to his conclusion⁶. b

In my judgment the intention of the testatrix in the present case was not so restricted as counsel for the third defendant contends. I find from the language of document B, forming part of the will, that the mind of the testatrix was directed essentially to the relief of elderly women. Although she no doubt had much confidence in the local authorities, I cannot infer that her whole purpose was conditional on their co-operation. It follows that no part of the residuary gift fails. c

Determination accordingly. d

Solicitors: Wild, Collins & Crosse, agents for Hansell, Stevenson & Co, Norwich (for the plaintiffs); Sharpe, Pritchard & Co (for the corporation); Curwen, Carter & Evans (for the council); Theodore Goddard & Co (for the third defendant); Treasury Solicitor. e

Richard J Soper Esq Barrister.

Stevens v London Borough of Bromley

COURT OF APPEAL, CIVIL DIVISION f

SALMON, EDMUND DAVIES AND STAMP LJ

11th, 15th, 16th NOVEMBER, 13th DECEMBER 1971

Town and country planning – Enforcement notice – Validity – Owner and occupier notices coming into effect at different dates – Occupier – Licensee as occupier – Owner of caravan site – Caravan dweller residing in caravan as permanent home – Weekly payments by caravan dweller to site owner for use of pitch – Caravan dweller licensee of pitch – Copies of notice served on site owner and caravan dweller on different dates – Whether caravan dweller occupier of part of site – Town and Country Planning Act 1962, s 45 (3) (a). g

In 1964 the plaintiff, whose business was that of operating caravan sites, purchased several acres of land, part of which was an authorised caravan site. The remainder of the land ('the site') had no planning permission for caravans. The plaintiff, apparently under the impression that the site had existing user rights, began to develop it as a caravan site. He put down a road and hard standings and, in February 1965, the first caravan arrived. W took up residence in it. Before the end of September 1965 there were 10 or 11 large caravans on the site. The caravans were the permanent homes of their owners and many of them made gardens on the small plots of land surrounding their caravans. W marked off the boundary of his plot with large rocks. Main water and electricity were laid on to each caravan and drains were connected which carried the sewage from each caravan to a common cesspool. The caravan h

⁴ [1936] 3 All ER 378

⁵ [1965] 2 All ER 888, [1966] Ch D 191

⁶ [1965] 2 All ER at 895, [1966] Ch D at 205 j

- a owners, who made weekly payments to the plaintiff for the use of their plots, were licensees not tenants of the plaintiff. Their licences could not be revoked nor could their caravans be removed from the site unless one month's notice in writing was given. On 24th September 1965 the defendants, the planning authority for the district, issued an enforcement notice requiring the plaintiff, pursuant to s 45^a of the Town and Country Planning Act 1962, to demolish the road and hard standings, to discontinue the use of the land as a caravan site, and to restore the land to its condition before the development took place. A copy of the notice was served on the plaintiff on 27th September. Copies were also served on W and a number of other caravan owners on other dates. The plaintiff claimed that the caravan owners were 'occupiers' of their pitches within the meaning of s 45 (3) (a) of the 1962 Act and that since copies of the enforcement notice had not been served on the plaintiff and the caravan owners on the same day the notice was, on the basis of the decision in *Bambury v London Borough of Hounslow*^b, invalid. (For present purposes it was accepted that *Bambury's* case was correctly decided.)
- c

Held (Stamp LJ dissenting) – The enforcement notice was invalid for the following reasons—

- (i) it was a fair inference from the provisions of ss 45-47^c of the 1962 Act that the intention of the legislature was to ensure that anyone who might be prejudiced by an enforcement notice should be served with it; the fact that the caravan owners were not tenants of the plaintiff but licensees did not necessarily preclude them from being entitled to receive an enforcement notice; in appropriate circumstances licensees were capable of being occupiers within the meaning of s 45 (3) (a) (see p 718 b c and f and p 722 c to e, post);
- d
- (ii) having regard, inter alia, to the length of time during which W had been on his plot on the site, and the nature of his licence to be there, W at least was an occupier within s 45 (3) (a) (see p 718 f, p 719 c, p 721 b and p 722 f, post).
- e

Dictum of Viscount Cave in *Madrasa Anjuman Islamia of Kholwad v Municipal Council of Johannesburg* [1922] 1 AC at 504 applied.

Munnich v Godstone Rural District Council [1966] 1 All ER 930 distinguished.

- f Decision of Plowman J [1971] 2 All ER 331 affirmed.

Per Salmon and Stamp LJ. Paragraphs (a) and (b) of s 45 (3) must be construed separately; accordingly for a person to be an occupier within the meaning of s 45 (3) (a) it is not necessary that he should have, within the meaning of s 45 (3) (b), an 'interest' (i.e. a legal or equitable interest) in land (see p 717 h and j and p 723 e to g, post).

g Notes

For validity of enforcement notices, see 37 Halsbury's Laws (3rd Edn) 344-347, paras 447, 448; 351, 352, para 453, and for cases on the subject, see 45 Digest (Repl) 350-354, 91-101.

For service of enforcement notices, see 37 Halsbury's Laws (3rd Edn) 332-334, para 438, and for cases on the subject, see 45 Digest (Repl) 349, 350, 87-90.

- h For the Town and Country Planning Act 1962, ss 45, 46 and 47, see 42 Halsbury's Statutes (2nd Edn) 1015, 1017, 1019.

Section 45 has been repealed, and replaced by s 15 of the Town and Country Planning Act 1968.

Cases referred to in judgments

- j *Bambury v London Borough of Hounslow* [1966] 2 All ER 532, [1966] 2 QB 204, [1966] 2 WLR 1294, 130 JP 314, Digest (Cont Vol B) 693, 90a.
Field Place Caravan Park Ltd v Harding [1966] 3 All ER 247, [1966] 2 QB 484, [1966] 3 WLR 198, 130 JP 397, Digest (Cont Vol B) 611, 128b.

a Section 45, so far as material, is set out at p 716 e, post

b [1966] 2 All ER 532

c Sections 46 and 47, so far as material, are set out at p 716 g to p 717 a, post

Madrasa Anjuman Islamia of Kholwad v Municipal Council of Johannesburg [1922] 1 AC 500. a

Munnich v Godstone Rural District Council [1966] 1 All ER 930, [1966] 1 WLR 427, 130 JP 202, Digest (Cont Vol B) 472, 292b.

Shell-Mex and BP Ltd v Manchester Garages Ltd [1971] 1 All ER 841, [1971] 1 WLR 612.

Appeal

This was an appeal by the defendants, the London Borough of Bromley, from the judgment of Plowman J, given on 8th March 1971 and reported [1971] 2 All ER 331, whereby he declared that the enforcement notice served on the plaintiff, Harry John Stevens, and on other persons requiring them to demolish certain roads and hard standings and to discontinue the use of land specified therein as a caravan site was invalid and of no effect. The facts are set out in the judgment of Salmon LJ. b

Graham Eyre QC and Anthony Dinkin for the defendants. c

Michael Albery QC and Michael Essayan for the plaintiff.

Cur adv vult

13th December. The following judgments were read.

SALMON LJ. The plaintiff's business consists of owning and operating a number of caravan sites. In 1964 he bought $7\frac{3}{4}$ acres of land at Berry's Green Road, Single Street, near Biggin Hill in Kent. Three acres of this land was admittedly an authorised caravan site. This case concerns the remaining $4\frac{3}{4}$ acres which I will call 'the site'. There is no planning permission in existence for its use as a caravan site. The plaintiff, however, apparently under the impression that it had existing user rights, began to develop it as a caravan site. He put down a road and hard standings, and in February 1965 the first caravan appeared. Mr Bernard Wicks took up residence in it and he still resides there. Before the end of September 1965 there were 10 or 11 caravans on the site all being used as residences by their occupants. These were large caravans each with about 400 square feet of floor space, comprising separate bedrooms, a living room, a bathroom and w.c. Main water and electricity was laid on to each caravan and drains were connected which carried the sewage from each caravan to a cesspool serving the whole site. Most of the caravan dwellers made gardens on the small plots of land in the middle of which their caravans stood. The caravans were all bought by their occupiers from the plaintiff. No caravan was ever moved from one plot on the site to another and it would have been difficult if not impossible for the owner of any caravan to find any place to accommodate it were he to move it from the site. d

It is now common ground that the caravan dwellers were not tenants but each was the licensee of the plot on which the caravan stood, that each paid the plaintiff £1.75 a week 'rent' and that his licence could not be revoked nor could he remove his caravan from the site save by one month's notice in writing. The caravans were all used as permanent homes. The plaintiff's policy was not to serve a notice to quit on a caravan dweller unless he failed to pay his rent or made a nuisance of himself. The evidence was that no such notice had been served on any caravan dweller on this site. e

The question which arises for decision in this appeal is whether the caravan dwellers were occupiers of their respective plots and in particular whether Mr Bernard Wicks was the 'occupier' of the plot on which his caravan stood within the meaning of that word as used in s 45 (3) (a) of the Town and Country Planning Act 1962. If a local planning authority serves an enforcement notice under that section it must be served on all the occupiers as well as on the owner of the site to which it relates, otherwise the notice is invalid. f

The defendants, as the local planning authority, issued an enforcement notice dated 24th September 1965, the material particulars of which read as follows: g

a . . . 2. It appears to the [defendants] who are the local planning authority that the land has been developed by: (a) the carrying out thereon of civil engineering operations, namely the construction of a road and hard standings for caravans, and (b) the making of a material change in the use of the land to use as a caravan site by the stationing thereon of caravans for the purposes of human habitation without the planning permission required in respect thereof under Part III of the Town & Country Planning Act 1962 3. The [defendants] consider it expedient b having regard to the provisions of the development plan and to all other material considerations to serve this notice. Now THEREFORE pursuant to Section 45 of the Town and Country Planning Act 1962 the [defendants] HEREBY REQUIRE you within two calendar months from the date on which this notice takes effect: (1) To demolish the said road and hard standings and remove from the land all materials arising from such demolition (2) To discontinue the use of the land c as a caravan site (3) To restore the land to its condition before the development took place. THIS NOTICE SHALL TAKE EFFECT, subject to the Provisions of Section 46 (3) of the Town and Country Planning Act 1962, at the expiration of a period of thirty days from the service thereof upon you DATED this 24th day of September 1965 [signed by the] Deputy Town Clerk, Town Hall, Bromley, Kent. NOTE: d Your attention is drawn to the rights of appeal against an enforcement notice contained in Section 46 of the Act, a copy of this Section and other relevant Sections of the Act are annexed hereto.'

A copy of this notice describing the plaintiff as the owner and occupier of land at the site was served on the plaintiff on 27th September. A copy of the notice describing Mr Bernard Wicks as the occupier of land at the site was served on him on 25th e September. These dates are important as will presently appear.

The plaintiff in pursuance of his rights under s 46 of the 1962 Act appealed to the Minister against the enforcement notice on a number of grounds but did not then suggest that the enforcement notice was invalid. On 5th October 1966, after a public f local inquiry had been held, the Minister dismissed the plaintiff's appeal save that he varied the enforcement notice by providing that it should be complied with within six instead of two calendar months from the date on which it became effective.

The plaintiff then started the present proceedings in the Chancery Division claiming a declaration that the enforcement notice was invalid. He relied on the fact that whilst the copy of the enforcement notice was served on him on 27th September, g copies were served on other caravan dwellers on different dates and, in particular, the copy served on Mr Bernard Wicks was served as early as two days before 27th September, so that that enforcement notice became effective on different dates so far as the plaintiff and Mr Wicks and the other caravan dwellers were concerned. This, he argued, made the enforcement notice invalid on the authority of *Bambury v h London Borough of Hounslow*¹. And so, strangely enough, it does. Indeed counsel for the defendants conceded that the enforcement notice would have been invalid had it been necessary to serve it on Mr Wicks and the other caravan dwellers. He contended, however, that since none of them was an occupier none had any right to have the notice served on him. The learned judge² held that Mr Wicks and the other caravan dwellers were occupiers entitled to have the enforcement notice served on them and that as copies of it were served on them on different dates the notice was invalid. He accordingly made the declaration for which the plaintiff prayed. From that decision the defendants now appeal.

i *Bambury's case*¹, being a decision of the Divisional Court, was binding on the learned judge² but it is not binding on this court. The defendants have, however, accepted it in this court as correctly stating the law. During the course of the hearing of this appeal I intimated that I should like to hear argument whether *Bambury's case*¹

1 [1966] 2 All ER 532, [1966] 2 QB 204.

2 [1971] 2 All ER 331, [1971] 2 WLR 1291.

ought to be followed. It is perhaps not a very compelling authority because the respondent there conceded the point that an enforcement notice in this form is invalid if copies of it are served on the owners and occupiers on different dates. Lord Parker CJ considered, as I do, that the point was highly technical and completely devoid of merit. He went no further than to express the view³ that 'it may, nevertheless, be a good point'. Since the point had been conceded, he proceeded on the basis that it was a good point and then disposed of the argument that the defect in the notice had been cured. Counsel for the defendants accepted the underlying assumption in *Bambury's case*⁴ as being correct in law. Counsel for the plaintiff told us that he had not come here prepared to argue the contrary, and that if he was to do so, he would need an adjournment. Counsel for the defendants did not want an adjournment nor wish to question *Bambury's case*⁴. He asked us to deal with this appeal on the basis that *Bambury's case*⁴ was unexceptionable. In those circumstances, we thought that we must for the purposes of this appeal, but only for those purposes, make the same assumption as did Lord Parker CJ in *Bambury's case*³ itself. Having heard no argument on the matter I express no view about that case. I am very anxious however that, should the point arise for consideration in the future, our decision in this case shall not be regarded as an authority approving the underlying assumption in *Bambury's case*⁴. The point so far as this court is concerned is still wide open.

I will now consider the point on which this appeal turns, namely, whether Mr Wicks and the other caravan dwellers were occupiers of the plots on which their caravans stood. It would be enough to support the learned judge's⁵ finding if only Mr Wicks were an occupier.

It is necessary to set out the relevant sections of the 1962 Act. Section 45 (3) provides as follows:

'Where the local planning authority serve an enforcement notice, the notice—(a) shall be served on the owner and occupier of the land to which it relates, and (b) may, if the authority think fit, also be served on any other person having an interest in that land, being an interest which in their opinion, is materially affected by the notice.'

Section 46, so far as material, provides as follows:

'(1) A person on whom an enforcement notice is served, or any other person having an interest in the land, may, at any time within the period specified in the notice as the period at the end of which it is to take effect, appeal to the Minister against the notice on any of the following grounds, that is to say [then the grounds are set out (which I need not read) on which an appeal may be brought] . . .

'(3) Where an appeal is brought under this section, the enforcement notice shall be of no effect pending the final determination or withdrawal of the appeal.'

Section 47 (1) deals with the penalties which may be imposed on an owner for non-compliance with the enforcement notice. Section 47 (5) provides for penalties which may be imposed on occupiers (amongst others) for non-compliance with an enforcement notice. It provides as follows:

'Where, by virtue of an enforcement notice, a use of land is required to be discontinued, or any conditions or limitations are required to be complied with in respect of a use of land or in respect of the carrying out of operations thereon, then if any person uses the land or causes or permits it to be used, or carries out those operations or causes or permits them to be carried out, in contravention

³ [1966] 2 All ER at 535, [1966] 2 QB at 213

⁴ [1966] 2 All ER 532, [1966] 2 QB 204

⁵ [1971] 2 All ER 331, [1971] 2 WLR 1291

a of the notice, he shall be guilty of an offence, and shall be liable on summary conviction to a fine not exceeding one hundred pounds; and if the use is continued after the conviction, he shall be guilty of a further offence and liable on summary conviction to a fine not exceeding twenty pounds for every day on which the use is so continued.'

Section 177 provides as follows:

b '(1) Subject to the next following subsection, the validity of an enforcement notice which has been served under Part IV of this Act on the owner and occupier of the land shall not, except by way of an appeal under Part IV of this Act, be questioned in any proceedings whatsoever on any of the grounds specified in paragraphs (b) to (e) of subsection (1) of section forty-six of this Act.

c '(2) The preceding subsection shall not apply to proceedings brought under subsection (5) of section forty-seven of this Act against a person who—(a) has held an interest in the land since before the enforcement notice was served under Part IV of this Act, and (b) did not have the enforcement notice served on him thereunder, and (c) did not appeal against that notice under Part IV of this Act.

d '(3) The validity of a notice which has been served under section fifty-two of this Act on the owner and occupier of the building to which the notice relates shall not, except by way of an appeal under Part IV of this Act, be questioned in any proceedings whatsoever on the grounds that the works to which the notice relates were not, or were not wholly, works in contravention of subsection (1) of section thirty-three of this Act.

e '(4) Subject to the next following subsection, the validity of a notice which has been served under section thirty-six of this Act on the owner and occupier of the land shall not, except by way of an appeal under Part IV of this Act, be questioned in any proceedings whatsoever on any of the grounds specified in paragraphs (a) to (c) of subsection (1) of section fifty-seven of this Act.

f '(5) The last preceding subsection shall not apply to proceedings brought under section fifty-six of this Act against a person on whom the notice referred to in that subsection was not served, but who has held an interest in the land since before that notice was served on the owner and occupier of the land, if he did not appeal against the notice under Part IV of this Act.

g '(6) The validity of a notice purporting to be an enforcement notice shall not depend on whether any non-compliance to which the notice relates was a non-compliance with conditions, or with limitations, or with both; and any reference in such a notice to non-compliance with conditions or limitations (whether both expressions are used in the notice or only one of them) shall be construed as a reference to non-compliance with conditions, or with limitations, or both with conditions and limitations, as the case may require.'

h Counsel for the defendants has argued (1) that the interest referred to in s 45 (3) (b) is a legal or equitable interest in land and (2) that it follows, by necessary inference, that the occupiers referred to in s 45 (3) (a) must also have a legal or equitable interest in the land. I agree that the interest referred to in s 45 (3) (b) is confined to a legal or equitable interest and does not include an interest in the loose or colloquial sense of someone being interested in the land. I think that this view is underlined by the language of s 177 which speaks about a person 'who has held an interest in the land'—language which in my view is appropriate only in relation to a legal or equitable interest. There can be no doubt that the kind of interest referred to in s 177 is the same as that referred to in s 45 (3) (b). I cannot, however, accept the argument that it follows from this that a person to be an occupier within the meaning of that word in s 45 (3) (a) must also have a legal or equitable interest in the land. The substance of s 45 (3) (b) was first incorporated into the town and country planning legislation by s 35 (2) of the Caravan Sites and Control of Development Act 1960

which added to s 23 (1) of the Town and Country Planning Act 1947 the words now appearing in s 45 (3) (b) of the 1962 Act. Had the legislature intended to alter the meaning of the word 'occupier' as it appeared in s 23 (1) of the 1947 Act, surely it would have done so in far plainer language. Accordingly in my judgment the word 'occupier' in the 1962 Act means what it meant in the 1947 Act and its meaning cannot be affected by the reference to a legal or equitable interest in s 45 (3) (b).

Counsel for the plaintiff rightly concedes that there are many circumstances in which a licensee would not be an 'occupier' within the meaning of s 45 (3) (a). On the other hand he contends that the fact that a man is a licensee does not necessarily preclude him from also being an occupier entitled to be served with an enforcement notice under that section; whether or not he is an occupier depends not on his status vis-à-vis the landlord but on the facts and circumstances of the particular case. I agree with that contention. On the facts of this case which I have recited at the beginning of this judgment, it would, in my view be an affront to common sense no less than to ordinary justice to hold that Mr Wicks was not occupying the plot of land on which his caravan stood. No one, except, perhaps, a lawyer could doubt that he was in occupation of that land. Nor is there anything in the town and country planning legislation which suggests that the law points to any contrary conclusion.

'The word "occupy" is a word of uncertain meaning. Sometimes it denotes legal possession in the technical sense . . . At other times "occupation" denotes nothing more than physical presence in a place for a substantial period of time . . . Its precise meaning in any particular statute . . . must depend on the purpose for which, and the context in which, it is used.'

The town and country planning legislation makes anyone guilty of a criminal offence who fails to comply with the requirements of an enforcement notice. Compliance with such a notice may also, in some cases (as I shall show) involve abandoning home and business. The legislation, however, clearly intended to afford a measure of protection to an occupier by ensuring that he should be given adequate warning of the enforcement notice and the opportunity of appealing against it before he could be convicted of a failure to comply with it. I can find no ground for supposing that the legislature intended to deny that protection to anyone in Mr Wicks's position by excluding him from the category of occupier. His occupation of his caravan and the plot on which it stood was far from transient; they were his permanent home. In my view his occupation was exclusive. Even if the plaintiff had some measure of occupation in relation to the unit, Mr Wicks's occupation was clearly paramount. These are all factors to be taken into account in deciding whether or not a licensee is an 'occupier' within the meaning of that word in s 45 (3) (a). In each case it is a question of fact and degree. There may well be many cases in which it is difficult to decide on which side of the line it falls. On the present facts I have no doubt but that Mr Wicks is well on the right side of the line.

There can be no doubt that the caravan and the plot on which it stood together formed one unit of which Mr Wicks was in occupation and in respect of which he was therefore liable to pay rates: *Field Place Caravan Park Ltd v Harding*⁷. This last factor may not be of much importance but it would, at any rate, be odd if Mr Wicks enjoyed a sufficient degree of occupation to make him liable as a ratepayer and yet not enough to make him an occupier entitled to the protection to which I have referred. Counsel for the defendants concedes, as he must, that had there been a tenancy agreement in the same terms as the licence, Mr Wicks would have been an occupier within the meaning of s 45 (3) (a) (ibid). If that tenancy agreement had contained, as it might have done, an absolute prohibition against assigning or sub-letting

⁶ *Madrasa Anjuman Islamia of Kholwad v Municipal Council of Johannesburg* [1922] 1 AC 500 at 504 per Viscount Cave

⁷ [1966] 3 All ER 247, [1966] 2 QB 484

a there would have been no practical difference between Mr Wicks's position as it might then have been, and as it is now. I cannot accept that the legislature can have intended to give protection in the one case and not in the other. Nor can I see any incongruity in an occupier who has no legal or equitable interest being entitled to be served with an enforcement notice whilst there is no obligation to serve such a notice say on a mortgagee who does enjoy such an interest. An enforcement notice has a much more intimate connection with and impact on a person in the position of b Mr Wicks than it would have on a mortgagee. I of course recognise that since Mr Wicks and the other caravan dwellers were in fact served with copies of the enforcement notice they have not been prejudiced and have no complaint. I recognise too that the plaintiff has no merit since the case rests solely on the highly technical point arising out of *Bambury's case*⁸, which in turn depends on whether Mr Wicks was entitled to be served with the enforcement notice. The general importance, c however, of the principle that the licensee in the position of Mr Wicks is entitled to be served, in my view, far transcends the importance of the impact which it happens to have on the merits of this particular case.

It has been pointed out that of course a caravan dweller is only a solitary example of a great multitude of different kinds of people to whom the town and country planning legislation applies. Take the case of A who carries on business in a shop d and lives with his family in a flat above it. He has a licence to do so, in precisely the same terms as Mr Wicks's licence, from B, the owner of the whole premises. The agreement between A and B makes it plain that it is not a tenancy agreement and that A is being granted no legal or equitable title in the premises but only a licence to occupy them at a weekly rent, determinable by one month's notice in writing. Assuming it was possible, as it might be, to persuade the court that this was in truth e a licence, then if the defendants' contentions are correct it follows that the local planning authority could serve an effective notice in respect of those premises without being under any obligation to serve notice of it on A for A, being a licensee, could not be an occupier within the meaning of that word in the 1962 Act. He could thus be forced to leave his home and business and convicted of a criminal offence without f being given any opportunity of challenging the validity of the steps taken by the local authority to effect this end, and indeed without knowing anything about those steps.

Counsel for the defendants naturally relies strongly on *Munnich v Godstone Rural District Council*⁹. In that case the plaintiff with a man called Mr Taras bought 1½ g acres of land consisting of a field with a bungalow on it. He had unlawfully allowed four individuals to stand caravans in the field. The local planning authority issued an enforcement notice. One copy was served on the plaintiff and Mr Taras describing them as the owners of the site; one copy was served on each of the three remaining caravan owners (one of the four having departed) describing each of them as the 'occupier' of the land and these three copies were also served on the plaintiff and Mr Taras. The report does not state the degree of transience of the three so-called h occupiers in the field with their caravans, but I seem to recollect, and I am fortified in this recollection by the judgment of Danckwerts LJ¹⁰, that they were very much birds of passage. The point taken by the plaintiff was that the enforcement notice was invalid because the copy addressed to him and Mr Taras described them only as owners whilst the copy served on each of the three individuals was addressed to each as the occupier only of the piece of land on which his caravan was standing for the time being and therefore no notice had been served on the occupier or occupiers of j the whole site. This court decided that as the plaintiff and Mr Taras were the occupiers of the whole site and the notice had been served on them, it mattered not

8 [1966] 2 All ER 532, [1966] 2 QB 204

9 [1966] 1 All ER 930, [1966] 1 WLR 427

10 [1966] 1 All ER at 935, [1966] 1 WLR at 437

that it described them only as the owners. It still constituted a good notice on them as owners and occupiers. a

This court also found that none of the four individuals to whom I have referred was an occupier within the meaning of that word in s 23 of the 1947 Act, and nor were they on the facts of that case. It is true that there is a passage in the judgment of Lord Denning MR¹¹ which if taken literally could be read as meaning what I believe was never argued, namely that no caravan dweller who is a licensee can ever in any circumstances be an 'occupier' within the meaning of that word in s 23 of the 1947 Act. I do not think, however, that Lord Denning MR intended to lay down anything more than that a caravan dweller with a licence of the kind granted in that particular case could never be an 'occupier', indeed that a licensee could never be an 'occupier' unless the licence which he held put him, from a practical point of view, in much the same position as he would have been under a tenancy agreement. If, which I doubt, the judgment went further than that, then in my respectful view it went further than was necessary for deciding that case. I think it is plain from the report that both the other members of the court took the view that there can be circumstances in which a licensee is an occupier. I still hold that view and consider, for the reasons I have already indicated that the present is a classic example of such a case. b
c

It follows that I entirely agree with Plowman J's judgment¹² in the court below and would accordingly dismiss this appeal. d

EDMUND DAVIES LJ. Expressing himself as not satisfied that the relationship of landlord and tenant was ever created between the defendants and the caravan dwellers on the site with which we are concerned in this appeal, the learned trial judge¹² held that the latter were licensees. There was an abundance of evidence to justify this finding and it has been accepted before us. But what is in dispute is whether that finding concludes the matter in favour of the defendants. It is contended for the plaintiff that, even though the caravanners were licensees, they were also occupiers within the meaning of the Town and Country Planning Act 1962 and, as such, the provisions of s 45 (3) (a) had to be complied with. If that contention is right, it is common ground that, in the light of *Bambury v London Borough of Hounslow*¹³, the enforcement notice served by the defendants was invalid. Like Salmon LJ, I prefer to leave open the correctness of that decision, but, as this case has throughout been conducted on the basis that it is unexceptionable, I am content for present purposes to regard it in a like manner. e
f

The material facts and the legislation relevant thereto have already been set out by Salmon LJ and need now be referred to only incidentally. It is, I think, important to stress that counsel for the plaintiff accepts that not all licensee-caravanners are to be regarded as occupiers for the purposes of the 1962 Act. On the contrary, he accepts that the elements of (a) degree of control over and (b) duration of enjoyment of the premises concerned have direct relevance in this context, just as they have in relation to occupation for the purposes of rateability. For example, he does not contend that people who stay on a typical holiday caravan site for a short period would be occupiers of any part of it. On the contrary, he himself points to s 45 (7) and s 46 (1) (g) of the 1962 Act as indicating that the service of such notices is contemplated only on people who are regarded as likely to be on the site for a substantial period of time. Indeed, we know that all the notices in this case were expressed to take effect at the expiration of a period of 30 days from service, and called for the execution of works which, in the nature of things, involved a good deal more than simply clearing the site of a few caravans and which would probably require a not insubstantial period of time to complete. g
h
j

¹¹ [1966] 1 All ER at 934, [1966] 1 WLR at 436

¹² [1971] 2 All ER 331, [1971] 2 WLR 1291

¹³ [1966] 2 All ER 532, [1966] 2 QB 204

a For my part, I am prepared to apply the two tests of (a) degree of control and (b) duration, propounded by counsel for the plaintiff and to hold that, unless he can satisfy them, a person living on a caravan site has no legal right to have an enforcement notice served on him. But at least one of those served satisfied both tests, for Mr Wicks had been on the site some seven months when an enforcement notice (describing him as 'the occupier of land situate at Berry's Green Road') reached him on 25th September 1965. By that time he had marked off his boundary with big rocks and appears to have exercised a degree of control on his site indistinguishable from that of a tenant. Even disregarding the position of other caravanners on the site, if the proper inference from the foregoing facts is that Mr Wicks was an 'occupier' within the meaning of s 45 (3) (a), it follows that the notices served both on him and on the plaintiff were bad, being expressed to take effect from different dates: see *Bambury's case*¹⁴.

c On what grounds is it said that the act of the defendants in serving Mr Wicks was a superfluity which can and ought to be disregarded? In the last analysis, the assertion rests on an obiter dictum of Lord Denning MR in *Munnich v Godstone Rural District Council*¹⁵. Brushing aside the fact that in the enforcement notices served on certain caravan dwellers they were described as 'occupiers', Lord Denning MR said¹⁶:

d 'That was erroneous. They were not occupiers within the meaning of the Act. They were simply caravan dwellers. Caravan dwellers are only licensees and are never to be regarded as occupiers unless they are granted a tenancy. It was unnecessary to serve them at all.'

But Danckwerts and Salmon LJ were more guarded, the latter observing¹⁷,

e 'As DANCKWERTS, L.J., has said, there may well be cases where those dwelling in caravans are occupiers.'

In *Shell-Mex and BP Ltd v Manchester Garages Ltd*¹⁸ Lord Denning MR said that, when considering whether what had been granted amounted to a licence or a tenancy, the determining point was not the label applied to it, but the nature of the transaction itself. Similarly, in the present case the issue has to be resolved not simply

f by having regard to the evidence given by the plaintiff himself at the Ministerial inquiry and to the notice displayed in his site office to the effect that the caravanners were 'licensees', any more than by holding as conclusive against the defendants the fact that their own enforcement notices described each caravanner served as an 'occupier of land'. Instead, regard should be had to all the relevant circumstances.

g That no one can be regarded as the 'occupier' of land for any purpose unless he be either owner or tenant is an insupportable proposition: see the passages cited by the learned trial judge¹⁹ from the speech of Viscount Cave in *Madrassa Anjuman Islamia of Kholwad v Municipal Council of Johannesburg*²⁰. As to the term 'occupier', the learned lord concluded:

h 'Its precise meaning in any particular statute or document must depend on the purpose for which, and the context in which, it is used.'

In what context, then, is the word 'occupier' used in s 45 of the Town and Country Planning Act 1962? It must be borne in mind that Part IV of that Act (entitled 'Enforcement of Planning Control') deals with planning in general and is by no

j 14 [1966] 2 All ER 532, [1966] 2 QB 204

15 [1966] 1 All ER 930, [1966] 1 WLR 427

16 [1966] 1 All ER at 934, [1966] 1 WLR at 436

17 [1966] 1 All ER at 936, [1966] 1 WLR at 439

18 [1971] 1 All ER at 843, [1971] 1 WLR at 615

19 [1971] 2 All ER at 337, [1971] 2 WLR at 1298

20 [1922] 1 AC 500 at 504

means confined to the control of caravan sites. Section 47 (5), which has already been read by Salmon LJ, is important. The effect of it is that, provided an enforcement notice is validly served on someone, any person who thereafter uses the land in a manner contravening it is ipso facto rendered guilty of a criminal offence, regardless of whether or not he has himself been served and even regardless of whether he has knowledge that a notice has been served at all. Provided he is using the land in a manner which in fact constitutes a contravention of the notice, it matters not that his contravention was committed in complete ignorance of its terms or even of its existence. That this is the effect of s 47 (5) was at no time challenged by counsel for the defendants—indeed, he in terms accepted it. a

On the face of it, this result is so arbitrary and unjust that one is driven to strain to find some means of avoiding it. One way of achieving this is to adopt an expansive approach in determining the category of people who *must* be served with enforcement notices, and who can then appeal to the Minister (pursuant to s 46 of the 1962 Act) with a view to having it quashed or varied, or, alternatively, who can take steps to comply with it and so avoid criminal or other proceedings. That, in effect, was the course adopted in this case by the learned judge, who regarded it as a fair inference¹— b

‘that the intention of the legislature was . . . to ensure that anyone who might be prejudiced by an enforcement notice should be served with it and have an opportunity of appealing against it.’ c

Having in mind the requirement in s 45 (3) that an enforcement notice ‘shall be served on the . . . occupier of the land to which it relates’, and finding himself impelled to the conclusion that Mr Wicks (to take an example) was ‘a licensee and not a tenant’, he concluded¹: d

‘Whatever the status of such a person, vis-à-vis the owner of the land, he would, in my judgment, . . . be an occupier for the purposes of s 45.’ e

*Munnich’s case*² notwithstanding, such an approach commends itself to me, and I am prepared to adopt it as one amply warranted by the facts of the case, including the physical layout, duration of sojourn on the site, the contractual terms existing between the plaintiff and his caravanners, and all those other features to which Salmon LJ has already referred. Just as in *Field Place Caravan Park Ltd v Harding*³, a caravan and the pitch on which it stood were held to form one unit of occupation capable of being a single rateable hereditament, so also, in my judgment, Mr Wicks is to be regarded for the purposes of the 1962 Act as the ‘occupier’ of the allocated piece of land on part of which rested the caravan which was his permanent home. So regarding him, it follows that I would also be for dismissing this appeal. f

STAMP LJ. Counsel for the plaintiff in support of his submission that the word ‘occupier’ in s 45 (3) of the Town and Country Planning Act 1962 ought to be given a wide meaning to embrace persons in the position of Mr Wicks who, so it was submitted, had a degree of control over the land on which his caravan was placed, called in aid s 47 (5) of the Act. That subsection provides that where by virtue of an enforcement notice a use of land is required to be discontinued, or any conditions or limitations are required to be complied with in respect of a use of land or in respect of the carrying out of operations thereon, then if any person uses the land or causes or permits it to be used or carried out in contravention of the notice he shall be guilty of an offence and shall be liable to the fines there specified. It would, so the argument runs, be unjust and anomalous if a person was not to be served with a notice, the breach of which would render him liable to a penalty. I fully appreciate g

¹ [1971] 2 All ER at 337, [1971] 2 WLR at 1297

² [1966] 1 All ER 930, [1966] 1 WLR 427

³ [1966] 3 All ER 247, [1966] 2 QB 484

a the force of the argument and indeed one would have expected the two subsections ss 45 (3) and 47 (5), so to be framed as to embrace the same persons. Thus would the injustice or anomaly to which attention is called have been avoided. The court is accordingly asked to place on the word 'occupier' in the former subsection a meaning which would remove the injustice so far as regards persons in the position of Mr Wicks. The construction which we are asked to place on the word 'occupier' will not
b however remove the injustice or anomaly, for it will leave a class of persons not in the position of Mr Wicks who on any construction of s 45 (3) are not 'occupiers' and so not entitled to receive the enforcement notice but nevertheless liable to penalties under s 47 (5). Neither the construction of counsel for the plaintiff, nor as I see it any possible construction, of 'occupier' in s 45 (3) will comprehend all who may be using the land or carrying out operations thereon within the meaning of s 47 (5). A caravanner, such as the caravanner in *Munnich v Godstone Rural District Council*⁴, who uses the
c land or one whose caravan is moved from place to place on the land at the whim of the owner of the land will not be entitled to an enforcement notice but nevertheless liable to penalties if he fails to comply with it; and so I think would the organiser of a motor-cycle rally taking place once a fortnight on the land under licence from the owner. I cannot therefore impute to the legislature the intention that those
d persons liable to penalties should be served with an enforcement notice and on no principle of construction can I treat s 47 (5) as controlling or affecting the meaning of the word 'occupier'.

Nor am I able to accept the submission on behalf of the defendants that the word 'occupier' in s 45 (3) (a) takes its colour from s 45 (3) (b) so as to give the word 'occupier' a meaning which would comprise only those having an interest in the land. Section 45 (3) is the successor, as amended, to s 23 (1) of the Town and Country
e Planning Act 1947. That section provided that the enforcement notice should be served on the owner or occupier and there was no such reference as you find now in s 45 (3) (b) to any other person having 'an interest in that land'. At that point of time therefore the meaning of the word 'occupier' had to be determined without the aid of anything to be found in s 45 (3) (b), which was added by s 35 (2) of the Caravan Sites and Control of Development Act 1960 providing for the addition at the end of
f s 23 (1) of the 1947 Act of the words now found in s 45 (3) (b) of the Town and Country Planning Act 1962. The addition in 1960 of the reference to a person having an interest in the land cannot in my judgment affect the proper construction of the original words which in my judgment accordingly fall to be construed without regard to the terms of s 45 (3) (b).

I conclude therefore that neither the submission founded on the penal effect of s 47 (5) of the 1962 Act nor that founded on s 45 (3) (b) assists in the answer to the
g question whether any of the occupiers of the caravans in this case was an 'occupier' of the land within the meaning of s 45 (3) (a).

It is not contended in this case that the caravan dwellers are other than licensees—that is to say they had a contractual right to place their caravans on the land, to have them connected to the services there provided with no doubt ancillary contractual
h rights, expressed or implied, of access to and from their caravans, perhaps to walk round and disport themselves over the caravan site and, in the case of Mr Wicks, a licence to mark out an area of the land which surrounded his caravan. But none of them, not even Mr Wicks who is in the strongest position, had any interest legal or equitable in the land itself or any part of it. It is with the occupier of the land not of a caravan resting on it that s 45 (3) is concerned.

i Is there then any essential difference between the caravan dwellers in this case and those in *Munnich v Godstone Rural District Council*⁴. There Lord Denning MR decided not that the particular caravan dwellers in that case were not occupiers but that⁵:

4 [1966] 1 All ER 930, [1966] 1 WLR 427

5 [1966] 1 All ER at 934, [1966] 1 WLR at 436

'Caravan dwellers are only licensees and are never to be regarded as occupiers unless they are granted a tenancy.'

Danckwerts LJ in the course of his judgment said this⁶:

'In most cases, where persons are permitted to place caravans on land belonging to the owner, the owners of the caravans are not occupiers in the ordinary sense of the word, although it is possible that they may be occupiers in certain special circumstances. I remember a case in which I was concerned in which the land contained very permanent standings for the purpose of caravans being let out by the owner of the land, and, according to my recollection, the persons who hired the caravans were treated as tenants when I suppose they might become occupiers. In the present case, however, where it appears that there is a more or less shifting population with regard to the caravans which were brought on to the site and belonged to the person who came, I think that it is quite plain that in no sense of the word were the four persons mentioned in this case anything but licensees and, *therefore, that they were not occupiers.*'

Some criticism was directed in the course of the debate at the introductory part of the judgment of Danckwerts LJ, it being urged that he was erroneously directing himself to the meaning of the word 'occupier' in a different Act to that in question. But the remarks which followed were in general terms and in my view he was laying down a general rule that caravan dwellers who are mere licensees and have no interest in the land—and I use the word 'interest' in its strict legal sense—are not occupiers.

Whether or not, in view of the doubt whether the remarks in the judgment of Danckwerts LJ which I have quoted³¹ were part of his *ratio decidendi*, so that, there is a decision of this court that licensees are not occupiers within the meaning of the section here in question I would follow the decision in that case. There is already a difficulty in determining whether in any given set of circumstances a man is a tenant or a licensee and I would not wish to add further confusion in the law by holding that a licensee having no interest in the land may be an occupier according to the acts—or, if you will, the degree of control—which are either expressly or impliedly authorised by his licence. There is I think another reason for following the judgment of Lord Denning MR in the *Munnich* case⁷ in that it does in my view lead to a more sensible result; for it would, as I see it, be odd if it was compulsory, by the effect of s 45 (3) (a), to serve one who had no interest in the land but, by the effect of s 45 (3) (b), discretionary to serve it on one who had.

I only add this in relation to the meaning of the word 'occupier', that here it is used in a section designed to deal with a situation in which there has been a wrongful development of land which is to be remedied; and in my view a construction requiring the enforcement notice to be served only on those who may be supposed to have been responsible for and to be in a position to remedy what has been done, is to be preferred to one which would embrace one who has merely a contractual right to place his caravan there.

It follows in my judgment that it was not necessary or discretionary to serve the enforcement notice on any of the caravanners and I would allow the appeal.

Appeal dismissed.

Solicitors: *Herbert Smith & Co* (for the defendants); *James & Charles Dodd* (for the plaintiff).

Jacqueline Metcalfe Barrister.

⁶ [1966] 1 All ER at 934, [1966] 1 WLR at 436

⁷ [1966] 1 All ER 930, [1966] 1 WLR 427

a **Birmingham Corporation v Perry
Barr Stadium Ltd and another**

CHANCERY DIVISION

PENNYCUICK V-C

b 22nd, 25th, 26th, 27th OCTOBER 1971

c *Injunction – Interlocutory – Principle governing grant – Balance of convenience – Market – Statutory monopoly – Action for disturbance – Likelihood of loss to plaintiff if interlocutory relief refused – No evidence that defendant would suffer greater hardship – Plaintiff corporation claiming statutory monopoly of right to hold markets within area of city – Defendant holding unlicensed market within city – Plaintiff establishing clear prima facie right – Potential loss to plaintiff from fall in revenue from licensed markets and from fall in trade at plaintiff's own markets – No greater loss to defendant from grant of injunction – Defendant's business not involving much capital outlay.*

d In 1824 the right to hold a market and to collect tolls, granted by royal charter in 1154, was transferred to the board of street commissioners in the city of Birmingham by the then lord of the manor. The powers of the commissioners were transferred to the city of Birmingham by an Improvement Act of 1851. By s 89 of the Birmingham Corporation (Consolidation) Act 1883 the corporation were empowered to continue the pre-existing markets and to establish such markets as they might think fit. Under these powers the corporation established wholesale and retail markets within its area and in addition licensed seven other market sites for which the proprietors *e* paid licence fees. The first defendant owned a stadium within the city of Birmingham and granted a licence to the second defendant to hold a market in the stadium on Sundays. The second defendant held the first market on Sunday, 17th October 1971. On 20th October the corporation commenced proceedings and sought an interlocutory injunction to restrain the defendants from holding a market on Sundays at the stadium. The corporation claimed to possess under the 1883 Act a monopoly *f* right to hold markets in the city of Birmingham. Evidence was given on behalf of the corporation that, if the second defendant were permitted to hold an unlicensed market, the corporation's revenue from licence fees would be endangered and that it would also suffer loss from the fall in trade at the existing markets carried on by the corporation itself.

g **Held** – In the whole circumstances of the case the balance of justice and convenience required the grant of an interlocutory injunction against the second defendant because (a) the corporation had clearly established that under s 89 of the 1883 Act it had a statutory monopoly of the holding of markets within the boundary of the city, which it was entitled to enforce by whatever form of action was available in the courts; (b) the corporation had established that the second defendant was disturbing *h* that monopoly right; (c) there was evidence of the likelihood of loss on the part of the corporation; (d) there was no reason to suppose that the second defendant would suffer greater hardship by an injunction should he ultimately succeed in the action, for his business was not, in the nature of things, one which involved much capital outlay, and (e) the corporation would certainly be good for any damages that might ultimately be awarded to the second defendant in the event of the corporation's *j* claim failing (see p 728 g, p 730 b and g to p 731 b and p 732 d g and j, post).

Elwes v Payne (1879) 12 Ch D 468 distinguished.

Notes

For the right to protection from disturbance by the owner of a market, see 25 Halsbury's Laws (3rd Edn) 403-408, paras 788-798, and for cases on the subject, see 33 Digest (Repl) 475-482, 302-361.

For the exercise of the court's discretion in granting interlocutory injunctions, see 21 Halsbury's Laws (3rd Edn) 364-366, paras 763-766, and for cases on the subject, see 28 (2) Digest (Reissue) 966-980, 60-161.

Cases referred to in judgment

Abergavenny Improvement Comrs v Straker (1889) 42 Ch D 83, 58 LJCh 717, 60 LT 756, 33 Digest (Repl) 486, 399.

Birmingham Corpn v Foster (1894) 70 LT 371, 10 TLR 309, 33 Digest (Repl) 480, 348.

Elwes v Payne (1879) 12 Ch D 468, 48 LJCh 831, 41 LT 118, 33 Digest (Repl) 486, 411.

Hailsham Cattle Market Co v Tolman [1915] 1 Ch 360, 113 LT 254; *affd* CA [1915] 2 Ch 1, 84 LJCh 607, 113 LT 254, 33 Digest (Repl) 486, 401.

Manchester Corpn v Lyons (1882) 22 Ch D 287, [1881-85] All ER Rep 1090, 47 LT 677, 33 Digest (Repl) 480, 347.

Stevens v Chown, Stevens v Clark [1901] 1 Ch 894, 70 LJCh 571, 84 LT 796, 65 JP 470, 33 Digest (Repl) 488, 421.

Motion

The plaintiffs, Birmingham Corporation, sought an interlocutory injunction to restrain the first defendant, Perry Barr Stadium Ltd, and the second defendant, Nigel Maby, who had been granted a licence of Perry Barr Stadium, Perry Barr, in the city of Birmingham, by the first defendant, from holding a market at the stadium. The facts are set out in the judgment.

J R Reid for the plaintiff corporation.

H Brooke for the first defendant.

D R M Henry for the second defendant.

PENNYCUICK V-C. In this action the plaintiffs are the Lord Mayor, aldermen and citizens of the city of Birmingham. The defendants are, first, Perry Barr Stadium Ltd and, second, Nigel Maby. I have before me a motion on the part of the plaintiff corporation whereby it seeks an injunction to restrain the defendants, that is, both defendants, pending the hearing of the action or further order, from holding a market at Perry Barr Stadium, Birmingham, on Sundays in any week, or otherwise using or permitting to be used any portion of their property in such a manner as to interfere with or prejudicially affect the market rights of the plaintiff corporation in the city of Birmingham. The plaintiff corporation claims to possess a monopoly right to hold a market in the city of Birmingham. The first defendant owns a property known as Perry Barr Stadium, at Perry Barr, now in the city of Birmingham. The first defendant has granted a licence to the second defendant to hold a market in Perry Barr Stadium on Sundays. The second defendant held his market for the first time on Sunday, 17th October 1971, after protest on the part of the corporation. Then, on 20th October, the corporation commenced these proceedings and gave notice of motion. The motion was stood over and the second defendant held a market again on 24th October.

The market is of a mixed character and of very considerable extent. It appears that about 200 traders were present selling their goods in the market from stalls or otherwise, and on the first Sunday there were over 15,000 persons in the stadium. It is right to say that, on uncontradicted evidence from the defendants, the market was well conducted and no complaint is made under that head. The first defendant, the owner of the property, adopted what I may call a neutral attitude. It has merely granted a licence and it does not seek to do anything in contravention of the plaintiff corporation's rights if established. For all practical purposes, the issue is now between the plaintiff corporation and the second defendant. I should mention that the second defendant also operates a Sunday market in other towns.

The evidence on matters of fact is quite short, and really, I think, nothing turns on it. Mr Griffiths, a deputy general manager employed by the plaintiff corporation, gives an account of what took place on 17th October.

a 'On the car park of the Stadium I observed a concourse of buyers and sellers. This concourse had the appearance of constituting a market. There were approximately 200 traders selling goods from vehicles, open and covered stalls, and spaces on the ground. A number of the stall-holders were known to me as persons having stalls in the retail markets run by the City of Birmingham. The points of sale were arranged in rows, so that there were avenues for pedestrian flow. The goods offered for sale included fruit, vegetables, eggs, groceries, hot-dogs, beverages, knitwear, dresses, shoes, carpets and crockery. The general public had free access to the site and a very considerable number of people were present.'

b Then there is evidence on the part of the second defendant that he conducts markets elsewhere, and as I have said there is no suggestion that this market is not properly conducted. The real question on the notice of motion is, I think, almost wholly one of law.

c I will read the first few paragraphs from the affidavit sworn on behalf of the plaintiff corporation by Mr Pitt, a solicitor employed in the corporation town clerk's department. He says:

d '... 2. By a Charter of Henry II in 1154 Peter de Birmingham was granted a market. In 1824 the right to hold the market and to collect the market tolls was transferred to the Board of Street Commissioners in the City of Birmingham by the then Lord of the Manor ... 3. Following the Municipal Corporation Act 1835, a Municipal Charter was granted to the City of Birmingham in 1838, and by an Improvement Act of 1851 the powers and rights of the Street Commissioners were transferred to the Council. 4. By Section 89 of the Birmingham Corporation (Consolidation) Act, 1883, the Corporation were and are empowered to continue the pre-existing markets and to establish such other markets as they may think fit. There are at present three existing wholesale markets and one retail market established in the City under the franchise of market of 1154 and the powers contained in the Act of 1883. In addition there are two new retail markets established under Part III of the Food and Drugs Act 1955.'

e He then refers to certain Acts concerning Sunday trading, which I do not intend to read. He then refers to the correspondence with the defendants' solicitor concerning their proposal to open this market. In an affidavit in reply Mr Pitt says:

g '... The [plaintiff corporation] in addition to the various markets they run, license seven markets within the City of Birmingham. For the privilege of being allowed to run these markets, the proprietors pay licence fees. If it appears that [the second defendant] can hold a market unlicensed, the [plaintiff corporation's] licence fees from these licensed markets will be endangered. This is particularly important at the moment when negotiations are under way but have not been concluded for the grant of a licence for a market to be held at Corporation Square, Bull Street, Birmingham. The fees payable in respect of licences to hold markets are considerable and in the case of some of the licences payment is calculated by reference to the turnover of the market.'

h Then there is produced a copy of a typical licence agreement. Later on, he says:

j '... the [plaintiff corporation's] loss stems not only from the fall in trade at their existing markets, but also from the damage to the value of their franchise the decrease in turnover at their licensed markets and the loss of the opportunity to collect the tolls to which they are entitled.'

I shall refer in a moment to the Birmingham Corporation (Consolidation) Act 1883. Before doing so, I should mention that, at the date of that Act, Perry Barr was not

included in the city; it was so included by the Birmingham Extension Act 1927. Section 16 of that Act provides:

'Subject to the provisions of this Act the unrepealed provisions of the local Acts and of any other local Act (including any local Act passed or to be passed during the present session of Parliament) or of any other Provisional Order duly confirmed by Parliament, and affecting the existing city or the Corporation as the same respectively are in force within the existing city on the appointed day shall extend and apply to the city and any reference therein to the existing city and the Corporation shall be deemed to refer to the city and the Corporation thereof.'

The city is the extended city, and no point is taken on the fact that Perry Barr was not part of the city in 1883.

Section 89 of the 1883 Act provides as follows, so far as now material:

'The market undertaking of the Corporation as it exists at the commencement of this Act including all property rights powers and privileges of the Corporation in relation to markets and fairs shall continue vested in and may be held exercised and enjoyed by the Corporation subject to the provisions of this Act and the Corporation shall have the following powers (namely): ... (ii.) They may continue and from time to time provide market places and market houses for the sale of marketable articles and places for fairs with offices approaches and conveniences; (iii.) They may continue the market and fairs held at the commencement of this Act and may from time to time alter the days on which and the places at which the same respectively are or may be held and may establish and hold new markets and cattle fairs but not within the parish of Edgbaston ...'

I need not read (iv) and (v). I will refer in a moment to one or two other sections in that Act.

Section 89 contemplates the existence at the commencement of the Act of the market undertaking and provides that all property, rights, powers and privileges shall continue to be vested in and may be held, exercised and enjoyed by the corporation. On this motion, however, the plaintiff corporation has adduced no evidence as to the nature of the existing rights and powers, and counsel for the plaintiff corporation very properly accepted that, for the purpose of this motion, he must rely on the powers expressly conferred by s 89 itself, those powers supplementing whatever rights and powers the plaintiff corporation already possessed, but which latter rights and powers are not in evidence on the motion. It seems to me that s 89, and in particular paras (ii) and (iii) which I have read, plainly points to a statutory monopoly vested in the plaintiff corporation, the nature of the monopoly being the holding of markets within the boundary of the city. A monopoly of this kind created by statute differs only in name from a monopoly of the same kind created by charter, the latter being referred to as a franchise. On this point, I have been referred to *Birmingham Corp'n v Foster*¹, where Romer J said:

'I think that the plaintiffs in this case are entitled to an injunction. I shall assume in this case that, in accordance with the principle laid down in the case of the *Mayor of Manchester v Lyons*² ... the plaintiffs here must, in respect of their market, rely upon their statutory market rights, and not rely upon any special privileges or rights, if there were any, attached to the old manorial market which has been referred to. But, under the statute, the plaintiffs have undoubtedly market rights. They alone have the right to establish a market ...'

¹ (1894) 70 LT 371 at 372

² (1882) 22 Ch D 287, [1881-85] All ER Rep 1090

- a That is a statement concerning this particular corporation and is directly in point here. I was also referred to what was said by Sargant J in the case of *Hailsham Cattle Market Co v Tolman*³:

- b 'On these facts I have no doubt that, had the plaintiffs' market been an ordinary or normal charter market, the monopoly incident to such a market would have entitled them to complain of, and succeed in restraining, the defendant's proceedings. (See for instance *Elwes v. Payne*⁴.) And the case of *Birmingham Corporation v. Foster*⁵ is an authority, were one needed, that the owners of a statutory market are in as favourable a position in this respect, apart from any express or implied provisions in the statute to the contrary.'

- c The judge decided the particular case against the owner of the monopoly on a ground not now in point, and his decision was affirmed by the Court of Appeal⁶.

- c Before leaving this point, I would refer to Halsbury's Laws⁷ where, after enumerating the existing types of market, it is said, under the heading of 'Disturbance':

- d 'The owner of a market or fair is entitled to protection from disturbance, and disturbance may consist in any unjustifiable interference with the owner's exclusive right to hold his market or fair and take the profits thereof.'

- d A monopoly right created by statute may, of course, be cut down, either expressly or by implication, by other provisions in the relevant statute. For an instance of such cutting down by implication, see the case of *Abergavenny Improvement Comrs v Straker*⁸. But I am unable to find any provision in this Act either expressly or by implication cutting down the monopoly rights and powers conferred by s 89 on the plaintiff corporation.

- e Section 90 contains certain penal provisions on any person—I summarise it—who sells within the borough except in some market or fair lawfully authorised or in his own dwelling place shop or place etc, any animal article or thing in respect of which tolls, rents, stallages or charges are by this Act authorised to be taken. Then s 91 authorises the corporation itself to demand and receive tolls, rents, stallages and charges. I find nothing in ss 90 or 91, or any other section of this Act to which I have f been referred, which could be construed as cutting down the plaintiff corporation's monopoly right.

- f I should mention at this stage, in order to complete the picture, that s 3 of the 1883 Act incorporates the provisions of the Markets and Fair Clauses Act 1847, except insofar as any of these provisions are expressly varied by this Act. Section 13 of the 1847 Act contains another prohibition on selling, in these terms:

- g 'After the Market Place is opened for public Use every Person other than a Licensed Hawker who shall sell or expose for Sale in any Place within the prescribed Limits, except in his own Dwelling Place or Shop, any Articles in respect of which Tolls are by the special Act authorized to be taken in the Market, shall for such Offence be liable to a Penalty not exceeding Forty Shillings.'

- h It may well be that s 90, as originally enacted, displaces s 13 and there is some authority on that point. Then, however, s 110 of the Birmingham Corporation Act 1903 provides as follows:

- j 'Section 90 . . . of the Act of 1883 except the first proviso of that section is hereby repealed and in construing section 13 of the Markets and Fairs Clauses Act 1847 as incorporated in the Act of 1883 the prescribed limits shall mean the city.'

3 [1915] 1 Ch D 360 at 367

4 (1879) 12 Ch D 468

5 (1894) 70 LT 371

6 [1915] 2 Ch 1

7 25 Halsbury's Laws (3rd Edn) 403, para 788

8 (1889) 42 Ch D 83

I think it is really quite clear that by that section Parliament intended to treat s 13 of the 1847 Act as incorporated in the 1883 Act insofar as it was not already thereby incorporated. I mention those points in view of a number of arguments on a rather different issue which were addressed to me with respect to the 1883 Act and the provisions of that Act. I conclude, therefore, that there is nothing in the 1883 Act which cuts down the monopoly right of the plaintiff corporation.

That being the position, it seems to me that the plaintiff corporation is entitled to enforce its monopoly right by whatever form of action is available in these courts, that is, an action for damages and for an injunction. The suggestion was made by counsel for the second defendant that the penal provisions in s 90 of the 1883 Act might exclude the ordinary remedy. It seems to me that that is plainly not so. This is not the case of a new statutory wrong coupled with a statutory remedy. The wrong, i.e. the disturbance of a market, is one which has always existed under the common law and I see no reason to think that the ordinary remedy at law for this wrong is excluded by the penal provisions in the 1883 Act. That is nonetheless so because so far as I am concerned today the particular monopoly right now vested in the plaintiff corporation is provided by the same statute, the 1883 Act, as contains the penal provisions. On this point, I should refer to the case of *Stevens v Chown*⁹, where the headnote reads as follows:

‘Where a statute provides a particular remedy for the infringement of a right of property thereby created or re-enacted, the jurisdiction of the High Court to protect that right by injunction is not excluded, unless the statute expressly so provides.’

And the learned judge elaborated that point¹⁰.

Counsel for the plaintiff corporation relied on the penal provisions and their alleged breach by the second defendant or persons claiming under him as a separate ground of action from the disturbance of the plaintiff corporation’s monopoly right. There was a great deal of argument on that issue and a number of cases were cited on it. As I have said, I am satisfied that the monopoly right exists and I am also satisfied that the second defendant is disturbing that monopoly right. That being so, the plaintiff corporation has no need to have recourse to the alternative ground, but I would add that if I were not satisfied as to the monopoly right I would certainly not be disposed to grant an injunction on the alternative ground. Counsel for the plaintiff corporation also relied on the Shops Act 1850 and its provisions with regard to Sunday trading. Again, I would certainly not make an injunction on that ground if I was not satisfied as to the monopoly right, and I propose to say no more about it.

In order to obtain relief the plaintiff corporation will have to show damage at the trial of the action. For the purpose of this motion, it is sufficient—and this is accepted by counsel for the second defendant—that the plaintiff corporation should show a likelihood of damage. It seems to me that the passages I have read from the affidavit of Mr Pitt do establish the likelihood of damage. It is really apparent that if some other party, unauthorised by the plaintiff corporation, establishes a market within the city of Birmingham, the value of the plaintiff corporation’s monopoly right must be reduced. Obviously, if it is known that traders can get away with establishing a market without recourse to the licence of the plaintiff corporation, other traders are less likely to spend their money on obtaining a licence from the plaintiff corporation. There is also the point as to interference with the existing markets carried on by the plaintiff corporation itself.

I now come to a point which has caused me some difficulty, namely, whether it is right in the exercise of my discretion that I should make an interlocutory injunction in this case. Leaving aside for the moment something which was said in the case of *Elwes*

9 [1901] 1 Ch D 894

10 [1901] 1 Ch D at 903

a v Payne¹¹, I feel no doubt that I should do so. It seems to me that, the plaintiff corporation having established disturbance of its monopoly right, the balance of justice and convenience is in favour of putting an end to that disturbance at once. I do not see any ground for saying otherwise. This is not a case of delay on the part of the plaintiff corporation, nor, I think, is it a case where the second defendant is likely to have incurred capital expenditure, or anything like that, and I cannot see any special circumstances which would make it right to allow him to go on carrying on his market to the detriment of the plaintiff corporation pending the trial of this action. *b* What has troubled me is the decision of the Court of Appeal in the case of *Elwes v Payne*¹¹ nearly 100 years ago. The headnote reads as follows:

c 'The Plaintiffs were owners of the tolls of an ancient cattle market held weekly on Thursday. The Defendants, who were auctioneers, fitted up with stalls and pens a neighbouring piece of ground, and issued circulars stating that weekly sales of cattle by auction would be held there on Mondays. The Plaintiffs brought their action to restrain the Defendants from holding their proposed sales as being an interference with the Plaintiffs' market:—*Held*, by the Master of the Rolls, that, having regard to modern facilities for traffic, a market on Monday was *prima facie* an injury to a market on Thursday, that what the Defendants were *d* doing was in fact the establishment of a rival market, and that an interlocutory injunction ought to be granted. *Held*, on appeal, that, the Defendants undertaking to keep an account, an interlocutory injunction ought not to be granted, for that, if an injunction was granted and it turned out that the Defendants were in the right, there would be great difficulty in ascertaining the compensation to which they would be entitled, whereas, if an injunction was refused, and the *e* Plaintiffs succeeded at the trial, there would be no difficulty in giving them compensation, and their market would suffer no permanent injury from the sales by the Defendants in the meantime.'

The Court of Appeal thus reversed the decision by Sir George Jessel MR.

f In the argument in the Court of Appeal, the first sentence was¹²: 'It is by no means certain that the sales on Monday will hurt the market on Thursday.' James LJ¹³ said:

g 'I do not intend to express any opinion that the Plaintiffs will not succeed at the hearing of the action in establishing their franchise, which does not seem to be seriously in dispute, and in establishing that what the Defendants propose to do will be a nuisance to that franchise; but this is the first time that I have ever heard of an interlocutory injunction being granted in respect of such a right as this. The only question that it seems to me right to decide at the present moment is whether there has been such a case made out as to induce the Court before the rights are finally determined to do something which shall interfere with the *prima facie* rights of the Defendants [i.e. the right to trade] . . . The order of the Master of the Rolls is not in accordance with my view of what ought to be done, having regard to the greater amount or less amount of damage to be sustained *h* by these parties. If the Defendants are stopped from beginning a trade which may become a very valuable trade, then, supposing they should turn out to be right, they will have been prevented from carrying on a trade which they had a perfect right to carry on, and there would be great difficulty in determining the amount of damage they would have sustained. I do not know how they would be compensated if it should turn out that they are right. On the other hand, if *j* the Plaintiffs succeed at the trial, it does not seem to me that there will be the slightest difficulty in giving them full compensation for everything that they can shew they have lost.'

¹¹ (1879) 12 Ch D 468

¹² (1879) 12 Ch D at 475

¹³ (1879) 12 Ch D at 476, 477

Cotton LJ¹⁴ put it more generally:

'I am ready to admit that in such a case irremediable mischief need not be shewn, but I think that there is fallacy in the use of these words, "The Plaintiffs are in possession, and the Defendants are interfering with and disturbing their possession." The Plaintiffs are, no doubt, in possession of a franchise, but they are not in possession of anything with which the Defendants are directly or physically interfering. The question is whether or not what the Defendants are doing is an interference with the right of the Plaintiffs. That is the question to be tried at the hearing. Where the Plaintiffs are in possession and the Defendants are physically and directly interfering with that possession, the only question is whether the Defendants can justify those acts which are directly and physically interfering with the possession and the quiet enjoyment of the property as enjoyed by the Plaintiffs at the commencement of those acts of the Defendants. But where the interference is not physical or direct, but is indirect and only comes in the shape of the consequences which the acts of the Defendants may have upon the market, the case is very different. Therefore, upon the balance of convenience and inconvenience, in my opinion there should be no injunction.'

Now that is rather a strong decision against the grant of an interlocutory injunction in the circumstances of that case, but at the end of it all it is a decision based on the balance of convenience in the particular case having regard to the circumstances of that case. It will be observed that although the existence of the plaintiffs' franchise was not seriously in dispute it was, on the face of it, not apparent that the plaintiffs would suffer injury from the market which the defendants were proposing to establish. It must be borne in mind that the plaintiffs held a cattle market usually on Thursday, and it was proposed by the defendants to hold a cattle auction on Monday. Then it was considered that the defendants would be likely to suffer greater hardship from the injunction if they succeeded than would the plaintiffs from the refusal of the injunction. Counsel has not been able to find any subsequent case on which an interlocutory injunction has been either granted or refused in comparable circumstances.

In the present case, the plaintiff corporation is in a different position from that of the plaintiffs in *Elwes v Payne*¹⁵. The plaintiff corporation does not merely hold a market itself. It grants licences to other persons to do so within the city. There is evidence of the likelihood of loss on the part of the plaintiff corporation and there is really no reason to suppose that the second defendant will suffer greater hardship by an injunction should he ultimately succeed in the action, than would the plaintiff corporation from the refusal of the injunction should the plaintiff corporation succeed in the action. As I have said, the second defendant's business is not, in the nature of things, a business involving much capital outlay. And, finally, an important point, the plaintiff corporation will certainly be good for any damages that might ultimately be awarded to the second defendant. I am certainly moved by what the Court of Appeal said in that case, and specifically by the statement of James LJ¹⁶:

'... this is the first time that I have ever heard of an interlocutory injunction being granted in respect of such a right as this.'

But looking at the whole of the circumstances in the present case, I think that the balance of justice and convenience does require that I should make an interlocutory injunction, and I do not think that *Elwes v Payne*¹⁵, in principle, compels me to do otherwise. I propose, accordingly, to make an injunction against the second defendant. I have not, except at the outset, referred to the position of the first defendant,

¹⁴ (1879) 12 Ch D at, 479 480

¹⁵ (1879) 12 Ch D 468

¹⁶ (1879) 12 Ch D at 476

- a which has not at present, so far as I can see, invaded any right of the plaintiff corporation. I can see no reason why I should grant interlocutory relief against the first defendant.

Injunction granted against second defendant.

- b Solicitors: Sharpe Pritchard & Co, agents for T H Parkinson, Birmingham (for the plaintiff corporation); Barlow, Lyde & Gilbert, agents for Duggan, Elton & James, Birmingham (for the first defendant); Barlow, Lyde & Gilbert, agents for Field & Sons, Leamington Spa (for the second defendant).

Richard J Soper Esq Barrister.

c Thomas David (Porthcawl) Ltd and others v Penybont Rural District Council and others

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND GRIFFITHS JJ

13th DECEMBER 1971

- d *Town and country planning – Enforcement notice – Validity – Mining operations – Planning unit in relation to development – Area specified in enforcement notice – Actual working having occurred only within two smaller areas within area specified – Validity of notice in relation to larger area – Power of planning authority to determine that larger area planning unit for purposes of development in question – Town and Country Planning Act 1962, s 45 (1).*

- e *Town and country planning – Enforcement notice – Period for service of notice – Mining operations – Development – Four year period from carrying out of development – Initial working of area more than four years previously – Whether subsequent working of area within four year period new development or continuation of original development – Whether power to serve enforcement notice in relation to excavations being carried out within area of initial cut – Town and Country Planning Act 1962, ss 12 (1), 45 (2).*

- f The respondent local planning authority served an enforcement notice on the appellants under s 45 (1)^a of the Town and Country Planning Act 1962. The notice related to an area of sand on the seashore and stated that it appeared to the planning authority that a specified area of land had been developed within the meaning of s 12 (1)^b of the 1962 Act, by the carrying out thereon of mining operations, i.e. the extraction of sand and gravel. The land in question consisted of an area encircled by a red verge line on a plan attached to the notice. Paragraph 3 of the notice however made it clear that the actual working of sand and gravel had not taken place all over the land within the red verge line but only within two smaller areas coloured pink within the larger area. Furthermore, in the two smaller areas initial working for sand and gravel had in some instances taken place more than four years before the service of the enforcement notice whereas in other cases it had taken place within the four year period. The appellants appealed against a decision of the Secretary of State dismissing an appeal against the enforcement notice. The appellants contended (i) that, since no actual working had occurred outside the two pink areas it was not open to the planning authority to make the enforcement notice effective over the wider area indicated by the red line; and (ii) that in those parts of the pink areas where the initial working had been more than four years before the service of the enforcement notice there was by virtue of s 45 (2)^c of the 1962 Act no power

a Section 45 (1), so far as material, is set out at p 735 h and j, post

b Section 12 (1) is set out at p 735 g, post

c Section 45 (2), so far as material, provides: 'The period for the service of an enforcement notice—(a) where the notice relates to the carrying out of development, is the period of four years from the carrying out of that development....'

to prevent the appellants continuing to work those areas until they were worked out. a

Held – The appeal would be dismissed for the following reasons—

(i) there was no requirement that an enforcement notice in relation to mining operations should be restricted to the precise area which was the subject of an actual cut by the shovel or bulldozer; it was quite proper for the planning authority to consider whether the land on which the actual cut had been taken was not in fact part of a wider area, development of which was being started by the particular activity immediately referred to; if it was clear that the first cut was a cut relative to a larger area then it was right for the tribunal of fact to determine, if it thought fit, that the larger area was the planning unit for the purposes of the development in question; in the present case the planning authority and the Secretary of State were right in thinking that the area confined within the red line was a planning unit and was the land to which the enforcement notice should be directed (see p 737 j to p 738 c and h, post); dicta of Lord Denning MR and Diplock LJ in *G Percy Trentham Ltd v Gloucestershire County Council* [1966] 1 All ER at 703, 704 applied; b

(ii) so far as mining operations were concerned the initial cut did not constitute the development, subsequent operations downwards within the area of that cut merely being a continuation of that development; each shovelful or each cut by the bulldozer was a separate act of development; it did not follow therefore that, where the initial cut had occurred more than four years prior to the enforcement notice, the notice could not restrain further activity within the confines of that cut (see p 738 e f and h, post). c

Notes d

For the service and contents of enforcement notices, see 37 Halsbury's Laws (3rd Edn) 332-335, paras 438, 439, and for cases on the subject, see 45 Digest (Repl) 349-354, 87-101. e

For the meaning of development, see 37 Halsbury's Laws (3rd Edn) 259-263, para 366, and for cases on the subject, see 45 Digest (Repl) 325-327, 6-13.

For the Town and Country Planning Act 1962, s 12, see 36 Halsbury's Statutes (3rd Edn) 87, and for the Town and Country Planning Act 1962, s 45, see 42 Halsbury's Statutes (2nd Edn) 1015. f

Section 45 has been repealed, and replaced by s 15 of the Town and Country Planning Act 1968.

Case referred to in judgment g

Trentham (G Percy) Ltd v Gloucestershire County Council [1966] 1 All ER 701, [1966] 1 WLR 506, 130 JP 179, Digest (Cont Vol B) 689, 30d.

Appeal h

This was an appeal by Thomas David (Porthcawl) Ltd and the trustees of Merthyr Mawr Estates against a decision of the Secretary of State for Wales conveyed by letter dated 24th May 1971 whereby he dismissed an appeal by the appellants against an enforcement notice served on them by the Penybont Rural District Council, as agents for the Glamorgan County Council, the local planning authority for the county of Glamorgan. The grounds of the appeal were: 1. That the Secretary of State was erroneous in point of law in deciding that having regard to the special category of mineral extraction, whereby every extension of workings could be regarded as constituting development as part of a continuous operation, all operational development within the appeals land subsequent to 17th November 1962 constituted development for which planning permission was required, and that the operations proceeded in breach of planning control. 2. That the Secretary of State was erroneous in point of law in deciding that a mining operation was a continuous development in that every step in the development was itself an operation forming j

a an extension of the original operation. 3. That the Secretary of State was erroneous in point of law in deciding that each step in a mining operation, in the absence of planning permission, prolonged the period for taking enforcement action in relation to the early stages of the development which had been carried out since the appointed day and thereby constituted a mounting contravention of planning control. 4. That if the Secretary of State was correct in finding that a mining operation was a continuous development then that development was the development of the whole of the appeal site, and had commenced before 17th November 1962, and therefore could not be the subject of an enforcement notice. 5. Alternatively, that the enforcement notice included certain land, which had not been developed as at 17th November 1966, and which therefore could not have been the subject of an enforcement notice. The facts are set out in the judgment of Lord Widgery CJ.

b *c* Douglas Frank QC and J Ryman for the appellants.
 I D L Glidewell QC and Gordon Slynn for the Secretary of State for Wales.
 The respondents, the Penybont Rural District Council and the Glamorgan County Council, did not appear and were not represented.

d **LORD WIDGERY CJ.** This is an appeal under s 180 of the Town and Country Planning Act 1962, against the decision of the Secretary of State for Wales conveyed in his decision letter of 24th May 1971 dismissing an appeal by the present appellants against an enforcement notice served on 7th November 1966 by the Penybont Rural District Council, as agents of the Glamorgan County Council, the local planning authority for the county of Glamorgan. The enforcement notice related to an area of sand on the seashore known as Merthyr Mawr Warren, and it complained of development in the form of engineering operations. The Secretary of State, amongst other minor adjustments, directed that the notice should be amended to substitute 'mining operations' for 'engineering operations', and I will treat the notice as having been in those terms from the outset.

e Since development in the form of mining operations is not perhaps as common in this court as some other forms of development it is convenient to begin by refreshing one's memory on the legislation relevant to such development. This notice being served in 1966, the relevant statute is the Town and Country Planning Act 1962. Section 12 (1) of this provides:

f 'In this Act, except where the context otherwise requires, "development", subject to the following provisions of this section, means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.'

g An enforcement notice is dealt with in s 45 (1):

h 'Where it appears to the local planning authority—(a) that any development of land has been carried out without the grant of planning permission required in that behalf in accordance with Part III of this Act . . . then . . . the local planning authority, if they consider it expedient to do so having regard to the provisions of the development plan and to any other material considerations, may, within the period specified in the next following subsection, serve a notice under this section (in this Act referred to as an "enforcement notice").'

j The period specified in the next following subsection, so far as relevant, is a period of four years from the carrying out of that development. As to what the notice may contain, sub-s (4) provides:

'An enforcement notice—(a) shall specify the development which is alleged to have been carried out without the grant of planning permission as mentioned

in paragraph (a) of subsection (1) of this section or, as the case may be, the matters in respect of which it is alleged that any such conditions or limitations as are mentioned in paragraph (b) of that subsection have not been complied with, and (b) may require such steps as may be specified in the notice to be taken, within such period as may be so specified, for the purpose of restoring the land to its condition before the development took place, or of securing compliance with the conditions or limitations, as the case may be, and in particular may, for that purpose, require the demolition or alteration of any buildings or works, the discontinuance of any use of land, or the carrying out on land of any building or other operations.'

In regard to mining development these provisions are modified by Part II of the Town and Country Planning (Minerals) Regulations 1963¹. The effect of these modifications is that 'use' of land in s 12 does not include the use of land by the carrying out of mining operations but for the purpose of s 45 (4) reference to the discontinuance of a use includes discontinuance of mining operations. Thus in answer to the question 'development or no', what one has to have regard to in mining cases is the actual carrying out of work—that is the question—and no change of use is concerned in it. However, when one comes to enforcement under s 45, the effect of the amendment to which I have referred is that an enforcement notice may require the termination of mining operations in precisely the same way as it can require the termination of a use of land undertaken without planning permission.

To come back to the facts of the case. The enforcement notice which gives rise to this appeal, recited in para 3 that it appeared to the council that 'the said land' had been developed by the carrying out thereon of mining operations, namely the extraction of sand and gravel. Going back to para 1 of the notice, one finds that 'the said land' means an area encircled by a red verge line on the plan attached to the notice and before the court. So the land in respect of which the development is alleged to have taken place, or perhaps I should say on, in or under which the development is said to have taken place, is this large area encircled by the single red line. However, it is clear from para 3 of the notice that what is being alleged is that the actual working of the sand and gravel did not occur all over the land confined in the red verge line, but has taken place in two much smaller areas within the large area and each itself coloured pink. So the complaint is—and no one could have made it clearer than the draftsman of this notice—that the land comprised in the red verge line has been developed by reason of the taking of sand and gravel from two smaller pink-washed areas.

The present appellants appealed against that notice on a number of grounds and the usual inquiry was held. Since counsel for the appellants has been very economical in his argument in defining the points which he takes in his submission that the Secretary of State was wrong, I do not find it necessary to go into the history of this matter in any great detail. I think it suffices to illustrate the point in issue to say this. Workings for sand have taken place in this area for very many years indeed, certainly back to before the second world war, and when the inspector came to consider the history of the land encircled by the red line he found that no working had taken place in that area other than in the two areas washed pink. Further in the two areas washed pink initial working for sand and gravel had in some instances occurred before November 1962, and therefore more than four years before the service of the enforcement notice, whereas in other cases within the pink-washed land the initial development had taken place after November 1962 and therefore within the four year period.

Counsel's criticism of the Secretary of State's decision really crystallised itself into two submissions. His first submission is that it being found as a fact that no actual

¹ SI 1963 No 1221. The 1963 regulations were revoked and replaced by the Town and Country Planning (Minerals) Regulations 1971 (SI 1971 No 756) as from 5th May 1971

a mineral working has occurred outside the two pink-washed areas then as a matter of law it was not open to the planning authority to make the enforcement notice effective over the wider area comprised in the red line. The second submission is that in those parts of the pink-washed area where the initial mineral working occurred more than four years before the service of the enforcement notice, there is no power to prevent the appellants from continuing to work those areas until they are worked out. Put another way, he submits that in areas where the initial working was more than four years before the date of the notice, there is no control under the Act sufficient to enable an enforcement notice to be served which will prevent continued working of those areas until they are worked out. I will endeavour to deal with those two points separately.

c As to the first one, the control which can be exercised by the town and country planning legislation in respect of mineral working is in respect of any such workings which occur in, on, over or under land. Counsel for the appellants' argument is that there can be no development within those words in s 12 of the Act except on land where the top spit, the top surface, has actually been removed by way of working. He says that the area in question here outside the two pink-washed areas is an area in which no mineral workings have occurred and therefore an area which could not competently be included in the enforcement notice. In answer to that, counsel d for the Secretary of State reminded us of the fact that in many planning cases, although more particularly in cases concerning change of use, it is necessary to consider initially what is the planning unit to which the enforcement notice can properly be applied. One gets, for example, a field of ten acres with one caravan situated in the corner. If you look at the small area covered by the caravan and ask whether there has been e a material change of use, the answer will almost certainly be Yes. If you look at the ten acre field and ask the same question in relation to it, the answer may well be No. Accordingly, in such a case, before you can consider the effect of planning legislation you have to ask yourself what is the planning unit to which an enforcement notice can properly be addressed. That matter is dealt with authoritatively in the Court of Appeal in *G Percy Trentham Ltd v Gloucestershire County Council*² so far as f change of use cases are concerned and I refer to a passage from the judgment of Lord Denning MR. This was a case concerning farm buildings some of which had been used for storage of building materials, and Lord Denning MR said³:

g 'Even if the appellants were able to say that these nine buildings were a "repository", I do not think that they could sever them from the rest of the farmhouse and farm buildings. In applying the Town and Country Planning (Use Classes) Order 1963, one must consider the whole of the unit which is being used. I think that Diplock, L.J., indicated the right test towards the end of the argument. One should look at the whole area on which a particular activity is carried on, including uses which are ordinarily incidental to or included in the activity.'

h Diplock LJ makes the same point when he said⁴:

'As I suggested in the course of the argument, I think that for that purpose what the local authority are entitled to look at is the whole of the area which was used for a particular purpose including any part of that area whose use was incidental to or ancillary to the achievement of that purpose.'

i Accordingly, one finds in change of use cases that the extent of the planning unit has to be determined by looking at the whole area over which a particular activity is carried on.

Counsel for the Secretary of State contends, and for my part I agree with him,

2 [1966] 1 All ER 701, [1966] 1 WLR 506

3 [1966] 1 All ER at 703, [1966] 1 WLR at 512

4 [1966] 1 All ER at 704, [1966] 1 WLR at 514

that a similar approach must necessarily be used in connection with operational development such as development by mining. I do not think that it can possibly have been the intention of Parliament that, when an enforcement notice is served in regard to mining operations such as the present, the effect of the enforcement notice should be meticulously restricted to the very square yardage which is being the subject of an actual cut by the shovel or the bulldozer as the case may be. I think it is permissible and indeed right in mining operations cases to ask whether the land on which the actual cut is taken is not in truth and in fact part of a wider area which is being started in development by the particular immediate activity referred to. If as a matter of fact and common sense it is clear that the first cut is a cut relative to a larger area then it is right for the tribunal of fact to determine if it thinks fit that that larger area is a planning unit for present purposes. In this case I think therefore that the rural district council and the Secretary of State were right in thinking that the area confined in the red line was a planning unit and was the land to which the enforcement notice should be directed. I do not take time to dwell on the many inconsistencies and peculiar consequences which might follow in my judgment if the land to which the notice related had necessarily been confined to land on which an actual cut had been made.

As to the second point, counsel for the appellants as I have said contends that where in any particular spot the taking of minerals began before November 1962 the appellants retain the right to work downwards within the horizontal confines of that area to any extent. He justifies this by saying that the proper interpretation of such a situation is that the development occurred when the surface was cut, and since the development occurred when the surface was cut and since that was more than four years before the date of the notice, it follows that the notice cannot restrain further activity within the confines of that cut. For my part I think that that argument is unsound because I think that in these operational development cases, and I am particularly referring now to mining cases, that each shovelful or each cut by the bulldozer is a separate act of development and it seems to me to be of no comfort to the developer that he should have made a first cut at a particular point more than four years ago. When he continues the work he will be carrying out a further development, not merely continuing the development of four years ago. Accordingly, he would be doing something which is a breach of planning control, and I see no reason why an enforcement notice should not be appropriate.

I ought to say for completeness that the Secretary of State deleted from the notice a requirement for the making good of works which had taken place before the notice was served. Had that requirement remained, other matters might have required investigation in regard to whether that requirement applied to development occurring more than four years before the date of the notice. In the circumstances I find it unnecessary to go into this matter and content myself by saying that I think the Secretary of State was right in law. I would dismiss the appeal.

ASHWORTH J. I agree.

GRIFFITHS J. I agree also.

Appeal dismissed. Leave to appeal granted.

Solicitors: Collyer-Bristow & Co, agents for Cox & Cameron, Port Talbot (for the appellants); Solicitor, Department of the Environment.

N P Metcalfe Esq Barrister.

R v Birmingham Licensing Planning Committee, ex parte Kennedy

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND GRIFFITHS JJ

17th, 21st DECEMBER 1971

Licensing – Certificate of non-objection – Grant of certificate by licensing planning committee – Duty of committee to try to secure that number, nature and distribution of licensed premises accord with local requirements – Adoption by committee of policy of equating barrelage – Policy to refuse applications for certificates unless applicant had acquired licence in suspense covering barrelage equal to estimated barrelage of new premises – Licences only obtainable from existing holders by purchase – Object of policy to relieve local authority of need to compensate existing holders in respect of licences which would not be re-sited – Whether proper ground for refusing certificate that applicant had not purchased barrelage – Licensing Act 1964, s 119 (2).

The applicant applied to the respondent licensing planning committee ('the committee') for the grant of a certificate of non-objection to the grant of a justices' on-licence for a new hotel then under construction on a site in the committee's licensing planning area. Under s 123 (1)^a of the Licensing Act 1964 the applicant could not apply for a justices' on-licence until the committee had intimated to him that they had no objection to the grant. The committee had been set up as a result of the extensive war damage in the Birmingham area as a result of which many licences in respect of destroyed premises were placed in suspense. Accordingly, the committee, in purported exercise of its duty under s 119 (2)^b of the 1964 Act to try to secure that the number, nature and distribution of licensed premises in the area accorded with local requirements, adopted an 'equation of barrelage' policy, by which, unless an applicant for a new on-licence had obtained a licence or licences in suspense covering a barrelage equal to that which it was estimated would be needed for the new premises, objection would almost always be taken under s 123 (1). At all material times it had always been possible to obtain a licence or licences in suspense from the current holder of such licences, but only by paying for it. The price which the applicant would have had to pay, on an agreed estimated barrelage of 1,450 barrels, was £14,500. In accordance with this policy the committee refused to grant a certificate on the ground that the applicant had not obtained the appropriate licence in suspense. It was made clear that the reason for the committee's policy was that, in view of the redevelopment that was necessary, there was a large number of licences in suspense which would require to be dispersed to new sites; accordingly the principle of equating barrelage had to be accepted by all applicants if the Birmingham Corporation were not to be left to pay out considerable sums for compensation in respect of licences which would never be re-sited. It was thus conceded that one of the objects of the policy was to relieve the corporation of the liability to pay compensation. The applicant applied for an order of mandamus directing the committee to hear and determine his application on the ground, inter alia, that they were acting ultra vires in requiring him to purchase barrelage before they would grant him a certificate.

Held – In seeking to relieve the corporation from the liability to compensate the holders of licences in suspense and in formulating the policy of equating barrelage the committee had taken into consideration a factor which was quite irrelevant to

^a Section 123 (1) is set out at p 741 b, post

^b Section 119 (2) is set out at p 741 d, post

the duties laid down in s 119 (2); accordingly the application for mandamus would be granted and the committee directed to consider the application on proper grounds (see p 743 g and j to p 744 a, post).

R v Bowman [1898] 1 QB 663 applied.

Notes

For the general duties of licensing planning committees, see 22 Halsbury's Laws (3rd Edn) 643, para 1353.

For the principles on which mandamus will be granted, see 11 *ibid* 85-87, para 161, and for cases on the subject, see 16 Digest (Repl) 316, 317, 945-952.

For the Licensing Act 1964, ss 119, 123, see 17 Halsbury's Statutes (3rd Edn) 1168, 1172.

Cases referred to in judgment

R v Bowman [1898] 1 QB 663, 67 LJQB 463, 78 LT 230, 62 JP 374, 16 Digest (Repl) 462, 2825.

R v London (Metropolis) Licensing Planning Committee, ex parte Baker [1970] 3 All ER 269, [1971] 2 QB 226, [1970] 3 WLR 758.

R v Port of London Authority, ex parte Kynoch Ltd [1919] 1 KB 176, 88 LJKB 553, 120 LT 177, 83 JP 41, 16 Digest (Repl) 327, 1056.

R v Torquay Licensing Justices, ex parte Brockman [1951] 2 All ER 656, [1951] 2 KB 784, 115 JP 514, Digest (Cont Vol A) 951, 214a.

Cases also cited

R v Athay (1758) 2 Burr 653, 97 ER 494.

R v Rotherham Licensing Justices, ex parte Chapman [1939] 2 All ER 710.

Sagnata Investments Ltd v Norwich Corp'n [1971] 2 All ER 1441, [1971] 2 QB 614, [1971] 3 WLR 133.

Motion for mandamus

This was an application by way of motion by Stephen Kennedy for an order of mandamus directed to the respondent licensing planning committee for the licensing planning area of Birmingham ('the committee'), requiring them to hear and determine an application for the grant of a certificate of non-objection to a grant of a justices' on-licence for a new hotel under construction on a site adjoining New Street, Birmingham. The grounds of the application were (i) that the committee were acting ultra vires in requiring the applicant to purchase barrellage before they would grant him the certificate, (ii) that the committee were acting unlawfully in adopting a policy which fettered their discretion and prevented them from carrying out their duties under s 119 of the Licensing Act 1964, and (iii) the policy which the committee had adopted was unlawful as it was contrary to the public interest. The facts are set out in the judgment of Ashworth J.

D W Tudor Price for the applicant.

R A W Sears for the committee.

Cur adv vult

21st December. **ASHWORTH J** read the following judgment. I am instructed by Lord Widgery CJ to say that he has read the judgment which I am about to read, and that he agrees with it.

In these proceedings counsel moves on behalf of the applicant, one Stephen Kennedy, for an order of mandamus directed to the respondent licensing planning committee for the licensing planning area of Birmingham requiring them to hear and determine according to law an application for the grant of a certificate of non-objection to the grant of a justices' on-licence for a new hotel now under construction

a on a site adjoining New Street in the city of Birmingham. The need for such a certificate arises by reason of s 123 (1) of the Licensing Act 1964 which provides:

'No new justices' licence, other than a Part IV licence, shall be granted for any premises in a licensing planning area unless the licensing justices are satisfied that the licensing planning committee have no objection to the grant.'

b The new hotel is in a licensing planning area and accordingly a certificate of non-objection, as it is called, is required before a justices' on-licence can be obtained.

It is convenient at the start of this judgment to set out the statutory duty of the licensing planning committee (hereinafter called 'the committee') which is laid down in s 119 (2) of the Licensing Act 1964 in the following terms:

c 'It shall be the duty of every licensing planning committee to review the circumstances of its area and to try to secure, after such consultation and negotiation as it may think desirable, and by the exercise of the powers conferred on it by this Part of this Act, that the number, nature and distribution of licensed premises in the area, the accommodation provided in them and the facilities given in them for obtaining food, accord with local requirements, regard being had in particular to any redevelopment or proposed redevelopment of the area.'

The committee was originally set up because of the extensive war damage caused in and around Birmingham which resulted in the area being declared a licensing planning area. Quite apart from any licensing considerations, the city of Birmingham was faced with the task of redeveloping the stricken area and it is manifest that if the programme of redevelopment were to achieve success, there would have to be close consultation between the committee and the corporation. Indeed by para 1 (b) of Sch 11 to the Licensing Act 1964, it is provided that the committee shall include members of the local planning authorities having jurisdiction in the area.

f One result, stemming from the extensive war damage and also from compulsory purchase orders made in pursuance of schemes for redevelopment, was that a very considerable number of licences was placed in suspense. It is this feature, together with the policy adopted for the purpose of dealing with it, that has given rise to the present proceedings.

g It is apparent from the documents exhibited to the affidavit sworn herein by the chairman of the committee that the existence of these licences in suspense presented to the committee and the corporation of Birmingham a serious problem. The solution which they adopted, and which is challenged in these proceedings, was to institute a policy described as 'equation of barrelage'. The court was informed that no other area had adopted a similar policy, but that fact cannot affect its legality.

h In practice the policy means that, unless an applicant for a new on-licence has obtained a licence or licences in suspense covering a barrelage equal to that which is estimated to be needed for the new premises, objection will almost always be taken under s 123 of the 1964 Act. It has at all material times been possible to obtain a licence or licences in suspense from the current holder of such a licences, but only by paying for it. The price which the present applicant would have to pay, on an agreed estimated barrelage of 1,450 barrels, would be £14,500 and it is not surprising that he questions the policy under which he would have to pay so large a sum in order to obtain an on-licence. The reason underlying this policy is made clear in several places in the documents exhibited to the chairman's affidavit. An example is the following extract from a memorandum submitted to the departmental committee on licensing planning by the committee:

'Where redevelopment is necessary in older Cities and towns usually there is a concentration of licences which will require to be dispersed to new sites. In

such circumstances the principle of equating barrelage must be accepted by all applicants if the Local Authority is not to be left to pay out considerable sums for compensation in respect of licences which will never be re-sited.' a

Counsel for the committee candidly admitted that one at least of the objects of the policy was to relieve the corporation of a liability to pay compensation, but he contended that this was legitimate.

One issue which might have arisen is the question whether in the circumstances of this case the remedy by way of mandamus is available to the applicant in order to challenge the decision of the committee. However counsel for the committee expressly disclaimed any intention of arguing to the contrary and in my judgment he was right in taking this course. If authority is needed in support of this view, it can be found in the recent decision of this court in *R v London (Metropolis) Licensing Planning Committee, ex parte Baker*¹. b

It is now well established that provided a tribunal is willing to consider any application which may be made to it, there is prima facie nothing wrong in its formulating and declaring a policy which it will apply generally to applications that may be made to it. In *R v Port of London Authority, ex parte Kynoch Ltd*², Bankes LJ said: c

'There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case. I think counsel for the applicants would admit that, if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course.' d

On the other hand, it is equally well established that if, in formulating its policy, a tribunal takes into account an irrelevant consideration or, as it is sometimes put, extraneous matter, its refusal of an application on the basis of such a policy can be challenged by way of mandamus. The legal position is fully considered in the judgment of this court in *R v Torquay Licensing Justices, ex parte Brockman*³. As an example of a tribunal being influenced by an extraneous consideration, reference may be made to *R v Bowman*⁴ in which justices were held to have acted wrongly in annexing to the grant of a licence a condition of payment of money intended by them to be applied to the relief of rates. It is interesting to note that in that case the justices also annexed a condition that the applicant should surrender three licences held by him, and on the legality of that condition Wills J⁵ declined to express a definite opinion, although he inclined to the view that the justices might lawfully have annexed it. e

The crux of the present case is the question whether the committee's policy of insisting that barrelage should be equated before a certificate of non-objection would be granted involves them in taking into account an extraneous consideration. In order to answer this question it is necessary to consider carefully the terms of s 119 (2) of the Licensing Act 1964, which have already been set out in full. f

The first duty of the committee, imposed by the subsection, is to review the circumstances of its area. Counsel for the committee submitted that this is a continuing duty and that, as development or redevelopment of the area proceeds, the committee is under a duty to see that licensed premises are correctly planned. For my part I think that this submission is right. Redevelopment is normally planned and carried g

¹ [1970] 3 All ER 269, [1971] 2 QB 226

² [1919] 1 KB 176 at 184

³ [1951] 2 All ER 656, [1951] 2 KB 784

⁴ [1898] 1 QB 663

⁵ [1898] 1 QB at 666 h

a out in stages and I agree that it is the committee's duty to keep the process under review in regard to licensed premises.

The second duty is to try to secure that the number, nature and distribution of licensed premises in the area accord with local requirements. In performing this duty, and indeed the first duty too, the committee has to have regard to any redevelopment or proposed redevelopment of the area.

b Counsel for the applicant emphasised the two words 'licensed premises' and contrasted them with the single word 'licences' which is not mentioned in s 119 (2). In his submission the committee is not concerned with licences at all, whether they are in existence or in suspense. It is concerned with licensed premises and in particular with their number, nature and distribution. The three specific matters last mentioned are essentially matters of planning and are to a large extent matters of local geography.

c I agree with counsel for the committee that the words 'licensed premises' are not to be limited to premises in existence at the time when the committee is called on to consider an application. The committee is not only entitled but is bound to look to the future, if it is to have due regard to the proposed development of the area. But at the same time the look into the future must be directed to the number, nature and distribution of licensed premises, and not to other considerations.

d It is in my view important to note that the policy adopted by the committee involves the acquisition of a licence or licences in suspense and not the surrender of a licence attached to existing licensed premises. In other words, there are no licensed premises covered by on-licences in suspense, although no doubt the holders of such licences might apply for their removal to other premises. It is unnecessary in this case to decide whether the committee would be justified in calling on an applicant e for a certificate of non-objection to surrender or acquire licences for existing licensed premises; like Wills J in *Bowman's case*⁶ I express no definite opinion. But in my view there is a great difference between licences for existing premises and licences in suspense, and it is only with the latter that this case is concerned.

In my judgment the principles applied in *Bowman's case*⁷ are equally applicable to this case. In *Bowman's case* Wills J said⁶:

f 'The justices had no more right to require the payment of money for public purposes than to require that it should be paid into their own pockets.'

In the present case the committee is seeking to relieve the corporation of Birmingham from the liability to compensate the holders of licences in suspense, and in my view g in formulating the policy of equating barrellage the committee has taken into consideration a factor which is quite irrelevant to the duties laid down in s 119 (2).

Counsel for the committee contended that even if the policy of the committee were held to be unjustifiable, nonetheless an order of mandamus should not issue. He pointed out that the policy has been applied over a considerable period without being challenged and he submitted that in the circumstances this court in its discretion h should refuse relief. For my part I feel quite unable to give effect to this submission. The corporation have already obtained considerable financial benefit as a result of the policy and I see no reason why they should receive more. Moreover the sum which the applicant would have to pay, if the policy were upheld, is no less than £14,500 and in my view it would be wrong to deny him relief from the obligation to pay it as the price of a certificate under s 123.

j In conclusion it is worth stating that counsel for the committee conceded that, apart from the issue of barrellage equation, the applicant would have obtained a certificate of non-objection. For this reason it has been essential to consider that

6 [1898] 1 QB at 666

7 [1898] 1 QB 663

issue with particular care. In my judgment this motion succeeds and the order of mandamus should go directing the committee to consider the application in the light of the judgment of this court. a

GRIFFITHS J. I agree.

Mandamus granted. Leave to appeal granted. b

Solicitors: *Beckman & Beckman* (for the applicant); *Sharpe, Pritchard & Co*, agents for Town Clerk, Birmingham (for the respondent committee).

N P Metcalfe Esq Barrister.

Morgan v Quality Tools & Engineering (Stourbridge) Ltd c

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND BRIDGE JJ

18th NOVEMBER 1971

National insurance – Contributions – Recovery – Arrears of contributions – Conviction for failing to pay contributions – Liability on conviction to pay amount equal to unpaid contributions – Order for payment by court on conviction – Power to recover sums by civil proceedings – Whether court which enters conviction bound to make order for payment – National Insurance Act 1965, s 95 (1), (3), (9). d

The respondent company was convicted by justices on 20 informations charging it with failing to pay weekly contributions in respect of specified employees, contrary to the National Insurance Act 1965, s 8 (2)^a. It was also found liable to pay arrears of other contributions as set out in notices served under s 95 (3)^b of the 1965 Act. The justices imposed a fine in respect of each information but refused to make an order against the respondent company for the recovery of the unpaid contributions which were the subject-matter of the informations and of the notices under s 95 (3), on the grounds (a) that s 95 (1)^c and (3) of the 1965 Act did not impose a duty on them to make such an order, and (b) that the recovery of the sum involved (£2,904) was more appropriate to civil proceedings under s 95 (9)^d than to proceedings for a penalty in a magistrates' court. e

Held – Although no reference was made in terms to any order for payment being made by the court which entered the conviction, the effect of the words 'shall be liable to pay to the National Insurance Fund' in s 95 (1) and (3) of the 1965 Act was to impose a mandatory duty on the justices to make an order for the payment of the contributions, since the scheme of the 1965 Act was such that the legislature must have intended that an order for payment after conviction would follow as a matter of course (see p 748 e h and j and p 749 c, post). f

Dictum of Lord Goddard CJ in *Shilvock v Booth* [1956] 1 All ER at 384 applied. g

Notes h

For the recovery of national insurance contributions on prosecution, see 27 Halsbury's Laws (3rd Edn) 706, para 1286, and for cases on the subject, see 35 Digest (Repl) 803, 8-10.

For the National Insurance Act 1965, ss 8 and 95, see 23 Halsbury's Statutes (3rd Edn) 262, 363. j

^a Section 8 (2) is set out at p 746 g, post

^b Section 95 (3), so far as material, is set out at p 747 a to d, post

^c Section 95 (1) is set out at p 746 j, post

^d Section 95 (9) is set out at p 747 j, post

Case referred to in judgment

- a *Shilvock v Booth* [1956] 1 All ER 382, [1956] 1 WLR 135, 120 JP 133, 35 Digest (Repl) 803, 8.

Case also cited

Leach v Litchfield [1960] 3 All ER 739, [1960] 1 WLR 1392.

Case stated

b This was an appeal by way of case stated by justices for the county borough of Warley in respect of their adjudication as a magistrates' court sitting at Old Hill on 21st April 1971 whereby they convicted the respondent company, Quality Tools & Engineering (Stourbridge) Ltd, on 20 informations preferred by the appellant, Dennis John Morgan, an officer of the Department of Health and Social Security, alleging failure to pay contributions in respect of employees, contrary to the National Insurance Act 1965, s 8 (2). The justices having convicted the respondent company, the appellant proved that notices under s 95 of the National Insurance Act 1965 had been served, with the summonses in respect of the 20 informations, of his intention in the event of conviction of the respondent company for the 20 offences to give evidence of the failure of the respondent company to pay other contributions under the National Insurance Act 1965 and under the National Insurance (Industrial Injuries) Act 1965 for the persons referred to in the informations and other persons employed by the respondent company which amounted in total to £2904.43 and which remained unpaid. The appellant therefore applied to the justices for an order, under s 95 (3) of the National Insurance Act 1965, for the payment by the respondent company of the arrears of contributions in the amount of £2904.43.

c It was contended by the appellant that the justices should make such an order having regard to the fact that the informations had been found to be proved and that the notices in respect of the arrears of contributions had been duly proved.

The justices were of opinion that: (a) The respondent company having been convicted on each of the 20 informations was, under s 8 (2) of the National Insurance Act 1965, liable on summary conviction to a fine not exceeding £10 in respect of each of their 20 offences; and accordingly the justices imposed a fine of £5 on the respondent company in respect of each of the 20 informations, making a total of £100 in penalties. (b) The appellant, having proved the informations and having proved that the notices under s 95 (3) of the National Insurance Act 1965 had been duly served and that the arrears of total contributions amounting to £2904.43 remained unpaid at the time of the conviction of the respondent company, was entitled to apply for an order for payment of such arrears and the justices had jurisdiction under s 95 to make the order; the justices, however, came to the conclusion that the words in s 95 'shall be liable to pay to the National Insurance Fund . . . a sum equal to the total of all the contributions . . . which remain unpaid at the date of the conviction' were not mandatory on them to make such an order; having regard to the financial position of the respondent company the justices were of opinion that the amount involved, ie £2904.43, was so large, that in the default of payment the powers of a magistrates' court to enforce the sum as a penalty being restricted to the issue of a distress warrant for distraint of the respondent company's goods, were not so adequate as those applicable to recovery by action in civil proceedings. They considered that in view of the amount involved the recovery of these arrears should be effected under the provisions of s 95 (9) of the National Insurance Act 1965 and accordingly made no order against the respondent company for the payment of arrears of contributions.

j The questions for the opinion of the High Court were: (a) Whether by reason of the words 'shall be liable' in s 95 (3) of the National Insurance Act 1965, it was mandatory on the court to make an order for payment of arrears of contributions if the court convicted under s 95 (1) and the notice referred to in s 95 (3) had been duly served,

in view of the fact that the appellant could utilise the provision of s 95 (9) to enforce the recovery of arrears of large amounts in the High Court. (b) If such an order must be made, could the magistrates' court ask the appellant to proceed to enforce by civil proceedings without the justices having to go through the procedure of allowing time to pay and delaying the enforcement action by abortive distress, having regard to ss 63 (1), 64 (1) and 65 (1) of the Magistrates' Courts Act 1952.

Gordon Slynn for the appellant.

The respondent company did not appear and was not represented.

LORD WIDGERY CJ. This is an appeal by case stated by justices for the county borough of Warley who on 21st April 1971 convicted the respondent company on 20 informations, each alleging that on a certain day at a specified place in Warley, the respondent company did fail to pay a contribution under the National Insurance Act 1965 in respect of a specified week and in respect of a specified employee. The informations are identical one with the other except in regard to the date, the week charged and the name of the employee. In fact there were five employees chosen for specimen charges, and in respect of each of them charges are made for four separate weeks.

Having found the offences proved, the justices convicted on each of the 20 informations; they fined the respondent company £5 on each of the informations, and then arose the question which brings the matter before this court, namely the question whether they should order payment of the unpaid contributions both in respect of these 20 informations and other like informations which were established before them.

To understand the considerations which arise in regard to any such order for payment, one must go to the legislation, and it will be remembered that under the National Insurance Act 1965 where a person is employed under a contract of service a single stamp is purchased by the employer in order to pay to the National Insurance Fund the total contribution due from the employer and the employee. Having paid the sum and thus made the total contribution, the employer is normally allowed to reimburse himself the employee's portion by deduction from the wages. The justices find, and there was no dispute in this case, that in a number of instances the employer, namely the respondent company, had deducted the appropriate amount from the employee's wages but had not bought the stamp, and it was this conduct which gave rise to the proceedings in the court below.

Under s 8 (2) of the 1965 Act it is provided:

'If any employer or insured person fails to pay at or within the time prescribed for the purpose any contribution which he is liable under this Act to pay, he shall be liable on summary conviction to a fine not exceeding ten pounds',

and it was under that subsection that the fines of a total of £100 were imposed.

In order to see what the position is in regard to any order made by the justices for payment of the unpaid contributions one goes to s 95 of the 1965 Act. Section 95 (1) provides:

'In any case where an employer or an insured person has been convicted of the offence under section 8 (2) of this Act of failing to pay a contribution at or within the time prescribed for the purpose and the contribution remains unpaid at the date of the conviction, he shall be liable to pay to the National Insurance Fund a sum equal to the amount which he failed to pay.'

It is to be observed that the phraseology there is that he shall be liable to pay, and no reference is made in terms to any order for payment being made by the court which enters the conviction. Section 95 (3) deals with a related aspect of the same matter, because under sub-s (3) it is possible for the authority to bring in and obtain

- a payment of unpaid contributions other than those which gave rise to the specific conviction before the court. Under sub-s (3):

‘On any such conviction as is mentioned in subsection (1) or (2) of this section, if notice of intention to do so has been served with the summons or warrant, evidence may be given—(a) in the case of an employer—(i) of the failure on his part to pay at or within the time prescribed for the purpose on behalf or in respect of the same person other contributions under this Act during the two years preceding the date of the offence, or contributions under the Industrial Injuries Act on that date or during those two years; and (ii) in the case of any such conviction as is mentioned in the said subsection (1), of the failure on his part so to pay on behalf or in respect of any other person employed by him any contributions under this Act or under the Industrial Injuries Act on that date or during those two years; . . . on proof of such failure the employer or the insured person shall be liable to pay to the National Insurance Fund or, as the case may require, the Industrial Injuries Fund or each such Fund, a sum equal to the total of all the contributions under this Act or, as the case may be, the Industrial Injuries Act which he is so proved to have failed to pay and which remain unpaid at the date of the conviction.’

- b
- c
- d One finds therefore, that if the appropriate notice of what one might call other omissions is served, and if the magistrates are satisfied that the failure is proved, then the same obligation to pay unpaid contributions of the kind referred to in sub-s (3) arises as in the case of unpaid contributions the subject of the conviction itself under sub-s (1).

- e The debate in this case revolves on the effect and meaning of the provision that in either instance the person at fault shall be ‘liable to pay’ the unpaid contributions. Further light is thrown on this by s 95 (6), which provides:

‘In England or Wales, any sum ordered to be paid to the National Insurance Fund or the Industrial Injuries Fund under this section shall be recoverable as a penalty.’

f

The method of recovery as a penalty is thus clearly provided.

Section 95 (8), which is of some relevance here, as the respondent is a company, is in these terms:

‘If the employer being a body corporate, fails to pay to the National Insurance Fund or the Industrial Injuries Fund any sum which the employer has been ordered to pay under this section, that sum, or such part thereof as remains unpaid, shall be a debt due to the National Insurance Fund or the Industrial Injuries Fund, as the case may be, jointly and severally from any directors of the body corporate who knew, or could reasonably be expected to have known, of the failure to pay the contribution or contributions in question.’

h

That is an important additional right whereby the fund can recover from the directors of a respondent company under the terms of the section, and it is to be observed that the subsection contemplates an order to pay, because the power to recover from directors is contingent on there having been an order made to pay. I should have drawn attention when dealing with sub-s (6) to the fact that there again is a reference to a sum ordered to be paid. It is therefore quite evident in my judgment that the Act contemplates that the convicting court may make an order in those terms.

j

I ought to conclude my references to s 95 by reading sub-s (9):

‘Nothing in this section shall be construed as preventing the recovery of any sums due to the National Insurance Fund or the Industrial Injuries Fund by means of civil proceedings.’

There is thus the possibility of recovering the sum as a penalty under sub-s (6) or by civil proceedings under sub-s (9). a

The justices took a great deal of trouble with this, to them, no doubt somewhat difficult case, and although they had no difficulty in deciding that the fine to which I have already made reference should be imposed, they obviously were reluctant to make an order for payment of the unpaid contributions, the total of which in this case had achieved the rather substantial sum of £2,904. It was contended before them on behalf of the appellant that there was a duty on them to make such an order, and that in substance they had no discretion in the matter at all. They were, as I say, somewhat reluctant, and I think it was for a very practical reason. I think they felt, rightly or wrongly, that the recovery of a sum of this kind was much more appropriate to civil proceedings than to proceedings for a penalty in the magistrates' court. They refer to a matter no doubt close to their hearts, namely the time involved in collection by weekly instalments of such a sum and all the complications with which of course they were very familiar. They concluded that on the true view of this case the proper remedy was recovery in civil proceedings under sub-s (9), and that it was within their discretion to refuse to make an order for payment with a view to recovery as a penalty. The short question is whether they had such a discretion, or whether, as the appellant contends before us today, it was in fact mandatory on them to make the order requested. b
c
d

Approaching the matter devoid of authority I would certainly have been inclined to the view that there was here no discretion. It is significant, I think, that s 95 at no time provides in what circumstances an order for payment is to be made. Both in sub-s (6) and in sub-s (8) it seems to assume that such an order for payment will be made, and having regard to the scheme of the section, and I think the scheme of the Act as a whole, I would have thought in the absence of authority that the proper view was that Parliament had intended an order for payment to follow as a matter of course once the failure to pay the relevant contributions had been established and the other procedural steps in the section had been taken. e

The matter, however, is not devoid of authority. It was the subject of an observation by Lord Goddard CJ in *Shilcock v Booth*¹. This was a case in which under the National Insurance Act 1946 and regulations² made under it, provisions which I may say for all practical purposes are in pari materia with the Act we are now considering, justices had taken the view that they had no jurisdiction to make an order for payment of arrears of contributions. Nothing turns on the fact that they had, one might say now, obviously the power to make an order, but it is relevant to observe that at the end of his judgment, a judgment with which the other members of the court concurred, Lord Goddard CJ referred to the very point with which this court is now concerned. Dealing with a convicted person who had failed to pay contributions, he said³: f
g

'He [a convicted person] is liable to pay these contributions as he is liable to pay the fine; and, although the draftsman might have written "On proof of such failure the insured person shall be ordered to pay", it is clear enough that that is what is meant. It is a summary and cheap method of recovering these contributions without further proceedings. For these reasons, I think the justices came to a wrong decision, and this case must go back with a direction that it is their duty to make an order that the respondent should pay the contributions which it has been proved he has failed to pay . . .'

h

That, if I may respectfully say so, entirely accords with my first impression of the meaning of this legislation, and I would follow it without hesitation. I would add only one word in regard to the justices' belief, that it was more appropriate that civil i

¹ [1956] 1 All ER 382, [1956] 1 WLR 135

² I.e. the National Insurance (Contributions) Regulations 1948 (SI 1948 No 1417)

³ [1956] 1 All ER at 384, [1956] 1 WLR at 138

a proceedings were used in this case, by referring again to s 95 (8), which gives the National Insurance Fund a special remedy against directors of a limited company which is a remedy which would not exist under the ordinary civil law. Accordingly, the justices were wrong in their conclusion that the civil remedy must necessarily be as good as the penal remedy because I think they failed to notice under that subsection the additional penal remedy.

b I would allow the appeal and send the case back to the magistrates, using the words of Lord Goddard CJ in *Shilvock v Booth*⁴, namely, with a direction that it is their duty to make an order for payment of the agreed sum of £2,094.

ASHWORTH J. I agree.

c BRIDGE J. I also agree.

Appeal allowed.

Solicitor: Solicitor, Department of Health and Social Security (for the appellant).

Gordon H Scott Esq. Barrister.

d British Railways Board v Herrington

HOUSE OF LORDS

LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD WILBERFORCE, LORD PEARSON AND LORD DIPLOCK

e 9th, 11th, 12th, 15th, 16th, 17th, 19th, 22nd NOVEMBER 1971, 16th FEBRUARY 1972

f Occupier – Negligence – Trespasser – Duty owed by occupier to trespasser – Duty in respect of concealed dangers on property – Duty to trespassers likely to come on to property – Child trespasser on railway – Electrified railway line – Failure by occupier to maintain adequate fence – Railway line passing alongside field open to the public – Chain link fence marking boundary of railway line with field – Fence broken down and giving easy access to short cut across railway – Occupier notified that children had been seen on line – Failure to inspect or repair fence – Child walking on to line seriously injured by electrified rail – Whether occupier liable for breach of duty to child.

g The plaintiff, a boy aged six, went with his two older brothers to play in a field which was National Trust property freely open to the public and frequented by children. Through the field ran a path which led to an electrified railway track owned by the British Railways Board ('the board'). Shortly before reaching the line of a four foot high chain link fence, which had been erected to border the railway track, the path turned to the right and led to a footbridge over the track. Where the path turned to the right, however, there was a further short stretch of trodden path which continued straight up to the fence. At the point where the trodden path reached it, the fence had become detached from one of the supporting posts and pressed down to within ten inches of the ground. The evidence showed that the fence had been in that condition for some time and that people had been using the gap to take a short cut across the railway line. There was also evidence that employees of the board had reported some seven weeks before the accident that children had been seen on the stretch of railway line but no action had been taken by the board in consequence of the report. After playing in the field for some time with his brothers the plaintiff wandered off, crossed the gap in the fence and walked on to the railway line where he was severely injured by the electrified rail. In an action by the plaintiff, the board

claimed that they were not liable to him for, being a trespasser on the railway track, they owed him no duty of care, nor had they shown any reckless disregard for his presence on the track.

Held – (i) Although as a general rule a person who trespassed on the land of another did so at his own risk, and the occupier of the land did not owe him the common duty of care owed to persons lawfully on the land, it did not follow that an occupier was never, in any circumstances, under a duty to take steps to protect a trespasser from potential danger; nor was the occupier's duty limited to refraining from acting with the deliberate intention of doing harm to a trespasser actually on the land or with reckless disregard of his presence there. Where an occupier knew that there were trespassers on his land, or knew of circumstances that made it likely that trespassers would come on to his land, and also knew of physical facts in relation to the state of his land or some activity carried out on the land which would constitute a serious danger to persons on the land who were unaware of those facts, the occupier was under a duty to take reasonable steps to enable the trespasser to avoid the danger. That duty would only arise in circumstances where the likelihood of the trespasser being exposed to the danger was such that, by the standards of common sense and common humanity, the occupier could be said to be culpable in failing to take reasonable steps to avoid the danger (see p 758 e to h, p 765 c to e, p 769 a and b, p 772 h, p 773 g, p 774 a to c, p 777 e to j, p 779 f to h, p 783 e and f, p 786 c, p 794 h and j, p 795 f to h, and p 796 a to d, post).

(ii) Accordingly the board were in breach of their duty to the plaintiff for they had brought on to their land in the electrified rail a lethal and, to a small child, a concealed danger; it would have been easy for them to have maintained and enforced a reasonable system of inspection and repair of the boundary fence; it was known to them that children were entitled and accustomed to play on the other side of the fence and they must have known that a young child might easily cross a defective fence and run into grave danger. Although in failing to take any steps to maintain the fence in good repair the board could not be said to have acted with reckless disregard of the plaintiff's presence on the track, they had failed to act with due regard to humane considerations and were, in the circumstances, culpable (see p 759 b and c, p 760 h, p 761 h, p 765 h, p 767 d, p 779 c, p 786 d and p 796 f, post).

Dicta of Best J in *Ilott v Wilkes* [1814-23] All ER Rep at 282, of Kitto J in *Thompson v Bankstown Municipal Council* (1952) 87 CLR at 642, 643, and of Dixon CJ and Windeyer J in *Railways Comr (NSW) v Cardy* (1961) 104 CLR at 286, 321, 322, applied.

Railways Comr v Quinlan [1964] 1 All ER 897 explained.

Edwards v Railway Executive [1952] 2 All ER 430 distinguished.

R Addie & Sons (Collieries) Ltd v Dumbreck [1929] All ER Rep 1 not followed.

Dictum of Lord Denning MR in *Videan v British Transport Commission* [1963] 2 All ER at 864 disapproved.

Decision of the Court of Appeal sub nom *Herrington v British Railways Board* [1971] 1 All ER 897 affirmed on other grounds.

Notes

For the duty owed by occupiers of premises to trespassers, see 28 Halsbury's Laws (3rd Edn) 53, 54, para 49, and for cases on the subject, see 36 Digest (Repl) 70, 71, 376-382.

For the standard of care in relation to trespassing children, see 28 Halsbury's Laws (3rd Edn) 17, 18, para 15, and for cases on the subject, see 36 Digest (Repl) 120, 121, 600-611.

Cases referred to in opinions

Adams v Naylor [1946] 2 All ER 241, [1946] AC 543, 115 LJKB 356, 175 LT 97, affg [1944] 2 All ER 21, [1944] 1 KB 750, 38 Digest (Repl) 53, 273.

- a* Addie (R) & Sons (Collieries) Ltd v Dumbreck [1929] AC 358, [1929] All ER Rep 1, 98 LJPC 119, 140 LT 650; *rvsg* sub nom *Dumbreck v Robert Addie & Sons (Collieries) Ltd* 1928 SC 547, 36 Digest (Repl) 120, 604.
- Baker v Bethnal Green Corp'n* [1945] 1 All ER 135, 109 JP 72, 43 LGR 75, 36 Digest (Repl) 217, 1148.
- Billings (A C) & Sons Ltd v Riden* [1957] 3 All ER 1, [1958] AC 240, [1957] 3 WLR 496, Digest (Cont Vol A) 1145, 1056.
- b* *Bird v Holbrook* (1828) 4 Bing 628, 2 Man & Ry MC 198, 1 Moo & P 607, 6 LJOSCP 146, 46 Digest (Repl) 421, 656.
- Blyth v Birmingham Waterworks Co* (1856) 11 Exch 781, [1843-60] All ER Rep 478, 25 LJEx 212, 26 LTOS 261, 20 JP 247, 36 Digest (Repl) 5, 1.
- Buckland v Guildford Gas Light and Coke Co* [1948] 2 All ER 1086, [1949] 1 KB 410, 113 JP 44, 20 Digest (Repl) 234, 149.
- c* *Carlgarth, The, The Otarama* [1927] P 93, 96 LJP 162, 136 LT 518, 17 Asp MLC 195, 38 Digest (Repl) 451, 1007.
- Carmarthenshire County Council v Lewis* [1955] 1 All ER 565, [1955] AC 549, [1955] 2 WLR 517, 119 JP 230; *affg* sub nom *Lewis v Carmarthenshire County Council* [1953] 2 All ER 1403, [1953] 1 WLR 1439, 118 JP 51, Digest (Cont Vol A) 168, 569a.
- d* *Cooke v Midland Great Western Railway of Ireland* [1909] AC 229, [1908-10] All ER Rep 16, 78 LJPC 79, 100 LT 626, 36 Digest (Repl) 118, 590.
- Creed v John McGeoch & Sons Ltd* [1955] 3 All ER 123, [1955] 1 WLR 1005, Digest (Cont Vol A) 1169, 588b.
- Davis v St Mary's Demolition & Excavation Co Ltd* [1954] 1 All ER 578, [1954] 1 WLR 592, Digest (Cont Vol A) 1169, 570b.
- Deane v Clayton* (1817) 7 Taunt 489, 1 Moo CP 203, 129 ER 196, 46 Digest (Repl) 394, 360.
- e* *Devlin v Jeffray's Trustees* (1902) 40 SCLR 92, 7 Digest (Repl) 293, *170.
- Donoghue (or McAlister) v Stevenson* [1932] AC 562, [1932] All ER Rep 1, 1932 SC (HL) 31, 101 LJPC 119, 147 LT 281, 36 Digest (Repl) 85, 458.
- Dunster v Abbott* [1953] 2 All ER 1572, Digest (Cont Vol A) 1157, 375a.
- Edwards v Railway Executive* [1952] 2 All ER 430, [1952] AC 737, 36 Digest (Repl) 121, 611.
- f* *Excelsior Wire Rope Co Ltd v Callan* [1930] AC 404, [1930] All ER Rep 1, 99 LJKB 380, 142 LT 531, 94 JP 174, 36 Digest (Repl) 118, 592.
- Gautret v Egerton, Jones v Egerton* (1867) LR 2 CP 371, 37 LJCP 191, sub nom *Gantret v Egerton, Jones v Egerton* 16 LT 17, 36 Digest (Repl) 47, 247.
- Glasgow Corp'n v Taylor* [1922] 1 AC 44, [1921] All ER Rep 1, 91 LJPC 49, 126 LT 262, 86 JP 89, 36 Digest (Repl) 119, 597.
- g* *Goldman v Hargrave* [1966] 2 All ER 989, [1967] AC 645, [1966] 3 WLR 513, [1967] ALR 113, Digest (Cont Vol B) 559, 382Aa.
- Grand Trunk Ry Co of Canada v Barnett* [1911] AC 361, 80 LJPC 117, 104 LT 362, 36 Digest (Repl) 71, 379.
- Haley v London Electricity Board* [1964] 3 All ER 185, [1965] AC 778, [1964] 3 WLR 479, 129 JP 14, Digest (Cont Vol B) 331, 2091a.
- h* *Hardy v Central London Ry Co* [1920] 3 KB 459, [1920] All ER Rep 205, 89 LJKB 1187, 124 LT 136, 36 Digest (Repl) 120, 603.
- Hawkins v Coulsdon & Purley Urban District Council* [1954] 1 All ER 97, [1954] 1 QB 319, [1954] 2 WLR 122, 118 JP 101, Digest (Cont Vol A) 1156, 869a.
- Hay (or Bourhill) v Young* [1942] 2 All ER 396, [1943] AC 92, 111 LJPC 97, 167 LT 261, 36 Digest (Repl) 16, 66.
- i* *Heaven v Pender* (1883) 11 QBD 503, [1881-85] All ER Rep 35, 52 LJQB 702, 49 LT 357, 47 JP 709, 36 Digest (Repl) 7, 10.
- Hillen and Pettigrew v ICI (Alkali) Ltd* [1936] AC 65, [1935] All ER Rep 555, 104 LJKB 473, 153 LT 403, 36 Digest (Repl) 71, 377.
- Holland v District Committee of Middle Ward of Lanarkshire* 1909 2 SLT 7, 1909 SC 1142, 7 Digest (Repl) 294, *175.

- Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294, [1970] AC 1004, [1970] 2 WLR 1140, [1970] 1 Lloyd's Rep 453, Digest (Cont Vol C) 731, 133*b*.
- Ilott v Wilkes* (1820) 3 B & Ald 304, [1814-23] All ER Rep 277, 106 ER 674, 46 Digest (Repl) 421, 655.
- Indermaur v Dames* (1866) LR 1 CP 274, [1861-73] All ER Rep 15, Har & Ruth 243, 35 LJCP 184, 14 LT 484; *affd* (1867) LR 2 CP 311, 36 Digest (Repl) 46, 246.
- Jay v Whitfield* (1817) 3 B & Ald 308, 106 ER 676, 46 Digest (Repl) 421, 654.
- Kingzett v British Railways Board* (1968) 112 Sol Jo 625, Digest (Cont Vol C) 742, 611*c*.
- Latham v Richard Johnson & Nephew Ltd* [1913] 1 KB 398, [1911-13] All ER Rep 117, 82 LJKB 258, 108 LT 4, 77 JP 137, 36 Digest (Repl) 49, 262.
- Lowery v Walker* [1910] 1 KB 173, 79 LJKB 297, 101 LT 873, *rvsd* HL [1911] AC 10, [1908-10] All ER Rep 12, 86 LJKB 138, 103 LT 674, 36 Digest (Repl) 55, 302.
- Lynch v Nurdin* (1841) 1 QB 29, [1835-42] All ER Rep 167, Arn & H 158, 4 Per & Dar 672, 10 LJQB 73, 5 JP 319, 36 Digest (Repl) 33, 150.
- McCarthy v Wellington City* [1966] NZLR 481, Digest (Cont Vol B) 560, *510*c*.
- M'Glone v British Railways Board* 1966 SC (HL) 1, 1966 SLT 2.
- Miller v South of Scotland Electricity Board* 1958 SC (HL) 20, 1958 SLT 229, 20 Digest (Repl) 237, *91.
- Mooney v Lanarkshire County Council* 1954 SC 245.
- Morran v Waddell* (1883) 11 R 44, 21 ScLR 28, 36 Digest (Repl) 124, *917.
- Mourran v Poulter* [1930] 2 KB 183, [1930] 1 All ER Rep 6, 99 LJKB 289, 143 LT 20, sub nom *Moulton v Poulter* 94 JP 190, 36 Digest (Repl) 71, 380.
- Munnings v Hydro-Electric Commission of Tasmania* (1971) 45 ALJR 378.
- New South Wales Transport Comrs v Barton* (1933) 49 CLR 114, (1933) Argus LR 228, 6 ALJ 459, 33 SRNSW 507, 50 NSWWN 230, 2 Digest (Repl) 306, *59.
- Perry v Thomas Wrigley Ltd* [1955] 3 All ER 243, [1955] 1 WLR 1164, Digest (Cont Vol A) 1170, 589*a*.
- Prentice v Assets Co Ltd* (1890) 17 R 484, 36 Digest (Repl) 74, *414.
- Railways Comr (NSW) v Cardy* (1961) 104 CLR 274, [1961] ALR 16, 34 ALJR 134, Digest (Cont Vol A) 1171, *867*c*.
- Railways Comr v McDermott* [1966] 2 All ER 162, [1967] 1 AC 169, [1966] 3 WLR 267, [1966] ALR 897, [1966] 1 NSW 420, Digest (Cont Vol B) 609, 398*a*.
- Railways Comr v Quinlan* [1964] 1 All ER 897, [1964] AC 1054, [1964] 2 WLR 817, [1964-65] NSW 157, [1964] ALR 900, Digest (Cont Vol B) 558, 380*a*.
- Read v J Lyons & Co Ltd* [1946] 2 All ER 471, [1947] AC 156, [1947] LJ 39, 175 LT 413, 36 Digest (Repl) 83, 452.
- Rich v Railways Comr (NSW)* (1959) 101 CLR 135.
- Ross v Keith* (1888) 16 R 86, 26 ScLR 55, 36 Digest (Repl) 172, *397.
- Thompson v Bankstown Municipal Council* (1952) 87 CLR 619, 69 NSWWN 64, 26 Digest (Repl) 350, *248.
- United Zinc & Chemical Co v Britt* (1922) 258 US 268, 42 Sup Ct 299.
- Videan v British Transport Commission* [1963] 2 All ER 860, [1963] 2 QB 650, [1963] 3 WLR 374, Digest (Cont Vol A) 1143, 89*b*.

Appeal

This was an appeal by the British Railways Board against the order of the Court of Appeal (Salmon, Edmund Davies and Cross LJ) dated 2nd December 1970 and reported [1971] 1 All ER 897, affirming the judgment of Cairns J dated 27th February 1970 awarding damages for personal injuries to the respondent, Peter Thomas Herrington, an infant, in an action brought by him by his mother and next friend, Kathleen Louise Herrington, against the appellants for damages for negligence and/or breach of statutory duty. The facts are set out in the opinion of Lord Morris of Borth-y-Gest.

R A Gatehouse QC and Robert Alexander for the appellants.
D S Hunter QC and M N Chambers for the respondent.

- a Their Lordships took time for consideration.
16th February. The following opinions were delivered.

LORD REID. My Lords, on 7th June 1965 the respondent, then a child of six years old, was playing with other children on National Trust property at Mitcham which is open to the public. Immediately adjoining this property the appellants
b have an electrified railway line a few yards from the boundary. Their boundary is marked by a fence which, if it had been in good repair, would have sufficed to prevent the respondent from reaching the railway line. But it was in very bad repair so that when the respondent strayed away from his playmates he was able to get through or over it. He then went a few yards farther and came in contact with the live electrified rail. Fortunately he was rescued but he had already sustained severe
c injury. His age was such that he was unable to appreciate the danger of going on to the railway line and probably unable to appreciate that he was doing wrong in getting over the fence.

I have no doubt that if the appellants owed to potential child trespassers any duty of care to take steps for their safety, they were in breach of any such duty. Enquiry soon after the accident showed that this was by no means the only place where their
d fence was defective and a well trodden track leading to the point where the respondent got on to their property showed that a considerable number of trespassers must have crossed the line at this point to other National Trust property on the other side. The appellants led no evidence at the trial and it cannot be inferred that they knew about these trespassers before the accident. The only evidence of their knowledge was a report produced by them which showed that they knew that a few weeks
e before the accident some children had been seen on the line at some point not very far away. But in my view the evidence was sufficient to show either that there was no systematic inspection of their fence or that if there was any system it was not operated or enforced.

The appellants' main contention is that they owed no duty to this child. They found on the leading case of *R Addie & Sons (Collieries) Ltd v Dumbreck*¹. The respondent
f founds on later authorities and asks us to reconsider Addie's case¹ if it cannot be distinguished. He is entitled to say that Addie's case¹ has frequently been criticised. I well remember that this decision, which reversed the decision of the Court of Session², was much criticised in Scotland at the time. But no one doubted that it had settled the law. And it has always been said to have been followed both in England and in Scotland, although it is not easy to reconcile with it much that has been
g said in recent cases. The speeches in Addie's case¹ must be read in the light of the facts which are set out in Session Cases². The Lord President (Lord Clyde) said³, after stating that the boy was a trespasser:

'On the other hand, he was a member of a class of persons—to wit, the local community of working-class residents of all ages—who, to the knowledge of the
h defenders, were in the habit of resorting to the field (1) as an open space; (2) as a playground; (3) as a means of access to chapel and railway station; and (4)—as regards the less well-disposed members of the local community—as a means of approach to the defenders' coal bing and wood depot for purposes of depredation. Against the latter class the defenders took the usual means of legal protection by frequent prosecutions for theft. Against the former class they took no measures of a kind calculated to be effective; and they knew that such measures as
i they did take were quite ineffectual to check the habitual resort of both adults and children to the field and to the immediate neighbourhood of the haulage system.'

1 [1929] AC 358, [1929] All ER Rep 1

2 1928 SC 547

3 1928 SC at 553

Then, having said that if the presence of a trespasser near a dangerous machine is known to the proprietor he cannot disregard that, he went on⁴:

'I am unable to distinguish that case from the case in which the proprietor knows of the habitual resort of adults or children, or both, to the near neighbourhood of the dangerous machine—a habit of resort which makes it to his knowledge likely that one or more of such persons may be at the machine when he applies the motive power.'

Later he said⁵:

'The intrusion of the local public upon the defenders' field and the site of their haulage system in the present case seems to me to have been very similar to the use by the local public of an unauthorised short cut in *Lowery v Walker*⁶ . . .'

The speeches in this House in *Addie's* case⁷ appear to me to be intended to lay down a general rule that no occupier is under any duty to potential trespassers, whether adults or children, to do anything to protect them from danger on his land however likely it may be that they will come and run into danger and however lethal the danger may be. I find it impossible to reconcile these speeches with any idea that the occupier will incur any duty of care to trespassers by carrying out dangerous operations on his land even when he knows that trespassers are very likely to come on to his land and that if they come these operations may cause them injury. If he knows that trespassers are already on his land then for the first time he does incur a duty but it is a duty of a very limited kind—a duty not to act with reckless disregard of their safety.

There was nothing new in that. But the rule was laid down with stark simplicity and the speeches must have been intended to check a growing tendency of courts both in England and Scotland to try to soften its impact. The noble and learned lords appear to have had in mind that occupiers are entitled to know precisely what their duties are and nothing could be simpler than the answer which they gave.

But there were already two exceptions to this rule. The first was where the occupier had put on his land something which was dangerous and was an allurement to children. That seems to me to be easy to explain. He ought to know that by putting that allurement there he was in a sense inviting children to meddle with the dangerous thing, and the law would not permit him to do that without imposing a duty on him. His liability arose from his own choice to endanger children in that way.

The second exception is not so easy to explain. If, after a certain point not easy to define, the occupier continued to stand by and acquiesce in the coming of trespassers he was held to have given a general permission or licence to trespassers to continue to do what those trespassers had been doing. Any 'licence' of this kind was purely fictitious. There was no need to find any evidence that he had in fact consented to the coming of the trespassers or to the continuance of the trespassing. His inaction in suffering the trespassing might have been due to many other reasons than his being willing to allow it. He might prove that there was some other reason but that would not avail him.

The Court of Session decided *Addie's* case⁸ on the ground that the child was a licensee. On the then current trend of authority I think they were well entitled to do so. But this House⁷ thought otherwise and it appears to me that their decision must be regarded as an attempt to confine the doctrine of licence within much narrower limits than had been customary.

Later cases can hardly be said to exhibit loyal acceptance of the *Addie*⁷ doctrine.

4 1928 SC at 554

5 1928 SC at 555

6 [1911] AC 10, [1908-10] All ER Rep 12

7 [1929] AC 358, [1929] All ER Rep 1

8 1928 SC 547

a In *Excelsior Wire Rope Co Ltd v Callan*⁹ this House giving extempore judgments dismissed an appeal by the occupier without hearing the respondent. There cannot have been any intention to modify the considered judgments in *Addie's case*¹⁰, and it is perhaps a little surprising that the House was able so easily to reach a different conclusion. I can only regard the decision in *Callan's case*⁹ as founded, rightly or wrongly, on the particular facts of the case. Encouraged by the decision in *Callan's case*⁹ the Court of Appeal were able to decide against the occupier in *Mourton v Poulter*¹¹. In *Adams v Naylor*¹² there was a difference of opinion in the Court of Appeal. Scott LJ decided against the occupier on grounds that are not easy to state succinctly. Mackinnon LJ and Morton J reluctantly followed *Addie*¹³. I need not notice any other cases until *Edwards v Railway Executive*¹⁴. There persistent trespassing by children imposed no duty on the railway to keep them out or protect them. I think Lord Goddard accurately stated the law when he said¹⁵:

‘ . . . repeated trespass of itself confers no licence . . . To find a licence there must be evidence either of express permission or that the landowner has so conducted himself that he cannot be heard to say that he did not give it.’

d So far *Addie*¹³ stood, disliked but essentially unshaken. A new chapter opened with *Videan v British Transport Commission*¹⁶. A stationmaster's child strayed on to the railway and was run over. It was rightly held that the child was a trespasser and that the authority were not liable. But some obiter dicta of Lord Denning MR appear to me to be directly contrary to the decision of this House in *Addie's case*¹³. Nevertheless, they have attracted much support in subsequent cases. Having pointed out that for child trespassers innocent of any wicked intent the rule in *Addie's case*¹³ works most unfairly, he said¹⁷:

‘Hence the shifts to which generations of judges have been put to escape the rule. They have time and again turned a trespasser into a licensee so as to give him a remedy for negligence when otherwise he would have none.’

f So far I take no exception. But then he went on to discuss¹⁸ ‘a new way . . . to mitigate the harshness of the old rule’, by confining the old rule to the responsibility of the occupier for the condition of his premises and inventing a new duty towards trespassers to conduct his activities on his property with reasonable care. But in *Addie's case*¹³ the danger was not in the condition of the property; the mechanism when at rest was quite safe. The danger arose when *Addie's* servant began the operation of setting the mechanism in motion. If this new theory were right *Addie's case*¹³ must have gone the other way. Lord Denning MR founded the new view on foreseeability. He said¹⁹:

h ‘The true principle is this: In the ordinary way the duty to use reasonable care extends to all persons lawfully on the land, but it does not extend to trespassers; for the simple reason that he cannot ordinarily be expected to foresee the presence of a trespasser. But the circumstances may be such that he ought to foresee even the presence of a trespasser; and then the duty of care extends to the trespasser also.’

j 9 [1930] AC 404, [1930] All ER Rep 1

10 [1929] AC 358, [1929] All ER Rep 1

11 [1930] 2 KB 183, [1930] All ER Rep 6

12 [1944] 2 All ER 21, [1944] 1 KB 750, *aff'd* [1946] 2 All ER 241, [1946] AC 543

13 [1929] AC 358, [1929] All ER Rep 1

14 [1952] 2 All ER 430, [1952] AC 737

15 [1952] 2 All ER at 436, [1952] AC at 746, 747

16 [1963] 2 All ER 860, [1963] 2 QB 650

17 [1963] 2 All ER at 864, [1963] 2 QB at 663

18 [1963] 2 All ER at 864, [1963] 2 QB at 664

19 [1963] 2 All ER at 865, 866, [1963] 2 QB at 666

But in *Addie's case*²⁰ the presence of the children was not only foreseeable, it was very probable. Nevertheless, this House held there was no duty. a

This House in *Addie*²⁰ held that no duty at all arose until the trespassers were known to be on the land. It is easy to extend that to a case when the occupier as good as knows, where he shuts his eyes; he will not then be heard to say that he did not know. But he has no duty to do anything before the trespasser arrives. If, on the other hand, a duty were to arise before the trespassers' arrival, when that arrival is merely foreseeable or probable, the situation would be very different. The occupier would have to do what that duty required him to do to prepare for the trespassers' arrival. But that is precisely what *Addie's case*²⁰ says he need not do. I can see no way of bringing in that foreseeability test without reconsidering and overruling at least that part of the decision in *Addie*²⁰. A duty to act with humanity towards a trespasser known to be there is one thing. A duty of care towards probable trespassers is of a different order. It would completely transform the whole picture and, so far as I can see, completely supersede the *Addie*²⁰ duty in all cases where the arrival of the injured trespasser had been probable or foreseeable. b

It follows that I cannot accept all that was said in the judgment of the Privy Council in *Railways Comr v Quinlan*¹ as being consistent with the decision in *Addie's case*²⁰. In one passage it is said, I think rightly²: c

'A person's knowledge is a question of fact: such a fact is a very different thing from the objective question whether there was a reasonable likelihood of someone being present at the relevant time and place and whether a person ought to have foreseen that likelihood. Given the fact of the knowledge, the occupier comes under the obligation not to inflict intentional or reckless injury on the person of whose presence he is aware. This again is a very different thing from an obligation to take precautions in advance against the likelihood of a trespasser being present.' d

And then there is a reference to the occupier being in a position in which he as good as knows that the other is there. So far that is pure *Addie*²⁰. But a later passage³ appears to me to be inconsistent with this. It would seem to say that it is sufficient if the presence of the trespasser is extremely likely or very probable. e

So we are confronted with the position that persistent attempts have been made to confer on child trespassers greater rights and to impose on occupiers greater obligations than are to my mind consistent with the decision of this House in *Addie's case*²⁰. I shall not deal with the forthright Australian authorities farther than to say that those attempts are even more persuasive and far reaching than those in this country. So it appears to me that no satisfactory solution can be found without a re-examination of the whole problem and a reconsideration by this House of its decision in *Addie's case*²⁰. f

Child trespassers have for a very long time presented to the courts an almost insoluble problem. They could only be completely safeguarded in one or other of two ways. Either parents must be required always to control and supervise the movements of their young children, or occupiers of premises where they are likely to trespass must be required to take effective steps to keep them out or else to make their premises safe for them if they come. Neither of these is practicable. The former course was practicable at one time for a limited number of well-to-do parents but that number is now small. The latter, if practicable at all, would in most cases impose on occupiers an impossible financial burden. g

Legal principles cannot solve the problem. How far occupiers are to be required h

²⁰ [1929] AC 358, [1929] All ER Rep 1

¹ [1964] 1 All ER 897, [1964] AC 1054

² [1964] 1 All ER at 906, [1964] AC at 1076

³ [1964] 1 All ER at 907, [1964] AC at 1077 i

a by law to take steps to safeguard such children must be a matter of public policy. The law was uncertain when *Addie's case*⁴ was decided. That decision was intended to make the law certain. It did so. This House must have taken the view that as a matter of public policy occupiers should have no duty at all to keep out such children or to make their premises safe for them. Their only duty was a humanitarian duty not to act recklessly with regard to children whom they knew to be there.

b It may have been arguable 40 years ago that that was good public policy. But for one fact I would think it unarguable today. That is the fact that only 14 years ago Parliament when it had an obvious opportunity to alter that policy failed to do so. The law with regard to occupiers' liability to persons coming on to their land was then so unsatisfactory that Parliament found it necessary to pass for England and Wales the Occupiers' Liability Act 1957. It imposed a 'common duty of care' on occupiers towards all persons who might lawfully come on to their land. But it pointedly omitted to alter the existing law as to trespassers. At that time there was no doubt that *Addie's case*⁴ had settled the law, and under the practice then prevailing this House could not alter that decision. The Court of Appeal had not yet begun to try to modify *Addie's case*⁴. As I have already said, they had no right to do that and I do not think that in 1957 their action could reasonably have been foreseen. So I find it exceedingly difficult to interpret the silence of Parliament in the 1957 Act with regard to trespassers in any other way than as an approval of the existing law with regard to them. And that means an approval of the decision in *Addie's case*⁴.

c It is, however, I think just possible to attribute that silence to Parliament (or those who then advised Parliament) being unable to make up their minds as to what to put in place of *Addie*⁴. I say that because, when the law of Scotland on this matter was amended in 1960, Parliament (no doubt acting on more robust advice from Scotland) did alter the Scots law with regard to trespassers. It seems unlikely that on a matter of this kind Parliament would deliberately adopt quite different policies for the two countries. So I think I may be justified in attributing to indecision the silence of Parliament in 1957 with regard to trespassers in England.

d The question, then, is to what extent this House sitting in its judicial capacity can do what Parliament failed to do in 1957. I dislike usurping the functions of Parliament. But it appears to me that we are confronted with the choice of following *Addie*⁴ and putting the clock back or drastically modifying the *Addie*⁴ rules. It is suggested that such a modification can be achieved by developing the law as laid down in *Addie's case*⁴ without actually overruling any part of the decision. I do not think that that is possible. It can properly be said that one is developing the law laid down in a leading case so long but only so long as the 'development' does not require us to say that the original case was wrongly decided. But it appears to me that any acceptable 'development' of *Addie's case*⁴ must mean that *Addie's case*⁴ if it arose today would be decided the other way. The case for the pursuer in *Addie's case*⁴ was stronger on the facts than the case for the present respondent and I do not think that we could dismiss this appeal without holding or at least necessarily implying that *Addie's case*⁴ was wrongly decided.

e I do not think that it would be satisfactory merely to follow the scheme of the Scottish Act⁵. That Act provides by s 2 that the care which an occupier is required to show to a person entering his land (which includes a trespasser) in respect either of its dangerous state or of dangerous activities on it shall be—

f 'such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger.'

g That may work satisfactorily where actions for damages for failure to exercise such care are generally decided by juries. Juries do not give reasons and so no verdict of a

4 [1929] AC 358, [1929] All ER Rep 1

5 I.e. the Occupiers' Liability (Scotland) Act 1960

jury can establish a precedent. But in England such actions are decided by judges who must give reasons and whose decisions can be the subject of appeal. No doubt if the matter were left at large in this way a body of case law with regard to the position of trespassers would develop over the years. The matter would in one form or another come before this House before very long and some authoritative guidance would then emerge. But I would not create such a period of uncertainty if that can be avoided, and I think it can be avoided.

The first matter to be determined is the nature of the duty owed by occupiers to trespassers. Here I think we can get good guidance from *Addie's case*⁶. The duty there laid down was a duty not to act recklessly. Recklessness has, in my opinion, a subjective meaning; it implies culpability. An action which would be reckless if done by a man with adequate knowledge, skill or resources might not be reckless if done by a man with less appreciation of or ability to deal with the situation. One would be culpable, the other not. Reckless is a difficult word. I would substitute culpable.

The duty laid down in *Addie's case*⁶ was a humanitarian duty. Normally the common law applies an objective test. If a person chooses to assume a relationship with members of the public, say by setting out to drive a car or to erect a building fronting a highway, the law requires him to conduct himself as a reasonable man with adequate skill, knowledge and resources would do. He will not be heard to say that in fact he could not attain that standard. If he cannot attain that standard he ought not to assume the responsibility which that relationship involves. But an occupier does not voluntarily assume a relationship with trespassers. By trespassing they force a 'neighbour' relationship on him. When they do so he must act in a humane manner—that is not asking too much of him—but I do not see why he should be required to do more. So it appears to me that an occupier's duty to trespassers must vary according to his knowledge, ability and resources. It has often been said that trespassers must take the land as they find it. I would rather say that they must take the occupier as they find him.

So the question whether an occupier is liable in respect of an accident to a trespasser on his land would depend on whether a conscientious humane man with his knowledge, skill and resources could reasonably have been expected to have done or refrained from doing before the accident something which would have avoided it. If he knew before the accident that there was a substantial probability that trespassers would come, I think that most people would regard as culpable failure to give any thought to their safety. He might often reasonably think, weighing the seriousness of the danger and the degree of likelihood of trespassers coming against the burden he would have to incur in preventing their entry or making his premises safe, or curtailing his own activities on his land, that he could not fairly be expected to do anything. But if he could at small trouble and expense take some effective action again I think that most people would think it inhumane and culpable not to do that. If some such principle is adopted there will no longer be any need to strive to imply a fictitious licence. It would follow that an impecunious occupier with little assistance at hand would often be excused from doing something which a large organisation with ample staff would be expected to do.

It is always easy to be wise after the event and in judging what ought to have been done one would have to put out of one's mind the fact that an accident had occurred and visualise the position of the occupier before it had happened. Quite probably this would not be the only point on his land where trespass was likely. One would have to look at his problem as a whole and ask whether if he had thought about the matter it would have been humane or decent of him to do nothing. That may sound a low standard but in fact I believe that an occupier's failure to take any preventive steps is more often caused by thoughtlessness than by any shirking of his

a moral responsibility. I think that current conceptions of social duty do require occupiers to give reasonable attention to their responsibilities as occupiers, and I see nothing in legal principles to prevent the law from requiring them to do that.

b If I apply that test to the present case I think that the appellants must be held responsible for this accident. They brought on to their land in the live rail a lethal and to a young child a concealed danger. It would have been very easy for them to have and enforce a reasonable system of inspection and repair of their boundary fence. They knew that children were entitled and accustomed to play on the other side of the fence and must have known, had any of their officers given the matter a thought, that a young child might easily cross a defective fence and run into grave danger. Yet they did nothing. I do not think that a large organisation is acting with due regard to humane considerations if its officers do not pay more attention to safety. c I would not single out the stationmaster for blame. The trouble appears to have been general slackness in the organisation. For that the appellants are responsible and I think in the circumstances culpable. I would therefore hold them liable to the respondent and dismiss this appeal.

d **LORD MORRIS OF BORTH-Y-GEST.** My Lords, on 7th June 1965 (Whit Monday) the respondent, a small boy aged six, went to play in a field near Mitcham called Bunces Meadow. He was with his two brothers who were a little older than he was. Bunces Meadow is National Trust property which is freely open to the public. Through it there runs a public path. For a part of its distance the path is a made-up path having a tarmacadam surface. It continues as a trodden path which makes a turn to the right. The reason for this is that straight ahead of the path there is a single line railway track, which runs between Mitcham Junction and Morden Road Halt. e By the side of the track there is a 'live' rail carrying the necessary electric current for trains which are driven along the track. The path to the right leads to a footbridge over the railway track. By crossing the railway another National Trust property, Morden Hall Park, is reached.

f The trodden path turned to the right near to but before reaching the line of the fence which had been erected to border the railway track. There was a further short stretch of trodden path (which should have been a cul-de-sac) reaching up to the fence. The fence was a chain link fence four feet high supported by concrete posts eight feet six inches apart. But at the very place where the fencing should have debarred a person from going straight on if he had not previously turned to the right it was defective. The fence was detached from one of the posts and had been pressed g down so that its top curved down to within about ten inches of the ground. The lower part of the chain link, which was rusty, was lying on the ground. The state of affairs was, as the learned judge found, that for some time before 7th June people going to Morden Hall Park had been taking a short-cut. They proceeded straight on and crossed the railway track. The fence was in so dilapidated a condition that anybody, adult or child, 'could quite easily get across on to the line'.

h The three boys played in Bunces Meadow but shortly after noon the two elder ones missed their young brother. He had wandered off. They went in search of him. One brother went through what was virtually the gap in the fencing and then found his young brother on the railway track. He was between the conductor rail and the running rail. He was lying unconscious. After help had been secured, a rescue was effected; but that was only after the boy had been most gravely injured. He suffered j very severe burns.

Certain additional facts call for mention. The learned judge was satisfied by the evidence given by two youths who had visited Bunces Meadow a number of times in the six weeks previous to 7th June that the fence had been in its dilapidated condition for at least several weeks before that date. The state of the fence and of the path lead the learned judge to think that the described condition of the fence had probably

existed for months. The appellants, the British Railways Board, made no attempt to contravert any of these conclusions. They thought it prudent not to put any witness in the box. They decided to give no explanations in regard to any of the documents which discovery disclosed. Thus, there was a memorandum dated 17th April 1965 (some seven weeks before the accident) from the stationmaster's office, Mitcham Junction, to the 'line manager' stating that the guard of an afternoon train two days previously had reported to the signaller at Mitcham on arrival at Merton Park that children were on the line between Mitcham and Morden Road Halt; the memorandum stated that the Mitcham police were requested to investigate. There were various memoranda written on the date of the accident; they recorded that at 3.10 pm there was an examination of the fences in the vicinity of Bunces Meadow; three places in the vicinity were discovered where children could get on to the line through the fences. One memorandum was to the 'line manager'; another was to the 'ganger' at Mitcham. 'Control' had ordered the stationmaster (of Mitcham Junction) to examine the fences and to report and also to inform the 'ganger' to get the fences repaired immediately. The 'engineers' department were instructed to make repairs in three places. A letter of 11th June from the 'divisional manager' recorded that he was advised that the fence at the site of the accident was 'in rather a bad state' and that there were three different places where children could get on to the line through the fences; the writer asked that he should be informed when the repair work was completed; the letter went to the 'line manager' with a copy to the stationmaster. A memorandum from the stationmaster to the divisional manager reported that the engineers' department were called out and that the fences were repaired on the day of the accident.

In view of the evidence which was before the learned judge and in the light of the documents referred to, it is a matter of some surprise that when a claim was made it was stated on behalf of the appellants that their engineer had made an inspection of the fence in question on the morning of the accident and found it in order.

'Our evidence quite clearly establishes that the fence was found in good order earlier on the day in question, but was found damaged after the accident.

Temporary repairs were carried out immediately afterwards, followed later by permanent repairs.'

Having regard to the evidence before the learned judge and to the terms of the various internal memoranda it is difficult to understand how the letter came to be written. There was no evidence either to support it or to explain it. If there was a system of inspection there must have been a lamentable failure in its operation. The fact remains that for weeks or months the fencing was so broken down at a point ahead of a public path that a person could easily get across to the line; an adult would doubtless appreciate the risks or perils in so proceeding; a boy aged six would not.

If the facts which I have outlined were put to any well-disposed but fair-minded member of the public, whether a parent or not, I venture to think that the response guided by the promptings of common sense would be that having regard to the dangerous nature of the live rail and its perils for a small child, the appellants were grievously at fault in allowing a fence at the particular place in question to remain for a long time in a broken down condition. It must at any time be a matter of regret and of concern if the answer of the law does not accord with the answer that common sense would suggest. But the appellants assert that the law must refuse the infant's claim. In effect they say that he was a legal outcast. In short he was a trespasser. And they say:

'Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk.'

7 See *R Addie & Sons (Collieries) Ltd v Dumbreck* [1929] AC 358 at 365, [1929] All ER Rep 1 at 4, per Lord Hailsham LC.

a On the authority of the same case⁸ they say that an occupier is only liable to a trespasser where the injury is due to some wilful act involving something more than the absence of reasonable care:

“There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser . . .”⁸

b

So they say that in the present case there was no wilful act done against the infant; the appellants did not know of his presence and did nothing in disregard of his presence.

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There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. The facts in the present case differ from those in *Addie's* case⁸. In the present case a question arises whether some duty may be owed to a person before he becomes a trespasser. In that case a question arose whether a duty was owed to someone who was already a trespasser. In that case both adults and children often went on to the land in question though it was made plain to them that they had no right to do so. There were many gaps in the hedge that surrounded the land. Children did in fact go and play on the land (in spite of their being periodically driven off); they played both near the wheel which was there and elsewhere. The wheel was about 100 yards within the boundary of the land. The wheel was not something as inherently dangerous as a live rail which it is highly perilous to touch. Those who set the wheel in motion did not know that a four year old boy had gone to sit on it. He was a trespasser and he had been warned not to go to the land or to go near to the wheel. But as those operating the wheel must have known that it was at least a possibility if not a likelihood that a child would be on or near to the wheel it might have been held that there was a duty to give some warning or to exercise some measure of care to see that no one was going to be injured before the machine was suddenly set in motion. But it was held that there was no liability for the death of the boy. The law was laid down in the terms that I have quoted. There have been many expressions of lament that the claim should not have succeeded as did the claim in *Excelsior Wire Rope Co Ltd v Callan*⁹.

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In the present case the boy was injured by coming into contact with something on the land—the live rail. The live rail was placed where it was for the legitimate purpose of supplying power for the running of trains. There was no question of intending to do harm to a trespasser. If the question is asked, what did the appellants do wrong? the answer must I think be that they allowed the fence to remain for a long time in such a state that a child who did not sense danger could quite easily get on to the line and the live rail. Anyone who gave any thought to the matter would at once appreciate that the purpose of having a fence bordering on a railway track with a live rail is to warn people that they must proceed no further and to be to some extent an obstacle to prevent them from so doing. Anyone would further appreciate that if the fencing had a gap in it and a gap near to a public path a child might go through the gap and be in a position of great danger. Not only might a child come into contact with the live rail; he might be struck by a passing train. So the question arises whether the appellants had any obligation to take thought and have taken thought to take some action. It is enough for them to say—true we could appreciate that if a child stepped over the broken fence he might get on to the railway track with its live rail and be killed or gravely hurt but the moment

8 *R Addie & Sons (Collieries) Ltd v Dumbreck* [1929] AC 358 at 365, [1929] All ER Rep 1 at 4 per Lord Hailsham LC

9 [1930] AC 404, [1930] All ER Rep 1

he stepped over the broken fence he would be a trespasser and 'Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger'? Although, generally speaking, an occupier is not obliged to fence his land and although, generally speaking, there is no obligation to prevent somebody from becoming a trespasser—are there some circumstances in which a duty arises to take some action to lessen the risk of peril both in the case of a potential or prospective trespasser and in the case of someone who has become a trespasser?

Having posed this question it is to be remembered that in *Addie's case*¹⁰ consideration was given to such cases as *Cooke v Midland Great Western Railway of Ireland*¹¹, *Lowery v Walker*¹² and *Latham v Richard Johnson & Nephew Ltd*¹³ and to many other cases and I think that it must be recognised that it was implicitly laid down in all the speeches that apart from cases where an occupier intends to injure a trespasser (as by laying a spring gun) he owes no duty to a potential or prospective trespasser and that it was expressly and indeed inexorably laid down that towards an actual trespasser he owes no duty apart from the duty not maliciously to cause him injury. The question now arises whether we should depart, as we were invited to do, from what was laid down in *Addie's case*¹⁰ or whether in the light of developments in the law since 1929 there are some modifications which permissibly can be accepted.

In approaching this question regard must be had to the fact of the enactment of and to the provisions of the Occupiers' Liability Act 1957. It seems to me that Parliament must have decided that problems relating to trespassers should be left to be decided according to common law principles. By s 1 (1) of the Act the 'rules' enacted by ss 2 and 3 are to have effect—

'in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them.'

To such 'visitors' (subject to exceptions) there is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there. But a trespasser is not a 'visitor'. The term trespasser is a comprehensive word; it covers the wicked and the innocent; the burglar, the arrogant invader of another's land, the walker blithely unaware that he is stepping where he has no right to walk, or the wandering child—all may be dubbed as trespassers.

When in 1960 the Occupiers' Liability (Scotland) Act was passed it was in terms which created a certain duty of care to trespassers. The English Act was, however, left as it was. It was not amended. It would not, in my view, be fitting for us to make fundamental changes in the law, according to our view as to what its terms and policy should be, when Parliament, apparently deliberately, has refrained from making such changes. We can, however, ensure that the tide of development of the common law is not unwarrantably impeded.

If a child is a visitor an occupier must 'be prepared for children to be less careful than adults' (see s 2 (3) of the English Act). But apart from any statutory provisions it is a matter of ordinary common knowledge that children will roam and will explore. If a fence marks a boundary an adult who climbs over it will appreciate what he is doing. A small boy who finds a part of a fence so dilapidated that there is no real obstacle to his progress will not or may not know that he is at once a 'trespasser' if he goes on. So the problem raised in this case is whether, if an occupier

¹⁰ [1929] AC 358, [1929] All ER Rep 1

¹¹ [1909] AC 229, [1908-10] All ER Rep 16

¹² [1911] AC 10, [1908-10] All ER Rep 12

¹³ [1913] 1 KB 398, [1911-13] All ER Rep 117

a has for legitimate reasons (and with no object of hurting anyone) placed something highly dangerous on his land, he owes any and what duty to take some steps to lessen the risk that a wandering child may run into the danger. Although the present case relates to a young child who obviously may be less perceptive than an adult the kindred question is raised whether there may be circumstances, if a situation of danger has been created on land, in which some measure of duty would be owed to an adult trespasser. Furthermore, although in the present case the place of great danger was quite close to the boundary of the private land, the question of principle might equally arise if the place of great danger was not close to such boundary. If a mine-field had for legitimate reasons been created and if it continued in existence I should be sorry to think that an occupier owed no duty to warn a potential or actual trespasser. In his powerful dissenting judgment in *Adams v Naylor*¹⁴ Scott LJ saw no reason in principle why an occupier should not be called on to take all reasonable precautions to keep trespassing children out of a place where he knows they will be blown up.

b In the early part of the 19th century, occupiers of land sometimes placed spring guns on their land; if a trespasser walked against a wire he would cause a gun to be fired and he might be injured. If an occupier could do as he liked on and within the confines of his own land why should he not place such guns? Yet certain trespassers who suffered injury brought claims. Could such a trespasser recover damages? The courts held that he could. There were two reasons. One was that an occupier could not do indirectly what he could not do directly; if he had been present on his land and had seen a trespasser he would not have been entitled to fire a gun at him. So he ought not to cause a gun to be fired indiscriminately and automatically if and when an intruder walked on the land. The other reason was that it was contrary to principles of humanity to place a spring gun of which a trespasser was unaware.

c Thus, in 1807 (in *Jay v Whitfield*¹⁵) a boy who entered the defendant's premises for the purpose of cutting a stick was shot by a spring gun; he recovered £120 damages (before Richards CB) for his injury. It is recorded in one of the cases that it was formerly the practice to give public notice in market towns if such means of protection as spring guns had been resorted to. It was the 'common understanding of mankind' that such notice ought to be given. That was before there was any statutory provision in regard to them.

d In *Ilott v Wilkes*¹⁶, which was in 1820, a trespasser who knew that there were spring guns in a wood (without knowing the actual particular spots where they were placed) was injured when he trod on a latent wire and caused a gun to be fired. On the principle *volenti non fit injuria* he failed in his claim for damages. But the duty to warn was recognised. Thus Bayley J said¹⁷:

e '... although it may be lawful to put these instruments on a man's own ground, yet as they are calculated to produce great bodily injury to innocent persons (for many trespassers are comparatively innocent) it is necessary to give as much notice to the public as you can, so as to put people on their guard against the danger.'

f Best J spoke with no uncertain voice when he proclaimed¹⁸:

'Humanity requires that the fullest notice possible should be given, and the law of England will not sanction what is inconsistent with humanity.'

g Bayley J recognised that there may be circumstances in which there is a duty to prevent injury to a trespasser. He instanced a situation in which a furious dog

14 [1944] 2 All ER 21, [1944] 1 KB 750, *affd* [1946] 2 All ER 241, [1946] AC 543

15 (1817) 3 B & Ald 308

16 (1820) 3 B & Ald 304, [1814-23] All ER Rep 277

17 (1820) 3 B & Ald at 312, [1814-23] All ER Rep at 279, 280

18 (1820) 3 B & Ald at 319, [1814-23] All ER Rep at 282

was loose in a yard but where there was notice over the entrance of the presence of the dog. He said that if a wrongdoer read the notice but then in the absence of the owner entered the yard he was voluntarily incurring the risk of being injured. But he expressed a further view for he said¹⁹:

'If, indeed, the master had been upon the spot at the time, and had seen the dog running towards the man, it would have been his duty to have done all in his power to prevent the animal from worrying him, and if he had not so done, the party injured might have had a right of action.'

The passage is of interest as showing that the learned judge thought that even inaction, when humanitarian impulses would prompt action, might amount to a breach of a duty owed to a trespasser.

In the later case, in 1828, of *Bird v Holbrook*²⁰, a young man, in order to catch a stray fowl (so as to help the servant of its owner), went over a wall into the defendant's garden where he came into contact with a wire which discharged a gun. He recovered damages in respect of the injury which he sustained. Best CJ stoutly proclaimed¹:

'But we want no authority in a case like the present; we put it on the principle that it is inhuman to catch a man by means which may maim him or endanger his life, and, as far as human means can go, it is the object of English law to uphold humanity, and the sanctions of religion.'

Burrough J said²:

'The Plaintiff was only a trespasser; if the Defendant had been present, he would not have been authorised even in taking him into custody, and no man can do indirectly that which he is forbidden to do directly.'

That approach would I think bring the case within the category of acts done with a 'deliberate intention of doing harm to a trespasser'. The spring gun would be deliberately placed so that it would cause injury to any trespasser who might arrive. As Viscount Dunedin said in *Addie's case*³:

'... he may not set a spring gun, for that is just to arrange to shoot him without personally firing the shot.'

Alternatively the placing of the spring gun might amount to a 'reckless disregard of the presence of the trespasser'. It is to be observed that Dixon CJ said in *Railways Comr (NSW) v Cardy*⁴:

'The fixed rule that a trespasser comes at his own risk and that only a wilful injury to him is actionable is modified by the assimilation of "reckless disregard of the presence of the trespasser" to wilfulness. It needs no argument to show that reckless disregard to the presence of a man must include not only the case of a man who is there but also of one whose coming is expected or foreseen.'

The spring gun would be placed on land because the possible presence of a trespasser would either be expected or foreseen—and there would be the circumstance that injury was intended. Although the conditions of danger on the railway track in the present case were not created with any intention of doing injury to anyone, if it could be expected or foreseen that some trespasser (such as a young child) might

19 (1820) 3 B & Ald at 313, [1814-23] All ER Rep at 280

20 (1828) 4 Bing 628

1 (1828) 4 Bing at 643

2 (1828) 4 Bing at 645

3 [1929] AC at 376, [1929] All ER Rep at 10

4 (1961) 104 CLR 274 at 285

a run into the danger unawares, was there some and, if so, what duty to take some and what steps to seek to avert such an occurrence? If humanity is to be a guide should it not operate to lessen the risk of foreseeable injury from a danger which has been created even though such injury is not intended?

b If the passages to which I have referred show that even in days when property rights were jealously safeguarded it was firmly recognised that the dictates of humanity must guide conduct even towards trespassers such recognition must surely be no less firm today. Indeed, it should be firmer. It is today basic to our legal thinking that every member of a community must have regard to the effect on others of his actions or his inactions. If in all probability the boy in the present case would not have suffered injury had the fence been in ordinary repair instead of being left dilapidated for weeks on end the question might be asked—even so as the boy would be a trespasser the moment he crossed the line of the fence why and for what reason should the appellants owe him any duty at all beyond that of not deliberately harming him thereafter or of acting with reckless disregard of his presence on their land? I would answer for reasons of common sense and common humanity. The nature and extent of any duty owed will call for separate consideration. But there must be some circumstances in which, by reason of them, a duty is owed by an occupier of land to potential trespassers as well as to actual trespassers of whom he is positively aware. As my noble and learned friend Lord Pearson said in *Videan v British Transport Commission*⁵, it is a heresy to suggest that occupation of land is a ground of exemption from liability; on the contrary (he said) occupation of land is a possible ground of liability and if a duty of care is owed then any person to whom it is owed is a neighbour although the content of the duty will vary according to the circumstances.

c If it is asked, why need the appellants give any thought to the question whether a trespasser might come to harm by trespassing on their land? the answer must I think again be that common sense and common intelligence so direct. What has been called ordinary civilised behaviour would so prompt. The words of Lord Macnaghten in *Cooke v Midland Great Western Railway of Ireland*⁶ (while remembering that it was held that the children in that case were licensees) are apposite:

f 'Would not a private individual of common sense and ordinary intelligence, placed in the position in which the company were placed, and possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to children resorting to the place and playing with the turntable, and would he not have thought it his plain duty either to put a stop to the practice altogether, or at least to take ordinary precautions to prevent such an accident as that which occurred?'
g

By taking ordinary thought and exercising 'common sense and ordinary intelligence'—even apart from the guidance of common humanity—I think that the appellants would see that in the circumstances of this case there was a likelihood that some child might pass over the broken down fence and get on to the track with its live rail and be in peril of serious injury. Even though the child would be a trespasser h ought it not to be their 'plain duty' to repair the fence? That would be a relatively simple operation not involving any unreasonable demands of time or labour or expense.

In the classic definition of negligence in 1856 in *Blyth v Birmingham Waterworks Co*⁷ Alderson B said that negligence was—

i 'the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.'

5 [1963] 2 All ER 860 at 873, [1963] 2 QB 650 at 677, 678

6 [1909] AC at 234, 235, [1908-10] All ER Rep at 18, 19

7 (1856) 11 Exch 781 at 784, [1843-60] All ER Rep 478 at 479, 480

Ought not the 'considerations which ordinarily regulate the conduct of human affairs' under some circumstances (and I would include those of the present case) produce the result that some duty is owed by an occupier of land towards those who if they proceed further may suffer injury at a time when they are trespassing?

That in a civilised community there is need to take thought as to the result of acts or omissions has long been recognised. Though in *Heaven v Pender*⁸ the colleagues of Sir Baliol Brett MR were unwilling to concur in 'laying down unnecessarily the larger principle' which he entertained his words may be recalled. He considered⁹ that from decided cases the proposition was to be deduced—

'that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.'

Sir Baliol Brett MR was of course not considering any question in regard to trespassers, but the question now arises whether there are not some trespassers for whom thought must be taken. The stress placed on the taking of thought by persons of 'ordinary sense' is today constantly reflected in decisions in the court. Lord Atkin in *Donoghue v Stevenson*¹⁰ said:

'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.'

The corporation in *Glasgow Corp'n v Taylor*¹¹ ought by taking thought to have realised that the poisonous berries deceptively presented a tempting and harmless appearance to a young boy who was entitled to be where he was; there was a case for trial as to whether the corporation had failed to take certain precautions that they ought to have taken. In *Haley v London Electricity Board*¹² it was held that those engaged in operations on the pavement of a highway ought to have foreseen that blind persons might walk along the pavement. So, by taking thought, should the danger have been appreciated of allowing the small child in *Carmarthenshire County Council v Lewis*¹³ to be out of care. So, by taking thought, should the consequences have been realised of failing to exercise reasonable control in the case *Home Office v Dorset Yacht Co Ltd*¹⁴.

I consider that it is abundantly clear that the appellants, if they had taken thought, must have realised that if they allowed the fence to be broken down at the particular place in question there was a considerable risk that a small child would pass through it and might as a result either be killed or come to serious harm. This was not a case in which a child could be said to have been invited or permitted to proceed with the result that he would as an invitee or licensee be proceeding towards what could be called a trap; nor do I think that any temptation to proceed could be said to have been in response to an allurement.

The present case is to be distinguished on its facts from *Edwards v Railway Executive*¹⁵, where the main issue was whether the boy could be said to have been a licensee. The layout of the land was in that case quite different from that in the present case and

⁸ (1883) 11 QBD 503, [1881-85] All ER Rep 35

⁹ (1883) 11 QBD at 509, [1881-85] All ER Rep at 39

¹⁰ [1932] AC 562 at 580, [1932] All ER Rep 1 at 11

¹¹ [1922] 1 AC 44, [1921] All ER Rep 1

¹² [1964] 3 All ER 185, [1965] AC 778

¹³ [1955] 1 All ER 565, [1955] AC 549

¹⁴ [1970] 2 All ER 294, [1970] AC 1004

¹⁵ [1952] 2 All ER 430, [1952] AC 737

a the fence in that case was repaired whenever it was observed to have suffered interference. There was evidence in that case that on the morning of the accident the fence was in proper repair.

Could a child such as the boy in the present case be regarded as a 'neighbour'? When Lord Atkin posed the question, who then in law is my neighbour? he said¹⁶ that the answer seemed to be—

b 'persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'

No one would suggest that every trespasser is a 'neighbour' but within these words was not the small boy in the present case a neighbour? When the railway track and its electrified rail were laid and at all times when they were maintained the risks of injury resulting if there was neither warning nor impediment such as a fence would provide would be clear to anyone who gave the matter a moment's thought. Yet when the boy went on to the track he undoubtedly became a trespasser. Does this mean that the strict edict of *Addie's* case¹⁷ prevents any kind of duty from arising towards such a neighbour, especially as Parliament has not legislated in terms which cover trespassers? In my view, while it cannot be said that the appellants owed a common duty of care to the young boy in the present case they did owe to him at least the duty of acting with common humanity towards him. In regard to the words that I have quoted from *Addie's* case¹⁸, I do not think that the appellants (through their servants) did any act with the deliberate intention of doing harm to the boy; their omission for a long time to repair the fence and their continuing distribution of electric power along their live rail did not, in my view, amount to a 'reckless disregard of the presence of a trespasser'. If those last quoted words can be said to cover the likely or expected or anticipated presence of a trespasser then the question arises whether the lamentable inaction of the appellants is to be characterised as 'reckless'. As to this I have doubt. The word 'reckless' seems more apposite in reference to positive conduct than to inaction.

f The duty that lay on the appellants was a limited one. There was no duty to ensure that no trespasser could enter on the land. And certainly an occupier owes no duty to make his land fit for trespassers to trespass in. Nor need he make surveys of his land in order to decide whether dangers exist of which he is unaware. The general law remains that one who trespasses does so at his peril. But in the present case there were a number of special circumstances: (a) the place where the fence was faulty was near to a public path and public ground; (b) a child might easily pass through the fence; (c) if a child did pass through and go on to the track he would be in grave danger of death or serious bodily harm; (d) a child might not realise the risk involved in touching the live rail or being in a place where a train might pass at speed. Because of these circumstances (all of them well known and obvious) there was, in my view, a duty which, while not amounting to the duty of care which an occupier owes to a visitor, would be a duty to take such steps as common sense or common humanity would dictate; they would be steps calculated to exclude or to warn or otherwise within reasonable and practicable limits to reduce or avert danger.

I would adopt the approach of my noble and learned friend Lord Pearson, in his judgment in the Court of Appeal in *Videan's* case¹⁹. In agreement with him, I do not think that there is any sound basis of principle for differentiating sharply between liability for the static condition of land and liability for current operations on land. In general, therefore, a trespasser has not only to take the land as he finds it but the

16 See *Donoghue v Stevenson* [1932] AC at 580, [1932] All ER Rep at 11

17 [1929] AC 358, [1929] All ER Rep 1

18 [1929] AC at 365, [1929] All ER Rep at 4

19 [1963] 2 All ER 860, [1963] 2 QB 650

current operations on land as he finds them. Yet a potential or actual trespasser may on occasion be a neighbour and, as my noble and learned friend said²⁰, the expression 'duty to a neighbour' is more appropriately used as an aid to ascertaining whether or not there is a duty of care owing by one person to another rather than as a definition of the content of such a duty. So¹:

'If the person concerned does not know of, or have good reason to anticipate, the presence of the trespasser, that person owes to him no duty of care because he is not within the "zone of reasonable contemplation" and is not a "neighbour". If the person concerned knows of, or has good reason to anticipate, the presence of the trespasser, that person owes to the trespasser a duty of care which is substantially less than the duty of care which is owing to a lawful visitor, because the duty to a trespasser is only a duty to treat him with common humanity and not a duty to make the land and operations thereon safe for the trespasser in his trespassing.'

The case of *Railways Comr (NSW) v Cardy*² amply repays study. Although the boy who was injured was a trespasser he recovered damages. In the course of his judgment Dixon CJ said³:

'In principle a duty of care should rest on a man to safeguard others from a grave danger of serious harm if knowingly he has created the danger or is responsible for its continued existence and is aware of the likelihood of others coming into proximity of the danger and has the means of preventing it or of averting the danger or of bringing it to their knowledge.'

Windeyer J expressed the view that the duty of an occupier is rooted at bottom in his duty to his neighbour in Lord Atkin's sense and he said⁴:

'No man has a duty to make his land safe for trespassers. But, if he has made it dangerous and the danger he has created is not apparent, he may have a duty to warn people who might come there of the danger of doing so. Whether there be such a duty in a particular case must depend upon the circumstances, including the likelihood of people coming there. But if they would be likely to come, the duty does not, in my view, disappear because in coming they would be trespassing. It is a duty owed to likely comers, to those who would be intruders as to those who would be welcome.'

He further said⁵:

'I do not see how, speaking generally, there can be a duty either to prevent people trespassing or to make the premises safe for those who do. But the duty that I think can, in appropriate circumstances, exist is a duty to warn persons coming upon premises of hidden dangers they may encounter there, when those dangers are not natural features of the land but arise from conditions created by the occupier. Such a duty is not necessarily discharged by posting notices such as "trespassers will be prosecuted"; for the warning required is not that trespassing is not tolerated but that entry may be dangerous.'

For the reasons which I have given I consider that the learned judge was warranted in deciding that the respondent was entitled to recover. My approach involves some departure from some of what was said in *Railways Comr v Quinlan*⁶. It involves also

²⁰ [1963] 2 All ER at 874, [1963] 2 QB at 678

¹ [1963] 2 All ER at 875, [1963] 2 QB at 680

² (1961) 104 CLR 274

³ (1961) 104 CLR at 286

⁴ (1961) 104 CLR at 321

⁵ (1961) 104 CLR at 322

⁶ [1964] 1 All ER 897, [1964] AC 1054

a that, on its facts, the decision in *Addie's case*⁷ should in my view have been the other way. The colliery company knew that young children were in the habit of playing on the ground near to the wheel in question and knew that although at times there were warnings, children continued to frequent the place. They knew that children might be or were likely to be there. I consider that with such knowledge they should have taken reasonable care to avoid the risk of a child trespasser being killed or injured by reason of the wheel being suddenly and blindly put to work. It follows that I consider that the case was wrongly decided.

b I would dismiss the appeal.

LORD WILBERFORCE. My Lords, this is, unusually, a straight case of an infant trespasser. The six year old boy was trespassing on the railway when he came into contact with a live electric rail, was fortunately not killed, but was severely injured. There was no allurement on to the appellants' land; there is no basis, in reality or fiction, by which the child can be treated as a licensee. There was no wilful intention to injure him; nor (I shall return to this) reckless disregard of his presence. At most (and this has been found) there was a lack of care by the appellants as regards the maintenance of its fences.

c We have not, in England, any general law as to public enterprise liability. As regards fencing, such duty as the appellants have (Railway Clauses (Consolidation) Act 1845, s 68, which, it seems protects cattle but not children) dates from 1845 since when, even after electrification, Parliament has not thought it necessary to impose new obligations on railway companies. So if the respondent is to recover, he must rely on our outdated law of fault liability which involves the need to establish a duty of care towards him and a breach of it. At once he is faced by the formidable authority of *R Addie & Sons (Collieries) Ltd v Dumbreck*⁷.

e There are perhaps two things about *Addie's case*⁷ which, out of many comments that have been made over the years are relevant here. First, the bulk of the criticism has been of it as a decision on its facts. It is claimed that it should have been decided the other way, in favour of the child, as it was decided in the Court of Session⁸, as, on very similar facts, *Excelsior Wire Rope Co Ltd v Callan*⁹ three years later was decided in the plaintiff's favour. The difference of opinion between the Inner House⁸ and this House⁷ was essentially as to whether the child should have been regarded as a licensee. The Lord President (Lord Clyde) said he should¹⁰—he compared him with the plaintiff in *Lowery v Walker*¹¹ and said, as to the user of the company's premises, that it was substantially acquiesced in and acquiescence is often a form of what may be called an unwilling consent. This House⁷ took a different view; he was, on the sheriff substitute's finding, a trespasser and nothing else. The wheel had been there long before the house in which he lived was built, so that there was no question of a dangerous thing having been placed in his proximity; the only relevant relationship was the occupier/trespasser relationship. I have referred to these factual points because I do not think that we should decide this case by meticulously comparing the facts here with the facts there. What we are concerned with is the principle of law which *Addie*⁷ established—to see what it is and what cases it governs.

g The second thing to be said about *Addie*⁷ is that it is a case to be considered in a context, the context of previous and subsequent cases of common law, and the context of bordering but not identical typical situations. This has often been forgotten. The prestige of the learned law Lords who gave the opinions in that case, and the clarity and emphasis of those opinions has led to its rules being treated as a code of

7 [1929] AC 358, [1929] All ER Rep 1

8 1928 SC 547

9 [1930] AC 404, [1930] All ER Rep 1

10 1928 SC at 555

11 [1911] AC 10, [1908-10] All ER Rep 12

law to be scrupulously applied to every situation where the defendant is an occupier of land whatever may be the set of facts out of which the injury, and the claim for damages, may have arisen. It is often the fate of clear pronouncements—in law as in science—to be treated in this way, with consequences more and more strained as different cases are forced within them by the use of fictions and other devices until there is a bursting of the seams and a cry that this case as a statement of the law must be overruled. That is what we are asked to do here.

I should say at once that, even apart from the argument against this which the Occupiers' Liability Act 1957 provides, I should hesitate to support this course. We should first see whether we can move on from the position taken in 1929 by classical methods of experience, analogy and logic. We should approach this without the too complacent assumption that our present age is humaner than was that of 40 years ago; but we may take the benefit of experience and recognise fresh situations—especially those of extreme danger, which have become typical.

There can be no doubt that the law regarding occupiers' liability forms part of the general law of negligence. The earlier 19th century cases were actions on the case (*Deane v Clayton*¹² and *Lynch v Nurdin*¹³) and although attempts were made to treat some of them as based on nuisance this was not a tendency which prevailed.

Since these were what we now call actions in negligence, it was necessary to define the degree of care owed to persons coming on land in particular circumstances, and this led to the emergence, in progressively segregated divisions of the familiar tripartite classification—which in *Addie*¹⁴ was stated to be exhaustive, and the line separating them an absolutely rigid line (per Viscount Dunedin). The first duty of the court, it was said, was to fix once and for all into which class the plaintiff falls. The Scottish courts avoided this rigidity and proceeded upon the general principles governing the law of negligence (*Addie's case*¹⁵ per the Lord President (Lord Clyde)). The formulation by this House in *Addie*¹⁶ gave rise not only to dissatisfaction in Scotland but to difficulty since human conduct can rarely be squeezed into a predetermined slot; and if this is what courts are told to do, they will find ways, according to their views of the merits, of crossing the lines. So they have found means of converting trespassers into licensees by imputing licences, and in the case of children they have improved their status by a finding of allurement or by straining the facts.

We ought now to ask the question directly, what, in relation particularly to infant trespassers, is the duty of care? (see *Railways Comr (NSW) v Cardy*¹⁷) for the recognition of some duty of care, even towards trespassers, in certain limited cases, is what the imputation of a licence really means. We may, although here we are getting near the dangerous ground of legislation, be readier than our predecessors to see liability for injuries to individuals placed on society generally, of which the appellants effectively form part. And if we do not go so far as to recognise that special rules ought to be devised for child trespassers (cf *American Restatement*¹⁸), we can at least accept that fresh and more lethal dangers to their safety have appeared, and come nearer to them, and that somewhere more care has to be used to prevent them being hurt. I say 'somewhere' because the occupier of adjoining land is not the only, or indeed the first, person in the line of responsibility. Even today parents have some control and responsibility, and if children are on a playground which someone has provided for the purpose, that person has a responsibility to see that it is safe.

Does, then, *Addie*¹⁶ contain an exhaustive definition of an occupier's duties to persons on his land? One does not see why, in principle, this should be so. It could be so

¹² (1817) 7 Taunt 489

¹³ (1841) 1 QB 29, [1835-42] All ER Rep 167

¹⁴ [1929] AC at 371, [1929] All ER Rep at 8

¹⁵ 1928 SC at 551

¹⁶ [1929] AC 358, [1929] All ER Rep 1

¹⁷ (1961) 104 CLR 274

¹⁸ Torts (2nd) s 339

a if the fact of occupation of land were to be the basis of exemption from any greater liability than the relevant rule prescribes. But this idea has been refuted more than once (see *Railways Comr v McDermott*¹⁹). The correct conception is that stated by the Privy Council²⁰ when through Viscount Radcliffe the Board said that the *Addie*¹ rules were expressive of certain consequences as regards proximity and foreseeability which flow from the given relationship (occupier and invitee—licensee—trespasser). Or, as was put by Barwick CJ², there is—

b ‘a quantitative element both in the extent of the foreseeability and of the reasonable steps required to fulfil any resultant duty arising from the circumstances in which the injured persons came on the scene.’

c If this is generally so, it must follow that the law can, particularly, take into account other relevant factors, if they exist, which bear on these matters of foresight and prudence. It does so when in the general case it considers it relevant to know whether the presence of the relevant person was known, ‘as good as known’ (*Railways Comr v Quinlan*³), or ‘extremely likely’ (*Excelsior Wire Rope Co Ltd v Callan*⁴), and it seems a necessary step from this to say that particular circumstances may exist in which an increased duty of ‘foreseeability’ may arise.

d There are other indications, in the law as it stands, of the relevance of particular factors as modifying the general rules. First there is the doctrine of allurements. It has been criticised, as a device, like imputed licences, for escaping from the *Addie*¹ rules. But it is older than *Addie*¹ and reflects the perfectly sound conception that as particular things are (‘foreseeably’) likely to be attractive to children, the occupier owes a duty, if they are dangerous, not to put them in the children’s way. The classic case is that of the berries in the park (*Glasgow Corp v Taylor*⁵). Secondly, there is the law as to fencing. In general an occupier is under no duty to fence his land so as to exclude trespassers, a rule of importance to railway companies and of validity as this House has decided (*Edwards v Railway Executive*⁶). The fact that Parliament has not imposed a duty securely to fence children or others out is a recognition that a compromise must be struck between the desire to save everyone from every danger and the cost to the community of doing so. It means that there are situations where even children will not recover. But the courts have qualified this exemption by reference to particular circumstances as, for example, that persons are known frequently to have access along a track, *Cooke v Midland Great Western Railway of Ireland*⁷ and *Lowery v Walker*⁸ which, although put on the imputation of a licence, really reflect the fact that some elementary duty is owed. Similarly, there are the cases of pitfalls—where an occupier makes an excavation near a highway (cf *Prentice v Assets Co Ltd*⁹) (the same would surely be true of other hazards, e.g. an electric wire); he is under a duty, even to trespassers, to take some steps to keep them off.

g Thirdly, there is the position of contractors carrying out work on land. A number of cases, *Davis v St Mary’s Demolition & Excavation Co Ltd*¹⁰, *Mooney v Lanarkshire County Council*¹¹, *A C Billings & Sons Ltd v Riden*¹², which I need not examine in detail

h 19 [1966] 2 All ER 162 at 167, [1967] 1 AC 169 at 186

20 In *Railways Comr v Quinlan* [1964] 1 All ER 897 at 904, [1964] AC 1054 at 1072

1 [1929] AC 358, [1929] All ER Rep 1

2 In *Munnings v Hydro-Electric Commission of Tasmania* (1971) 45 ALJR 378 at 382

3 [1964] 1 All ER at 906, [1964] AC at 1076

4 [1930] AC at 410, [1930] All ER Rep at 4

5 [1922] 1 AC 44, [1921] All ER Rep 1

j 6 [1952] 2 All ER 430, [1952] AC 737

7 [1909] AC 229, [1908-10] All ER Rep 16

8 [1911] AC 10, [1908-10] All ER Rep 12

9 (1890) 17 R 484

10 [1954] 1 All ER 578, [1954] 1 WLR 592

11 1954 SC 245

12 [1957] 3 All ER 1, [1958] AC 240

(some of them I think put the duty too high), have established their responsibility in principle, through a duty of care, toward trespassers, including infant trespassers. Their liability should not depend solely on whether they were, or were not, themselves occupiers of the land, and it would be absurd if there were one law for contractors doing work and another law if the occupier did the same work himself (cf *Buckland v Guildford Gas Light and Coke Co*¹³ and *Creed v John McGeoch & Sons Ltd*¹⁴) both perfectly sound decisions in themselves. This is not to say that the contractor's duty is to be imposed or measured regardless of the fact that the victim may have been a trespasser, but it is to say that there may be circumstances in which contractors and occupiers alike may have some (I am not saying the same) responsibility for trespassers' safety, outside the bare *Addie*¹⁵ principle. It is curious, in fact, that this point escaped attention so long after *Callan's case*¹⁶ had shown how easy it is to reach a just and sensible conclusion once one escapes from a narcotic preoccupation with the occupier/trespasser relationship.

These are merely examples to illustrate the proposition that *Addie*¹⁵ is not an all embracing code, but a piece in the larger whole of a man's duty of care to those who may come into his proximity, and may be injured by actions or events occurring on his land.

I have already referred briefly to the historical antecedents of the law of occupiers' liability. It would be possible to show, in my belief, that *Addie*¹⁵ to some extent represented a step back in the direction of categorisation from an earlier more general attitude to the duty of care. It is more significant for the present case to recall that it occurred precisely at a time when the law of negligence was being put on a generalised basis and that many of the eminent legal authorities of this time were parties, in differing combinations, to *Addie*¹⁵, *Callan's case*¹⁶ and *Donoghue v Stevenson*¹⁷. It is hard to believe that they regarded these cases as inconsistent, or as separating occupiers' cases, as such, from all other situations where care might be needed.

I pass over for the moment the Occupiers' Liability Act 1957 in order to refer to four Australian cases, decided in the High Court, which give us valuable guidance in the search for a modern definition, or at least outline of the duty of care which may be owed to trespassers in cases such as the present. It will be necessary to supplement this by consideration of *Quinlan's case*¹⁸ in which the Privy Council, on a New South Wales appeal, may appear to have taken a step back. The High Court cases are *Thompson v Bankstown Municipal Council*¹⁹, *Rich v Railways Comr (NSW)*²⁰, *Railways Comr (NSW) v Cardy*¹ and *Munnings v Hydro-Electric Commission of Tasmania*².

*Rich*²⁰ was a level crossing case, *Cardy*¹ one of a child straying on to an attractive rubbish dump with hot ashes under the surface; *Thompson*¹⁹ and *Munnings*² are nearer the subject-matter of this case, being concerned with high tension electric wires placed in proximity to places where children might be. Although each case is difficult in its facts and required extensive legal argument, they can fairly be summarised into the generalisation that they reflect a tendency towards the recognition of a duty of care, appropriate to the circumstances, extracted from the situation and shaped by it, independent of such liability as might arise from the relation of occupier and licensee or trespasser. I cite some passages which clearly reflect this. In *Thompson*³ the judgments of Dixon CJ and Williams J contained this:

13 [1948] 2 All ER 1086, [1949] 1 KB 410

14 [1955] 3 All ER 123, [1955] 1 WLR 1005

15 [1929] 1C 358, [1929] All ER Rep 1

16 [1930] AC 404, [1930] All ER Rep 1

17 [1932] AC 562, [1932] All ER Rep 1

18 [1964] 1 All ER 897, [1964] AC 1054

19 (1952) 87 CLR 619

20 (1959) 101 CLR 135

1 (1961) 104 CLR 274

2 (1971) 45 ALJR 378

3 (1952) 87 CLR at 628

a 'A man or child may be infringing upon another's possession of land or goods at the time he is injured and it will be no bar to his recovery, if otherwise he can make out the constituent elements of a cause of action.'

They cited in support of this *Callan's case*⁴, *Mourton v Poulter*⁵, *Buckland v Guildford Gas Light and Coke Co*⁶ and *Glasgow Corp'n v Taylor*⁷. In the same case the judgment of Kitto J contained an even more explicit passage. After mentioning, in terms of acceptance, the case of *Addie*⁸ and *Edwards*⁹, he said¹⁰:

b 'The respondent's contention appears to assume that the rule of law which defines the limits of the duty owed by an occupier to a trespasser goes so far as to provide the occupier with an effective answer to any assertion by the trespasser that during the period of the trespass the occupier owed him a duty of care. The assumption is unwarranted, for the rule is concerned only with the incidents which the law attaches to the specific relation of occupier and trespasser. It demands, as Lord Uthwatt said in *Read v. J. Lyons & Co. Ltd.*,¹¹ a standard of conduct which a reasonably-minded occupier with due regard to his own interests might well agree to be fair and a trespasser might in a civilized community reasonably expect. It would be a misconception of the rule to regard it as precluding the application of the general principle of *M'Alister (or Donoghue) v. Stevenson*¹², to a case where an occupier, in addition to being an occupier, stands in some other relation to trespasser so that the latter is not only a trespasser but is also the occupier's neighbour, in Lord Atkin's sense of the word: see *New South Wales Transport Comrs v. Barton*¹³.'

c The clarity of this passage has caused it to be followed, in analogous situations, in Australia, but it received some criticism based I think on some misunderstanding in *Quinlan's case*¹⁴.

d The same conception of a duty of care, co-existing with the special duties arising from occupation, is developed in the judgment of Fullagar J in *Rich*¹⁵, and again by Dixon CJ in *Cardy*¹⁶. I quote two passages¹⁷:

e 'The rule remains that a man trespasses at his own risk and the occupier is under no duty to him except to refrain from intentional or wanton harm to him. But it recognizes that nevertheless a duty exists where to the knowledge of the occupier premises are frequented by strangers or are openly used by other people and the occupier actively creates a specific peril seriously menacing their safety or continues it in existence. The duty may be limited to perils of which the person so using the premises are unaware and which they are unlikely to expect and guard against. The duty is measured by the nature of the danger or peril but it may, according to circumstances, be sufficiently discharged by warning of the danger, by taking steps to exclude the intruder or by removal or reduction of the danger.'

f 4 [1930] AC 404, [1930] All ER Rep 1
5 [1930] 2 KB 183, [1930] All ER Rep 6
6 [1948] 2 All ER 1086, [1949] 1 KB 410
7 [1922] 1 AC 44, [1921] All ER Rep 1
8 [1929] AC 358, [1929] All ER Rep 1
9 [1952] 2 All ER 430, [1952] AC 737
10 (1952) 87 CLR at 642, 643

g 11 [1946] 2 All ER 471, [1942] AC 156
12 [1932] AC 562, [1932] All ER Rep 1
13 (1933) 49 CLR 114
14 [1964] 1 All ER 897, [1964] AC 1054
15 (1959) 101 CLR 135
16 (1961) 104 CLR 274
17 (1961) 104 CLR at 286

And later¹⁸:

'In principle a duty of care should rest on a man to safeguard others from a grave danger of serious harm if knowingly he has created the danger or is responsible for its continued existence and is aware of the likelihood of others coming into proximity of the danger and has the means of preventing it or of averting the danger or of bringing it to their knowledge.'

There are no doubt words and expressions here which can be discussed, I do not say improved on, for Dixon CJ is a master of language; but he would himself never claim that every possible case can be included in a formula. The principle is one which I am happy to adopt; *Addie's case*¹⁹ as the plain general rule; room, in circumstances to be carefully defined, for a special duty of care. The other judgments, particularly that of Fullagar J repay study: I take my two short excerpts from that of Windeyer J. Of a trespasser he says¹:

'The trespasser in his relation to the occupier thus really stands outside the law of negligence, for to him, considered simply as an entrant upon the land, the occupier has no duty of care. Such a duty may, however, arise from some circumstances beyond the mere fact of entry, as for example from the occupier's knowledge of the trespasser's presence and of his proximity to dangerous operations. It arises then not as a duty to him as a trespasser, but to him as an individual whose relation to the occupier has become that of a "neighbour".'

And later²:

'No man has a duty to make his land safe for trespassers. But, if he has made it dangerous and the danger he has created is not apparent, he may have a duty to warn people who might come there of the danger of doing so. Whether there be such a duty in a particular case must depend upon the circumstances, including the likelihood of people coming there. But if they would be likely to come, the duty does not, in my view, disappear because in coming they would be trespassing. It is a duty owed to likely comers, to those who would be intruders as well as to those who would be welcome.'

The recognition of a larger area surrounding *Addie's case*¹⁹, which I favour, is well summed up in the first two sentences of the latter citation.

*Quinlan's case*³ has been thought by later Australian cases, and some English authorities, to constitute an obstacle to a wider view of the law as regards trespassers. It was difficult and unusual in its facts, being concerned with a private railway crossing used by the respondent in conditions hard to define. No discussion of it would be fair unless it were squarely recognised that it came down firmly against the view that a duty of care (called in the judgment a 'general duty of care') can co-exist with the very limited duty to a trespasser stated in *Addie's case*¹⁹. But it is important to see what was meant by this disclaimer.

The previous history of the case and the form of the direction to the jury show very clearly, and importantly, that what the courts had to consider was whether Mr Quinlan, although a trespasser, might succeed in negligence under 'the duty of general care'. This the appellants rejected on a basis appearing early in the judgment. There is no principle, it is said, to be deduced from *Donoghue v Stevenson*⁴ which

¹⁸ (1961) 104 CLR at 286

¹⁹ [1929] AC 358, [1929] All ER Rep 1

¹ (1961) 104 CLR at 318

² (1961) 104 CLR at 321

³ [1964] 1 All ER 897, [1964] AC 1054

⁴ [1932] AC 562, [1932] All ER Rep 1

a throws any particular light on the legal rights and duties that arise when a trespasser is injured on a railway level crossing where he has no right to be. More particularly the likelihood of a trespasser being present at some time or another is not sufficient to impose on the occupier any general duty of care towards such a trespasser. It is this proposition which the appellants are concerned to justify from the authorities. With this proposition I have no desire to disagree. I would accept that in such a case the

b rules of *Addie's* case⁵ may adequately govern the situation. The trespasser is just a trespasser and there is no relevant set of circumstances—involving serious risk and proximity—sufficient to call in play a duty of care independent of the occupier-trespasser relationship. Indeed the proposition itself, by referring to 'the general duty of care' carries its own affirmation. A general duty, without supporting circumstances giving rise to this duty and measuring its extent, is a meaningless idea.

c *Donoghue v Stevenson*⁶ does not evoke it, *Addie's* case⁵ denies it. But it is a very different matter when proved circumstances exist sufficient to place a definable duty (however slight—for example to warn) on the person who is responsible for the existence of those circumstances, occupier or not, and I think that the judgment in *Quinlan*⁷ recognised this when it was, perhaps rather cryptically, said:

d ' . . . that, so long as the relationship of occupier and trespasser is or continues to be a relevant description of the relationship between the person who injures . . . and the person who is injured—an important qualification—the occupier's duty is limited in the accepted terms.'

(Can 'a relevant' here be read as 'the relevant'?) Whether sufficient circumstances of this kind were to be found in *Quinlan's* case⁸ is not a matter which need concern us. It is only when the judgment is invoked as a denial of the possibility of such circumstances and the correlative duty that I must part company with its interpreters.

e Further extensive citation is undesirable, but I must mention one passage where reference is made to the extract from the judgment of Kitto J in *Thompson's* case⁹. The criticism made¹⁰ is again that the limited duty of an occupier to a trespasser cannot

f co-exist with 'the wider general duty of care appropriate to the *Donoghue v. Stevenson*⁶ formula': if there is to be another relation the grounds of it must admit of reasonably precise definition otherwise it will be impossible to direct juries in an adequate manner.

I think that Kitto J has here been misunderstood. I do not understand him (or those who have followed him) to be arguing for a general duty of care; nor do I think

g that he would disagree with the necessity for reasonably precise definition; certainly I would not, and I fully recognise that, unless that is possible, plaintiffs such as the present plaintiff cannot, if they are outside the *Addie's* rules, succeed. As was well said in the High Court, we should not be too ready to erode the general rule of *Addie's* case⁵ by discovering too easily special duties of care (*Munnings's* case¹¹ per Walsh J).

h There is one other point discussed in the judgment, on which I find myself in agreement with the appellants—that is the discussion of the (then) recent Court of Appeal case of *Videan v British Transport Commission*¹². This, too, was a case of an infant trespassing on a railway and of a rescuer. The infant's claim failed but the majority in the Court of Appeal made (obiter) a distinction between simple occupation

j 5 [1929] AC 358, [1929] All ER Rep 1
6 [1932] AC 562, [1932] All ER Rep 1
7 [1964] 1 All ER at 905, [1964] AC at 1074
8 [1964] 1 All ER 897, [1964] AC 1054
9 (1952) 87 CLR 619 at 642, 643
10 [1964] 1 All ER at 910, [1964] AC at 1081
11 (1971) 45 ALJR at 394
12 [1963] 2 All ER 860, [1963] 2 QB 650

of land and the carrying on of operations on land, and held that as regards the latter the occupier's duty as regards a trespasser was 'the common duty of care' or a duty to take 'reasonable care'. This duty arose whenever he 'ought to foresee' their presence. The appellants criticised this in two respects: first, as regards the words 'ought to foresee' which it pointed out begs the whole question at issue—namely, whether there is a duty towards trespassers at all, and imposes far too wide a duty on occupiers. Secondly, and this is consistent with the appellants' general approach, it rejected the imposition of a general or common duty of care; in this I would agree with it but in a full statement of the law it would, in my opinion, be necessary to recognise the possibility both of a duty to foresee and of a special and limited duty of care arising out of and quantitatively measured by particular circumstances (see citations above from *Quinlan's case*¹³ and *Munnings's case*¹⁴). I think that the judgment of Pearson LJ in *Videan*¹⁵ endorses this approach.

How does the matter rest? It is often said that the law on this topic is in confusion, but this is to do it less than justice. When one has eliminated from it complexities of fact situation (were the pedestrians in *Lowery v Walker*¹⁶ trespassers or licensees according to the judge's notes? how did the wheel in *Addie*¹⁷ differ from that in *Callan*¹⁸? were the children in *Cooke*¹⁹ licensees or trespassers?) and when once one has discarded fictions, rules can be seen to emerge from the mists with reasonable clarity, but I emphasise no greater clarity than we ought to expect from the common law, which always leaves a residue to be completed by common sense.

In general, an occupier of land owes no duty to trespassers, or intending trespassers; he is not obliged to make his land safe for their trespassing. If he knows, or 'as good as knows' (*Quinlan*²⁰) of the actual presence of a trespasser, he is under a duty—as defined in *Addie's case*¹⁷—not to act with the deliberate intention of doing harm to him or to act with reckless disregard of his presence. I must return to this matter of recklessness, but at present it is enough to say that reckless disregard as used by Lord Hailsham LC surely bears its normal meaning in the law—as akin to intentional injury, but instead of intention, not caring whether he does so or not. And this involves knowledge of the trespasser's presence.

I see no reason to discard the alternative test of 'extremely likely' (Lord Buckmaster in *Callan*²¹), in relation to the trespasser's presence. Apart from its origin it has received support from Dixon CJ¹ and Windeyer J² and other judges as well as the Privy Council in *Quinlan*¹³. It excludes necessarily any lower duty of foreseeability in the general case by an occupier of trespassers' presence (see *Quinlan*³).

This is the general rule as stated by Lord Hailsham LC. I think it is still a sound rule and I think that we must support it. The question remains whether, in particular circumstances, a man may be under some duty of a particular kind, other than to abstain from wilful injury, or reckless disregard. A test more specific than that of 'foresight of likelihood of trespass' and a definition of duty more limited than that of 'the common duty of care' is required.

The dangers of too precise, or exhaustive or codified, a definition are exemplified by *Addie's case*¹⁷ itself. On the other hand, to adopt the expedient of recoiling on the

13 [1964] 1 All ER 897 at 905, [1964] AC 1054 at 1074.

14 (1971) 45 ALJR 378 at 382.

15 [1963] 2 All ER 860, [1963] 2 QB 650.

16 [1911] AC 10, [1908-10] All ER Rep 12.

17 [1929] AC 358 at 364, [1929] All ER Rep 1 at 4.

18 [1930] AC 404, [1930] All ER Rep 1.

19 [1909] AC 229, [1908-10] All ER Rep 16.

20 [1964] 1 All ER at 903, [1964] AC at 1070.

21 [1930] AC at 410, [1930] All ER Rep at 4.

1 (1961) 104 CLR at 286.

2 (1961) 104 CLR at 320.

3 [1964] 1 All ER at 904, 905, [1964] AC at 1072, 1074.

- a comfortable concept of the reasonable man is hardly good enough. It evades the problem by throwing it into the lap of the judge. We must try at least to set up some boundary marks. I think it is safer to proceed by exclusion, and then to the facts of this case. An occupier is not under any general duty to foresee the possibility or likelihood of trespass on his land, or to carry out an inspection to see whether trespass is occurring or likely. To suppose otherwise would impose impossible burdens.
- b Nor can a trespasser by giving notice to the occupier that he may trespass at a particular place or time, by that fact create a duty towards him.

An occupier is under no general duty to fence his land against trespassers, or even against child trespassers; and in my opinion, in principle, this exclusion is valid whether or not the occupier is carrying on operations on the land or whether some danger exists through a static condition (eg a quarry, *Holland v District Committee of Middle Ward of Lanarkshire*⁴). A poisoned pool⁵ may give rise to a special duty.

- c Exceptions may be found (these are only examples) (a) in the case of pitfalls and analogous situations of dangers created near a place where the victim had a right to go, (b) in the case of allurements to children. The principle behind the latter is, in my opinion, not one of imputing a licence, but that of a duty to take reasonable steps not to place in the way of small children potentially hurtful and attractive objects.

- d In the particular case of railway companies, there is no general duty to erect or maintain fences sufficient to exclude adults or children—the case of *Edwards*⁶ is clear on this point and I respectfully think right; the only duty is to mark off the railway property. If more precautions are needed because of the proximity of a playground they may have to be taken by those in control of the playground fencing in, rather than fencing out.

- e Then on the positive side I think that we can best serve the development of the law by concentrating on the particular type of case which has engaged the courts, and on which the law has been tested by experience. Just as in the 19th century the introduction of turntables, attractive to children, accessible and dangerous, gave rise to a jurisprudence known by their name, so we must take account of the placing of electrical conductors above or on the ground all over our overcrowded island and

- f see where this leads as regards foresight and care. The ingredients of such duty as may arise must stem from the inevitable proximity to places of access, including highways, from the continuous nature of the danger, from the lethal danger of contact and from the fact that to children the danger may not be apparent. There is no duty to make the place safe, but a duty does arise because of the existence, near to the public, of a dangerous situation. The greater the proximity, the greater the risk, and correspondingly the need of foresight and a duty of care.

- g What is the nature of this duty of care? Again, it must be remembered that we are concerned with trespassers, and a compromise must be reached between the demands of humanity and the necessity to avoid placing undue burdens on occupiers. What is reasonable depends on the nature and degree of the danger. It also depends on the difficulty and expense of guarding against it. The law, in this context, takes account of the means and resources of the occupier or other person in control—
- h what is reasonable for a railway company may be very unreasonable for a farmer, or (if this is relevant) a small contractor. If a precedent is needed for this concept of relative responsibility I may venture to refer to the Privy Council judgment in *Goldman v Hargrave*⁷, where, in relation to another common law duty, it was said, *inter alia*:

- j ‘ . . . the standard ought to be to require of the occupier what it is reasonable to expect of him in his individual circumstances.’

4 1909 2 SLT 7

5 *United Zinc & Chemical Co v Britt* (1922) 258 US 268, 42 Sup Ct 299

6 [1952] 2 All ER 430, [1952] AC 737

7 [1966] 2 All ER 989 at 996, [1967] AC 645 at 663

My Lords, in my opinion, if the law is such as I have suggested, the law as stated in *Addie's case*⁸ is developed but not denied; not, I venture to think, developed beyond what is permissible and indeed required of this House in its judicial capacity. It was suggested that some difficulty arose from the passing of the Occupiers' Liability Act 1957, the argument being that, as Parliament deliberately changed the law about invitees and licensees but not that concerning trespassers, the House was bound hand and foot by *Addie's case*⁸ at its narrowest. I do not follow this. There might be some force in an argument that for this House to depart from (i.e. overrule) *Addie's case*⁸ would, in effect, be to legislate where Parliament has abstained, but I can see no sense in supposing that when Parliament left the law alone as regards trespassers the intention was to freeze the law as it was, or as it was taken to be, in 1929. As this Act itself shows, what Parliament left alone in the case of trespassers, while displacing them in the case of invitees or licensees, were the rules of common law. But the common law is a developing entity as the judges develop it, and so long as we follow the well tried method of moving forward in accordance with principle as fresh facts emerge and changes in society occur, we are surely doing what Parliament intends we should do. So long as liability continues to be based on fault we may, indeed must, adjust it to reason and experience. I do not think that any argument can be drawn from the passing by the same Parliament three years later of the Occupiers' Liability (Scotland) Act 1960, which (s 2) defined the occupier's duty towards trespassers as that of such care as in all the circumstances of his case is reasonable. But it is interesting to see that in a case⁹ on that section which reached this House, recognition was given to the differing standard of care which may be required towards invitees, licensees or trespassers. My noble and learned friend, Lord Reid, expressed¹⁰ this standard in words very appropriate to the issue in this appeal.

Dealing now with the case of the infant respondent. In the Court of Appeal¹¹ he succeeded on a basis of recklessness—that of the stationmaster at the nearest station who some time before had been informed some six weeks earlier that on one occasion children had been seen somewhere on the line. As to this, unless 'recklessness' means 'gross carelessness' and in my opinion not even then, there is no basis on which the appellants can be liable for this injury. But I agree with Salmon LJ and not with the majority in the Court of Appeal that recklessness, in this context, has its classical meaning.

In *Quinlan's case*¹² the Privy Council suggested that the way ahead lay through an extended scope of wanton and reckless conduct. This may be enough in some cases, but in others, and in a case such as the present, I prefer a direct acceptance of an appropriate duty of care. The use of 'recklessness' or imputed recklessness seems to me too like another fiction of the kind it is better to discard. However, if the approach I have suggested is correct, it will follow that a basis exists here on which, given satisfactory proof, an action in negligence could lie.

I feel bound to say that I have less confidence than your Lordships or the trial judge that the proved facts make the case good. The evidence as to the condition of the fence at the relevant time, the means of access to it and the use of the open spaces on either side of the line ('the meadow was not much used by children' said the only witness) is exiguous. Conclusion on it can hardly be reached without a degree of strain. Evidence as to the knowledge or lack of it as to the condition of the fence or the so-called path to the fence by the appellants (much less conspicuous than the official path leading to a footbridge over the railway close by, whose existence seems largely to be forgotten) or as to the system of maintenance, or lack of it, hardly

⁸ [1929] AC 358, [1929] All ER Rep 1

⁹ *M'Glone v British Railways Board* 1966 SC (HL) 1

¹⁰ 1966 SC (HL) at 11

¹¹ [1971] 1 All ER 897, [1971] 2 QB 107

¹² [1964] 1 All ER 897, [1964] AC 1054

- a exists. That it was necessary to call in aid the fact that six weeks before the accident the presence had been reported of some children of unspecified age, somewhere on the two mile stretch of the line between Morden and Mitcham (the fact relied on as showing 'recklessness') does not reassure me as to the solidity of the case. But there remains the fact of this electrified line lying between two open spaces albeit linked by a bridge and of the broken down chain link fence at a point near to where children
- b might play and I think that there is force in the point that the appellants, once they knew of the gap, took immediate steps to repair it and indeed contended at one time that it was in repair at the critical time. The case is not therefore (as in *Edwards's* case¹³) one of a barrier erected in accordance with statute but in fact inadequate to keep children out, but of a barrier designed to be adequate, in view of the existing risk, and become inadequate through lack of maintenance. The distinction is, I think,
- c a real, as well as a fine one. I am not prepared, especially in view of the judge's finding, to differ from your Lordships' view that, in relation to the special duty of care incumbent on the appellants in the relevant place, there was a breach of that duty amounting to legal negligence, but I am left with the feeling that cases such as these would be more satisfactorily dealt with by a modern system of public enterprise liability devised by Parliament.
- d I would dismiss the appeal.

LORD PEARSON. My Lords, in relation to an occupier of premises the position of a trespasser must be radically different from that of a lawful visitor. The broad effect of s 2 of the Occupiers' Liability Act 1957 is that an occupier of premises owes to his lawful visitors, i.e. the persons who come on the premises at his invitation or with his permission, the common duty of care; and that is a duty to take such care as

e in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted to be there. In my opinion, the occupier of premises does not owe any such duty to a trespasser: he does *not* owe to the trespasser a duty to take such care as in all the circumstances of the case is reasonable to see that the trespasser will be reasonably

f safe in using the premises for the purposes for which he is trespassing. That seems to me to be the fundamental distinction, and it should be fully preserved.

It does not follow that the occupier never owes any duty to the trespasser. If the presence of the trespasser is known to or reasonably to be anticipated by the occupier, then the occupier has a duty to the trespasser, but it is a lower and less onerous duty than the one which the occupier owes to a lawful visitor. Very broadly stated, it is a duty to treat the trespasser with ordinary humanity: *Bird v Holbrook*¹⁴, *Grand Trunk Ry Co of Canada v Barnett*¹⁵ and *Latham v Johnson*¹⁶. But that is a vague phrase. What is the content of the duty to treat the trespasser with ordinary humanity? The authoritative formulation of the duty, as given in *R Addie & Sons (Collieries) Ltd v Dumbreck*¹⁷, is severely restrictive and is, I think, now inadequate. Subject to the difficulty created by that formulation, I think one can deduce from decided cases

h that, normally at any rate, the occupier is not at fault, he has done as much as is required of him, if he has taken reasonable steps to deter the trespasser from entering or remaining on the premises, or the part of the premises, in which he will encounter a dangerous situation. In simple language, it is normally sufficient for the occupier to make reasonable endeavours to keep out or chase off the potential or actual intruder who is likely to be or is in a dangerous situation. The erection and maintenance of suitable notice boards or fencing or both, or the giving of suitable oral

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13 [1952] 2 All ER 430, [1952] AC 737

14 (1828) 4 Bing 628 at 641

15 [1911] AC 361 at 369

16 [1913] 1 KB 398 at 411, [1911-13] All ER Rep 117 at 124, 125

17 [1929] AC 358, [1929] All ER Rep 1

warning, or a practice of chasing away trespassing children, will usually constitute reasonable endeavours for this purpose: *Ilott v Wilkes*¹⁸, *Bird v Holbrook*¹⁹, *Morran v Waddell*¹, *Ross v Keith*², *Cooke v Midland Great Western Railway of Ireland*³, *Lowery v Walker*⁴, *Hardy v Central London Ry Co*⁵, *Mourton v Poulter*⁶, *Excelsior Wire Rope Co Ltd v Callan*⁷, *Edwards v Railway Executive*⁸ (where Lord Porter said:

'In any case I cannot see that the respondents were under any obligation to do more than keep their premises shut off by a fence which was duly repaired when broken and obviously intended to keep intruders out.');

*Perry v Thomas Wrigley Ltd*⁹ and *M'Glone v British Railways Board*¹⁰. If the trespasser, in spite of the occupier's reasonable endeavours to deter him, insists on trespassing or continuing his trespass, he must take the condition of the land and the operations on the land as he finds them and cannot normally hold the occupier of the land or anyone but himself responsible for injuries resulting from the trespass, which is his own wrongdoing. But that statement is subject to this proviso: if the occupier knows or as good as knows that some emergency has arisen whereby the trespasser has been placed in a position of imminent peril, ordinary humanity requires further steps to be taken; the very obvious example is that, if the driver of a train sees a trespasser fallen on the line in front of him, he must try to stop the train. The variety of possible situations is so great that one cannot safely try to formulate for all cases what steps an occupier is required to take for the protection or rescue of a trespasser, but the decided cases show what is required in typical situations, and that I have endeavoured to summarise. In *Railways Comr (NSW) v Cardy*¹¹ Dixon CJ said:

'The duty is measured by the nature of the danger or peril but it may, according to circumstances, be sufficiently discharged by warning of the danger, by taking steps to exclude the intruder or by removal or reduction of the danger.'

In the case of the poisonous berries in the public park (*Glasgow Corp'n v Taylor*¹²) the simplest and cheapest and most effective way of protecting children who might be tempted to eat them would have been, not the erection of a fence or warning notices, but to dig up and remove the tree or shrub on which the poisonous berries grew. But as an illustration of the duty to trespassers normally being sufficiently discharged by reasonable measures designed to exclude them from the situation of danger, I will cite a passage from the judgment of Windeyer J in *Munnings v Hydro-Electric Commission of Tasmania*¹³. He said:

'The duty of care that the Commission owed to the plaintiff was not a duty to have its pole safe for trespassers. It was a duty which arose from the very fact that it was dangerous to trespassers. High voltage electricity is a highly

18 (1820) 3 B & Ald 304, [1814-23] All ER Rep 277

19 (1828) 4 Bing 628

1 (1883) 11 R 44

2 (1888) 16 R 86

3 [1909] AC 229, [1908-10] All ER Rep 16

4 [1911] AC 10 at 13, 14, [1908-10] All ER Rep 12 at 15

5 [1920] 3 KB 459, [1920] All ER Rep 205

6 [1930] 2 KB 183, [1930] All ER Rep 6

7 [1930] AC 404, [1930] All ER Rep 1

8 [1952] 2 All ER 430 at 435, [1952] AC 737 at 744

9 [1955] 3 All ER 243, [1955] 1 WLR 1164

10 1966 SC (HL) 1

11 (1961) 104 CLR 214 at 286

12 [1922] 1 AC 44, [1921] All ER Rep 1

13 (1971) 45 ALJR 378 at 389

a dangerous thing. To bring such a dangerous thing to a locality frequented by members of the public imposed a duty of care. That duty could be discharged by putting live wires beyond easy reach and not enabling unauthorised persons to come to them.'

There are several reasons why an occupier should not have imposed on him onerous obligations to a trespasser.

b (1) There is the unpredictability of the possible trespasser both as to whether he will come on the land at all and also as to where he will go and what he will do if he does come on the land. I enlarged on this point in *Videan v British Transport Commission*¹⁴, and I will only summarise it shortly here. As the trespasser's presence and movements are unpredictable, he is not within the zone of reasonable contemplation (*Hay (or Bourhill) v Young*¹⁵) and he is not a 'neighbour' (*Donoghue v Stevenson*¹⁶) to the occupier, and the occupier cannot reasonably be required to take precautions for his safety. Occupiers are entitled to farm lands, operate quarries and factories, run express trains at full speed through stations, fell trees and fire shots without regard to the mere general possibility that there might happen to be in the vicinity a trespasser who might be injured. The occupiers do not have to cease or restrict their activities in view of that possibility, which is too remote to be taken into account and could not fairly be allowed to curtail their freedom of action.

d (2) Even when his presence is known or reasonably to be anticipated, so that he becomes a neighbour, the trespasser is rightly to be regarded as an underprivileged neighbour. The reason for this appears, I think, most clearly from a consideration of the analogous position of a lawful visitor who exceeds his authority, going outside the scope of his licence or permission. In *Hillen and Pettigrew v ICI (Alkali) Ltd*¹⁷, Lord Atkin said:

'... this duty to an invitee only extends so long as and so far as the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises by the invitee for the purposes for which he has been invited. He is not invited to use any part of the premises for purposes which he knows are wrongfully dangerous and constitute an improper use. As Scrutton L.J. has pointedly said: "When you invite a person into your house to use the staircase you do not invite him to slide down the bannisters."¹⁸ So far as he sets foot on so much of the premises as lie outside the invitation or uses them for purposes which are alien to the invitation he is not an invitee but a trespasser, and his rights must be determined accordingly. In the present case the stevedores knew that they ought not to use the covered hatch in order to load cargo from it; for them for such a purpose it was out of bounds; they were trespassers. The defendants had no reason to contemplate such a use; they had no duty to take any care that the hatch when covered was safe for such a use; they had no duty to warn any one that it was not fit for such use.'

h In *Munnings v Hydro-Electric Commission of Tasmania*¹⁹ Barwick CJ said:

'Of course in determining what ought to have been foreseen, as well as in deciding what steps ought to have been taken or omitted in the particular case, the right, or absence of right, of the injured person to have been at the place where he was injured, or at the point from which his injuries stemmed, would be material factors. Though the rigid categories of invitee, licensee and trespasser

i 14 [1963] 2 All ER 860 at 874, [1963] 2 QB 650 at 670

15 [1942] 2 All ER 396, [1943] 3 AC 92

16 [1932] AC 562, [1932] All ER Rep 1

17 [1936] AC 65 at 69, 70, [1935] All ER Rep 555 at 558

18 *The Carlgarth* [1927] P 93 at 110

19 (1971) 45 ALJR a 1382

may not be applicable as such, there must remain a quantitative element both in the extent of the foreseeability and of the reasonable steps required to fulfil any resultant duty arising from the circumstances in which the injured person came upon the scene.' a

(3) It would in many, if not most, cases be impracticable to take effective steps to prevent (instead of merely endeavouring to deter) trespassers from going into or remaining in situations of danger. The cost of erecting and maintaining an impenetrable and unclimbable, or as it has been put, 'boy-proof' fence would be prohibitive, if it could be done at all. The cases of *M'Glone v British Railways Board*²⁰, *McCarthy v Wellington City*¹ and *Munnings v Hydro-Electric Commission of Tasmania*² illustrate the agility, ingenuity and persistence of boy trespassers. As Lord Goddard said in *Edwards v Railway Executive*³, referring to the Railway Executive: b

'Had they to provide watchmen to guard every place on the railways of the Southern Region where children may and do get on to embankments and lines, railway fares would be a great deal higher than they are already.' c

(4) There is also a moral aspect. Apart from trespasses which are inadvertent or more or less excusable, trespassing is a form of misbehaviour, showing lack of consideration for the rights of others. It would be unfair if trespassers could by their misbehaviour impose onerous obligations on others. One can take the case of a farmer. He may know well from past experience that persons are likely to trespass on his land for the purpose of tearing up his primroses and bluebells, or picking his mushrooms or stealing his turkeys, or for the purpose of taking country walks in the course of which they will tread down his grass and leave gates open and watch their dogs chasing the farmer's cattle and sheep. It would be intolerable if a farmer had to take expensive precautions for the protection of such persons in such activities. d

I have said that an occupier does not owe to a trespasser the 'common duty of care', which is now the relevant statutory expression for the occupier's duty to lawful visitors. It can also be said that the occupier does not owe to the trespasser any general duty of care. This question was fully considered and decided in the case of *Railways Comr v Quinlan*⁴. The question was directly raised by the trial judge's directions to the jury. Viscount Radcliffe said⁵: e

'... their lordships think that there is no doubt that the jury must have received the definite impression that the law that they were to apply to the facts was that, once they thought that there was a "likelihood" of people coming to the crossing and that the appellant was aware of such a likelihood, the appellant owed a general duty to the respondent as "a member of the public" to take reasonable precautions to secure his safety, and that this duty was not affected by the fact that the respondent was a trespasser. In their lordships' opinion this direction was not in accordance with law ... The court had ... ordered a new trial, because in their view the case, if retried, might show that the respondent, though a trespasser, was nevertheless entitled to claim from the appellant the duty of general care and a liability in negligence for a breach of it: such a duty, it was suggested, might be founded on a general principle derived from the House of Lords' decision in *Donoghue v. Stevenson*⁶. Their lordships think this view mistaken. They cannot see that there is any general principle to be deduced f

²⁰ 1966 SC (HL) 1 g

¹ [1966] NZLR 481

² (1971) 45 ALJR 378

³ [1952] 2 All ER at 437, [1952] AC at 747

⁴ [1964] 1 All ER 897, [1964] AC 1054 h

⁵ [1964] 1 All ER at 902, 903, [1964] AC at 1069, 1070

⁶ [1932] AC 562, [1932] All ER Rep 1 i

- a** from that decision which throws any particular light on the legal rights and duties that arise when a trespasser is injured on a railway level crossing where he has no right to be: more particularly, they consider that it is not correct in principle to suppose that the mere fact that there was a likelihood, apparent to the occupier, of a trespasser being present on the crossing at some time or another is sufficient to impose on the occupier any general duty of care towards such a trespasser.
- b** The consequences of such a supposition would be far-reaching indeed.'

I respectfully agree with that passage. Viscount Radcliffe also said, referring to what he described as 'the accepted formulation of the occupier's duty to a trespasser'⁷.

- '... what is intended is an exclusive or comprehensive definition of the duty. Indeed there would be no point in it if it were not. It follows then that, so long as the relationship of occupier and trespasser is or continues to be a relevant description of the relationship between the person who injures or brings about injury and the person who is injured—an important qualification—the occupier's duty is limited in the accepted terms.'
- c**

There is economy of doctrine, simplicity of principle, in having one exclusive and comprehensive formula defining the duty of occupier to trespasser. But the formula itself has created difficulties and aroused criticism, and I think it is not now adequate or defensible as applying to modern conditions. Before coming to the formula, I will attempt a summary of the principles so far dealt with.

d

- It seems to me that there is rational justification for the common law attitude towards trespassers, in so far as it has recognised that (a) in relation to an occupier the position of a trespasser is radically different from that of a lawful visitor; (b) the unknown and merely possible trespasser is not a 'neighbour' in the sense in which that word 'neighbour' was used by Lord Atkin in *Donoghue v Stevenson*⁸, and the occupier owes to such a trespasser no duty to take precautions for his safety; and (c) if the presence of the trespasser is known to or reasonably to be anticipated by the occupier, then the occupier (i) does not owe to the trespasser the common duty of care (which is the single statutory substitute for the different duties formerly owing to invitees and licensees); (ii) does not owe to the trespasser a general duty of care; but (iii) does owe to the trespasser a lower and less onerous duty, which has been described as a duty to treat him with ordinary humanity.
- e**
- f**

- So far so good. Insofar as those are the rules of the common law on this subject, they seem to be fully acceptable. The difficulty, however, arises from the narrow formulation of the duty to trespassers in *R Addie & Sons (Collieries) Ltd v Dumbreck*⁹. Lord Hailsham LC, after stating the duties of occupiers towards invitees and licensees, said¹⁰:
- g**

- 'Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser.'
- h**

- j** Viscount Dunedin said¹¹:

⁷ [1964] 1 All ER at 905, [1964] AC at 1074
⁸ [1932] AC at 580, [1932] All ER Rep at 11
⁹ [1929] AC 358, [1929] All ER Rep 1
¹⁰ [1929] AC at 365, [1929] All ER Rep at 4
¹¹ [1929] AC at 376, 377, [1929] All ER Rep at 10

'In the present case, had the child been a licensee I would have held the defenders liable: secus if the complainer had been an adult. But if the person is a trespasser, then the only duty the proprietor has towards him is not maliciously to injure him: he may not shoot him; he may not set a spring gun, for that is just to arrange to shoot him without personally firing the shot. Other illustrations of what he may not do might be found, but they all come under the same head—injury either directly malicious or an acting so reckless as to be tantamount to malicious acting.'

The formulation is too narrow and inadequate in at least three respects.

First, it appears to hold the occupier liable only for positive acts and not in respect of omissions. Suppose that the occupier is running an electrified railway, with an exposed live rail, in the vicinity of a public playground, and that he has not provided any warning notice or fence to deter children from straying on to the railway, and in consequence a child strays on to the live rail and is seriously injured. Surely common sense and justice require that the occupier must be held liable in such a case for his nonfeasance. I doubt, however, whether it was intended to confine liability to positive acts. Perhaps the words 'act' and 'acting' in *Addie v Dumbreck*¹² can be interpreted as including omissions.

Secondly, the formulation appears to say that the occupier has no duty to do anything for the protection of trespassers until there is a trespasser actually on the land and the occupier knows he is there. But again the case of a child straying on the live rail of an electrified railway shows that there must be a duty on the occupier to take some steps in advance to deter children from trespassing on the railway.

Thirdly, the formulation makes the occupier liable only in respect of deliberate or reckless acts. I think the word 'reckless' in the context does not mean grossly negligent but means that there must be a conscious disregard of the consequences—in effect deciding not to bother about the consequences. Thus a subjective, mental element, a sort of mens rea, is required as a condition of liability. Mere negligence would not be enough to create liability, according to this formulation. There would be no duty to take care, but only a duty to abstain from deliberately or recklessly causing injury. That is plainly inadequate.

It must be conceded that *Addie v Dumbreck*¹² does not stand alone. There is other authority to the effect that a man trespasses at his own risk and must take the land as he finds it. Hamilton LJ said in *Latham v Johnson*¹³:

'The rule as to trespassers is most recently indicated in *Lowery v. Walker*¹⁴ and is stated and discussed in *Grand Trunk Ry. Co. of Canada v. Barnett*¹⁵. The owner of the property is under a duty not to injure the trespasser wilfully: "not to do a wilful act in reckless disregard of ordinary humanity towards him"; but otherwise a man "trespasses at his own risk." On this point Scotch law is the same. In English and Scotch law alike, when people come on the lands of others for their own purposes without right or invitation, they must take the lands as they find them, and cannot throw any responsibility upon the person on whose lands they have trespassed: per Lord Kinnear, *Devlin v. Jeffray's Trustees*¹⁶.'

The rule was applied to child trespassers in *Hardy v Central London Ry Co*¹⁷.

Nevertheless the rule was evidently found to be unsatisfactory in cases both before and after *Addie v Dumbreck*¹² especially in cases where child trespassers were concerned. Where there had been frequent trespassing and no effective prevention of it,

¹² [1929] AC 358, [1929] All ER Rep 1

¹³ [1913] 1 KB 398 at 411, [1911-13] All ER Rep at 124, 125

¹⁴ [1911] AC 10, [1908-10] All ER Rep 12

¹⁵ [1911] AC 361

¹⁶ 1902 40 SCLR 92

¹⁷ [1920] 3 KB 459, [1920] All ER Rep 205

a a licence was held to be implied, although there was no voluntary grant of permission. Instances are *Cooke v Midland Great Western Railway of Ireland*¹⁸, *Lowery v Walker*¹⁹ and *Excelsior Wire Rope Co Ltd v Callan*²⁰. In such cases the licence was a legal fiction by which the harsh rule of law was circumvented and, one may say, eroded. (See per Viscount Dunedin in *Excelsior Wire Rope Co Ltd v Callan*¹ and per Lord Denning in *Miller v South of Scotland Electricity Board*², and in *Videan's case*³.) As Dixon CJ pointed out in *Railways Comr (NSW) v Cardy*⁴, that is how the

b common law develops. See also *Quinlan's case*⁵. Also in more recent times there has been another development or attempted development of the law to circumvent the harsh rule in *Addie v Dumbreck*⁶. Distinctions have been made (a) between the liability of the occupier and the liability of other persons who carry out active operations on the land; (b) between the liability of the occupier qua occupier and his liability qua operator himself carrying out active operations on the land. The theory

c is that, whereas the occupier qua occupier has a large measure of exemption from liability in respect of the static condition of the land, the occupier or any other person carrying out active operations on the land has the full duty of care even towards a trespasser under the 'neighbour' principle of *Donoghue v Stevenson*⁷. (See per Lord Denning in *Miller's case*², *Dunster v Abbott*⁸ and *Videan's case*⁹. See also *Buckland v Guildford Gas Light and Coke Co*¹⁰, *Davis v St Mary's Demolition & Excavation Co Ltd*¹¹ and *Creed v John McGeoch & Sons Ltd*¹²). Reservations or doubts about this theory were expressed in *Miller's case*¹³, in *Perry v Thomas Wrigley*¹⁴ and in *Videan's case*¹⁵. Insofar as the theory has gained acceptance, it constitutes another circumvention and erosion of the rule in *Addie v Dumbreck*⁶.

I should, however, make it plain that I do not accept the theory. I doubt whether there is any major distinction for the present purpose (i) between the static condition of the land and active operations on the land; (ii) between the occupier and other persons (such as his servants or agents or independent contractors or employees of public authorities) lawfully carrying out operations on the land and having control of the operations and perhaps of the land as well for the time being; (iii) between trespass on land and trespass on installations or railway vehicles. Occupation is associated with control and is a ground of liability, not of exemption from liability.

f The trespasser's movements are unpredictable and he goes into places where he has no business to be and imposes his unwanted presence; these considerations affect what can reasonably be required not only in the case of the occupier but also in the case of such other persons.

g It seems to me that the rule in *Addie v Dumbreck*⁶ has been rendered obsolete by changes in physical and social conditions and has become an incumbrance impeding the proper development of the law. With the increase of the population and the

18 [1909] AC 229, [1908-10] All ER Rep 16

19 [1911] AC 10, [1908-10] All ER Rep 12

20 [1930] AC 404, [1930] All ER Rep 1

1 [1930] AC at 411, [1930] All ER Rep at 4

h 2 1958 SC (HL) 20

3 [1963] 2 All ER at 860, [1963] 2 QB at 663

4 (1961) 104 CLR at 285

5 [1964] 1 All ER at 911, 912, [1964] AC at 1083, 1084

6 [1929] AC 358, [1929] All ER Rep 1

7 [1932] AC 562, [1932] All ER Rep 1

8 [1953] 2 All ER 1572 at 1574

i 9 [1963] 2 All ER at 865, [1963] 2 QB at 664

10 [1948] 2 All ER 1086, [1949] 1 KB 410

11 [1954] 1 All ER 578, [1954] 1 WLR 592

12 [1955] 3 All ER 123, [1955] 1 WLR 1005

13 1958 SC (HL) at 35, 36

14 [1955] 3 All ER at 243, 244, [1955] 1 WLR at 1166

15 [1963] 2 All ER at 874, [1963] 2 QB at 678

larger proportion living in cities and towns and the extensive substitution of blocks of flats for rows of houses with gardens or back yards and quiet streets, there is less playing space for children and so a greater temptation to trespass. There is less supervision of children, so that they are more likely to trespass. Also with the progress of technology there are more and greater dangers for them to encounter by reason of the increased use of, for instance, electricity, gas, fast-moving vehicles, heavy machinery and poisonous chemicals. There is considerably more need than there used to be for occupiers to take reasonable steps with a view to deterring persons, especially children, from trespassing in places that are dangerous for them. a

In my opinion the *Addie v Dumbreck*¹⁶ formulation of the duty of occupier to trespasser is plainly inadequate for modern conditions, and its rigid and restrictive character has impeded the proper development of the common law in this field. It has become an anomaly and should be discarded. But in my opinion the duty of occupier to trespasser should remain limited in the ways that I have endeavoured to indicate. b

I need not lengthen this already long opinion by describing again the facts of the present case which have been described by my noble and learned friends. The appellants in the circumstances had a duty to take reasonable steps to deter children from straying from the public space on to the electrified railway line. Obviously, reasonable steps for this purpose included proper maintenance of the fence. But the appellants failed to repair the broken down fence even after they had been notified that children had been seen on the line. There was a clear breach of the duty. c

I would dismiss the appeal. d

LORD DIPLOCK. My Lords, in a heavily populated suburban area of London there are two public open spaces in which children of all ages are accustomed to play. Between them runs a line of the appellants' railway equipped with live electric rail which would cause serious injury or even death to anyone who came into contact with it. Its dangerous character would not be appreciated by little children. It is within a few yards of the boundary between the railway and one of the open spaces —Bunces Meadow. Along the boundary is a chain link fence four feet high. But at one point, approached by a well-trodden path across the meadow it had, for several weeks before 7th June 1965, been pressed down to a height of no more than ten inches from the ground. It presented no obstacle to access to the live rail by children too young to appreciate the danger. On 7th June 1965 the respondent, a child aged six years, crossed the fence at this point, came into contact with the live rail and sustained very serious injuries. e

If the facts as to the use of the meadow and the condition of the fence which I have just recited were known to those responsible for running the railway, I believe that anyone endowed with common humanity would say that the common law ought to afford to the injured child a legal right to compensation against the railway authorities; and that if it did not there was something wrong with the common law. f

The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold. g

A court may take judicial notice that railway lines are regularly patrolled by linesmen and gangers. In the absence of evidence to the contrary, it is entitled to infer that one or more of them in the course of several weeks noticed what was plain h

a for all to see. Anyone of common sense would realise the danger that the state of the fence so close to the live rail created for little children coming to the meadow to play. As the appellants elected to call none of the persons who patrolled the line there is nothing to rebut the inference that they did not lack the common sense to realise the danger. A court is accordingly entitled to infer from the inaction of the appellants that one or more of their employees decided to allow the risk to continue of some child crossing the boundary and being injured or killed by the live rail rather than to incur the trivial trouble and expense of repairing the gap in the fence.

b Even if these inferences are drawn, it is the submission of the appellants that the common law affords no remedy to the injured. Such is said to be the ineluctable consequence of the decision of this House over 40 years ago in *R Addie & Sons (Collieries) Ltd v Dumbreck*¹⁷ and, in particular, is said to follow from the lapidary statement in the speech of Lord Hailsham LC¹⁸:

c 'Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser.'

d *Addie v Dumbreck*¹⁷ was a case of trespass by a child aged four and a half years. It was decided in the year that I started to read for the Bar. Even at that time it offended against what Lord Atkin, only three years later, was to call 'a general public sentiment of moral wrongdoing for which the offender must pay.' (*Donoghue v Stevenson*¹⁹). I well recall the disappointment with which it was received by those who thought that previous cases in this House had shown the common law as moving towards a less draconian treatment of those who trespassed innocently on other people's land.

e If the facts in the instant appeal are compared with those in *Addie v Dumbreck*²⁰ as stated by Lord Hailsham LC I do not think it possible to say that, judged by current standards of behaviour, the conduct of those engaged in operating the appellants' railway in the instant case was any more blameworthy than the conduct of those engaged in running the colliery of the successful appellant in *Addie v Dumbreck*¹⁷. Yet all nine judges who have been concerned with the instant case in its various stages are convinced that the plaintiff's claim ought to succeed; and, if I may be permitted to be candid, are determined that it shall. The problem of judicial technique is how best to surmount or to circumvent the obstacle presented by the speeches of Lord Hailsham LC and Viscount Dunedin in *Addie v Dumbreck*¹⁷ and the way in which those speeches were dealt with in the Privy Council in the comparatively recent Australian appeal of *Railways Comr v Quinlan*¹.

f By the time that *Addie v Dumbreck*¹⁷ was decided the law as to an occupier's duty towards trespassers had made some advance since Best CJ in *Bird v Holbrook*² had laid it down that an occupier was not entitled intentionally and maliciously to injure a trespasser. For present purposes the significance of that case, which arose out of setting of spring guns to injure trespassers, is twofold. First, it recognised that the duty, whatever its content, was owed by the occupier to an unknown but expected trespasser as well as to a trespasser actually known to the occupier to be trespassing on his land. Secondly, Best CJ based the duty on its being the object of English law

j 17 [1929] AC 358, [1929] All ER Rep 1

18 [1929] AC at 365, [1929] All ER Rep at 4

19 [1932] AC 562 at 580, [1932] All ER Rep 1 at 11

20 [1929] AC at 359, 360, [1929] 3 All ER Rep at 3

1 [1964] 1 All ER 897, [1964] AC 1054

2 (1828) 4 Bing 628

to uphold humanity. This expression found its echo in Lord Robson's reference in *Grand Trunk Ry Co of Canada v Barnett*³ to 'a wilful or reckless disregard of ordinary humanity', which was adopted by Lord Sumner, then Hamilton LJ, as the definition of the duty of an occupier to a trespasser, in his judgment in *Latham v Richard Johnson & Nephew Ltd*⁴—a judgment which was expressly approved by both Lord Hailsham LC and Viscount Dunedin in *Addie v Dumbreck*⁵.

But attention had been diverted from the development of the content of an occupier's duty towards trespassers by the adoption of the technique of re-classifying as 'licensees' persons whom the occupier had not made sufficiently effective efforts to exclude from his land, so as to give them the benefit of the ready-made duty of care for their safety owed at common law by an occupier to those who, in reality, entered on his land by his permission and not against his will. This technique had been accepted without adverse comment in cases in this House itself. *Cooke v Midland Great Western Railway of Ireland*⁶ and *Lowery v Walker*⁷ are noteworthy examples. The resulting duty may be briefly summarised as a duty to take reasonable steps to enable the licensee to avoid a danger known to the occupier.

In *Addie v Dumbreck*⁸ the First Division of the Court of Session had departed from this technique and sought to recognise as a separate category of persons to whom a duty was owed, members of a class whom the occupier knew to be in the habit of resorting to his land without his permission. The majority had held that to such trespassers the occupier owed a duty to take reasonable steps to deter their intrusion if it was likely to result in serious injury to them. The decision of this House in *Addie v Dumbreck*⁵ was primarily directed to asserting the propositions: that persons present on an occupier's land could be assigned to one of three mutually exclusive categories only, i.e invitees, licensees and trespassers; that there was no sub-division of the category of trespassers; and that the duty owed by an occupier to a person on his land was determined solely by the category into which that person fell. In order to decide the appeal, however, it was also necessary to state the content of the duty towards trespassers—the category into which it was held that the respondent fell—in order to determine whether the appellant was in breach of it. This Lord Hailsham LC did in the passage that I have cited⁹.

In *Addie v Dumbreck*⁸ the child had not been found by the Court of Session to be a licensee. The decision of this House⁵ did not therefore directly impugn the technique of inferring the tacit permission of the occupier to an intruder's presence on his land from his failure to take effective steps to manifest to the intruder his objection to it. Indeed *Addie v Dumbreck*⁵ appeared to confirm this as the only way of mitigating the lot of meritorious trespassers; although the actual decision on the facts showed a greater reluctance to make use of it than had been evinced by the members of this House who had decided *Lowery v Walker*⁷.

The technique accordingly continued to be used. Appellate courts confined themselves to preventing what was felt to be its misuse—as this House did in *Edwards v Railway Executive*. Lord Porter there¹⁰ refers to it in terms as 'the doctrine of implied licence' and says:

'... where the owner (sc. occupier) of the premises knows that the public or some portion of it is accustomed to trespass over his land he must take steps to show that he resents and will try to prevent the invasion'

3 [1911] AC 361 at 370

4 [1913] 1 KB 398 at 411, [1911-13] All ER Rep 117 at 124, 125

5 [1929] AC 358, [1929] All ER Rep 1

6 [1909] AC 229, [1908-10] All ER Rep 16

7 [1911] AC 10, [1908-10] All ER Rep 12

8 1928 SC 547

9 [1929] AC at 365, [1929] All ER Rep at 4

10 [1952] AC 737 at 744; cf [1952] 2 All ER 430 at 435

a if he is to avoid the implication. Lord Goddard¹¹, with whose speech my noble and learned friend Lord Reid agreed, based the implied licence on estoppel: the occupier must have 'so conducted himself that he cannot be heard to say that he did not give it' (sc permission to go on his land); Lord Oaksey said¹²:

b 'The circumstances must be such that the suggested licensee could have thought, and did think, that he was not trespassing, but was on the property in question by the leave and licence of its owner.'

It is implicit in each of these statements that even when there is no real consent by the occupier to a person's entry on his land, there may be circumstances in which a mere failure to take reasonable steps to deter entry will confer on a person entering, the same common law rights as respects his personal safety as if he had been the occupier's licensee.

c That the 'licence' treated as having been granted in such cases was a legal fiction employed to justify extending to meritorious trespassers, particularly if they were children, the benefit of the duty which at common law an occupier owed to his licensees, was explicitly acknowledged by Dixon CJ in *Railways Comr (NSW) v Cardy*¹³. What he said on this topic was approved by the Privy Council in *Railways Comr v*
d *Quinlan*¹⁴, who added:

'... those conceptions of licence or permission ... are virtually without meaning at any rate as applied to children.'

The facts in *Lowery v Walker*¹⁵ stated at the beginning of the report show that in the case of adults the so-called 'licence' could be equally fictitious.

e By use of the fiction of a 'licence' to persons who would otherwise be trespassers the courts were enabled to recognise that there were circumstances which imposed on an occupier a duty either (a) to take reasonable steps to deter such persons from entering on a part of his land where he knew they would be exposed to serious risk of personal injury; or, if he did not do so, (b) to take reasonable steps to enable them to avoid the danger. Breach of the former duty entitled them to the status of
f 'licensees'; the acquisition of that status entitled them to the benefit of the latter duty. Once the circumstances which impose these duties have been identified in a sufficient number of cases to form a body of precedent on their own, the fiction has served its purpose in the development of the common law and is ripe for discard. The misfortune of *Addie v Dumbreck*¹⁶ was that the majority of the Court of Session tried to discard the fiction before the time was ripe to do so. The need to retain it
g persisted so long as it continued to be accepted doctrine that a duty to regulate one's conduct towards one's neighbour so as to reduce the risk of injuring him, could only arise if there were some pre-existing legal relationships between the parties which fell within some category already recognised at common law. This obstacle to the rational development of an occupier's duty towards trespassers was penetrated by the decision of this House in *Donoghue v Stevenson*¹⁷ and broken down
h by *Hay (or Bourhill) v Young*¹⁸. The significance of these two cases for present purposes is not the content of the duty there discussed but the recognition that conduct likely to cause injury to another person could in itself create the legal relationship between the parties to which the duty attached.

j ¹¹ [1952] All ER at 437, [1952] AC at 747

¹² [1952] All ER at 437, 438, [1952] AC at 748

¹³ (1961) 104 CLR 274

¹⁴ [1964] 1 All ER 897 at 911, [1964] AC 1054 at 1083

¹⁵ [1911] AC 10, [1908-10] All ER Rep 12

¹⁶ 1928 SC 547

¹⁷ [1932] AC 562, [1932] All ER Rep 1

¹⁸ [1942] 2 All ER 396, [1943] 3 AC 92

It is surely time now for this House to follow the example of Dixon CJ¹⁹ and of the Privy Council in *Quinlan's case*²⁰ and to discard the fiction of a 'licence' to meritorious trespassers. Once the conduct of the occupier is recognised as being capable in itself of creating a legal relationship to another person which attracts duties owed to that person in respect of his safety, it is no longer necessary in cases where that conduct attracts a duty to take reasonable steps to deter another person from entering a dangerous part of the occupier's land, to sub-divide his duties to that person into a duty to deter his entry, a breach of which gives rise to a subsequent duty to take reasonable steps to enable him to avoid the danger. To deter his entry is merely one way of enabling him to avoid the danger. The whole duty can be described as a duty to take reasonable steps to enable him to avoid the danger.

My Lords, this approach clearly runs counter to that of this House in *Addie v Dumbreck*¹. It rejects categorisation of the injured person as a trespasser or licensee as the source of any duty owed to him by the occupier to take steps for his safety and looks instead to the conduct of the occupier as creating the relevant relationship. *Addie v Dumbreck*¹ asserts the necessity for such categorisation; but by leaving intact the technique of inferring a licence by the occupier to a person to whose presence on his land he does not really consent, it transfers from the category of trespassers to that of licensees persons who for the purposes of all other incidents of the legal relationship between them and the occupier, except his duty to take steps for their safety, would remain in the category of trespassers. But, as each of the previous citations from the speeches in *Edwards's case*² confirms, the criteria for eligibility for transfer from one category to the other depended on the conduct of the occupier. So, even on this approach, the enquiry necessarily started with an examination of the occupier's conduct before the person subsequently injured enters on his land. These criteria were not defined or analysed in the speeches in this House in *Addie v Dumbreck*¹. It simply held that the particular facts found in that case did not justify treating the trespassing child as if she were a licensee.

My Lords, this House has since 1966³ abandoned its former practice of adhering rigidly to the ratio decidendi of its previous decisions. There is no longer any need to discuss whether to discard the fiction of a so-called 'licence' to enter granted by the occupier of land to the person who suffers personal injury on it, should be characterised as overruling *Addie v Dumbreck*¹ or as doing no more than explaining its reasoning in terms which are in harmony with the general development of legal concepts since 1929 as to the source of one man's duty to take steps for the safety of another. For my part I would reject the fiction and direct attention to the kind of conduct of an occupier of land which attracts the duty to take reasonable steps to enable a person who enters on his land without his actual consent, to avoid a danger of which the occupier knows.

I come now to *Quinlan's case*²⁰. Owing to the way in which it had proceeded in the courts of New South Wales, no question arose in the Privy Council as to the status of Mr Quinlan as a 'trespasser' on the level crossing where he was injured. The judgment of the Board was mainly directed to rejecting the proposition that there were circumstances in which a person entitled only to the status of 'trespasser' might be owed by the occupier on whose land he was trespassing the common duty of care laid down in *Donoghue v Stevenson*⁴ which was a higher duty than that which is owed by an occupier of land to his licensees in Australia where the common law has not been replaced by statutory provisions such as those to be found in the English Occupiers' Liability Act 1957. In the course of examining three recent decisions of

19 (1961) 104 CLR 274

20 [1964] 1 All ER 897, [1964] AC 1054

1 [1929] AC 358, [1929] All ER Rep 1

2 [1952] 2 All ER 430, [1952] AC 737

3 See Note [1966] 3 All ER 77, [1966] 1 WLR 1234

4 [1932] AC 562, [1932] All ER Rep 1

a the High Court of Australia on which the rejected proposition was said to be based, the Privy Council⁵ expressly approved the actual decision in *Cardy's case*⁶ on the ground that:

'The circumstances seemed to place the case squarely among those "children's cases", in which an occupier who has placed a dangerous "allurement" on his land is liable for injury caused by it to a straying child.'

b It was in the context of such cases that the Privy Council recognised the unreality of the 'licence' to the straying child. But although recognising the 'licence' as a fiction, they accepted the correctness of the conclusions as to the legal consequences of the conduct of the occupier which had hitherto previously been accepted as constituting an implied 'licence' to the person trespassing and so entitling him to the benefit of the higher duty owed by an occupier to take steps for the safety of his licensees.

c My Lords, *Quinlan's case*⁷ is authority for the proposition that an occupier does not owe to a person who is unlawfully on his land the common duty of care and foresight as respects dangerous activities which he carries out there, that he owes to persons who are lawfully present there, as was the successful plaintiff in the contrasting Australian level crossing case (*Railways Comr v McDermott*⁸) which came to the Privy Council a few years later.

d I have no quarrel with *Quinlan's case*⁷ as an authority for this proposition. What I regard as defective in its reasoning is that, although it is recognised that, in the case of children at any rate, their categorisation as 'licensees' instead of 'trespassers' was a mere legal fiction, it failed to recognise that it was a necessary corollary that 'the general formula as laid down in *Addie's case*⁹' was not, as had been stated earlier in the judgment, 'an exclusive or comprehensive' statement of the duty owed by an occupier to those who entered on his land, otherwise than in the exercise of a legal right or with his actual consent.

e But although the *Addie*⁹ test (there must be some act done with the deliberate intention of doing harm to the trespasser or at least some act done with reckless disregard of the presence of the trespasser) was accepted as being exclusive or comprehensive, the Privy Council went on to say¹⁰:

f 'That formula may embrace an extensive and, it may be, an expanding interpretation of what is wanton or reckless conduct towards a trespasser in any given situation, and, in the case of children, it will not preclude full weight being given to any reckless lack of care involved in allowing things naturally dangerous to them to be accessible in their vicinity.'

g A formula which is both exclusive and expansive seems to me, as a matter of linguistics, to be a contradiction in terms. For my part I would not follow the alternative route thus hinted at by which an amelioration of the law in favour of meritorious trespassers might be attained. I think it preferable to seek to identify the underlying principles which had been tacitly accepted in *Addie v Dumbreck*⁹ as justifying exclusion from the category of intruders to whom the *Addie* test applies, those persons to whom judges have hitherto managed to ascribe the status of licensee without acknowledging the fictitious character of their imputed 'licence' from the occupier.

h Any duty imposed by common law on one person to take steps to avoid harming another arises out of some relationship recognised by the common law as subsisting between the two persons. Where the harm to be avoided is personal injury a necessary characteristic of the relationship is one of physical proximity between the person

j 5 [1964] 1 All ER at 911, [1964] AC at 1084

6 (1961) 104 CLR 274

7 [1964] 1 All ER 897, [1964] AC 1054

8 [1966] 2 All ER 162, [1967] 1 AC 169

9 [1929] AC 358, [1929] All ER Rep 1

10 [1964] 1 All ER at 912, [1964] AC at 1084

to whom the duty is owed and the person by whom the duty is owed or some thing whose dangerous condition that person has played a part in creating or continuing. Where the dangerous thing is situate on land in private occupation and is dangerous only to persons who come on to the land, the necessary characteristic of proximity between the occupier of the land and a person who sustains harm from the dangerous thing is created by that person's own act in coming on to the land. a

There is thus a relevant distinction between a person who is lawfully on the occupier's land with the occupier's consent and a trespasser. In the case of the former the occupier has consented to the creation of the relationship from which the duty flows; in the case of the trespasser the relationship has been forced on the occupier against his will and as the result of a legal wrong inflicted on him by the trespasser himself. b

This distinction, as it seems to me, supplies the jurisprudential basis for the proposition, implicit in the Scots cases about fencing land against trespassers, which were cited with the approval by Viscount Dunedin in *Addie v Dumbreck*¹¹ and explicit in *Quinlan's case*¹², that the occupier is not under any duty to take any precautions in advance to acquaint himself as to the likelihood or otherwise of trespassers coming on to any part of his land. He is entitled to assume that persons will not inflict a wrong on him unless he has actual knowledge of the likelihood that they will do so. It would be an unjustifiable burden for the law to impose on an occupier for the benefit of wrongdoers, a duty to make inspections and enquiries in order to ascertain whether or not trespassers were likely to come on to his land. So in the ordinary case of a person to whom the occupier has not given permission to come on his land, keeping the danger within the boundaries of his own land is itself a fulfilment of any duty he may owe to such a person to take reasonable steps to enable him to avoid such danger. The test of whether an occupier is under any duty to a trespasser to do more than to keep the danger within the boundaries of his land is whether he is actually aware of facts which make it likely that some trespasser will come on to that part of his land where the danger is. It is not what the occupier would have been aware of if he had exercised more diligence or foresight than he did. c
d
e

My Lords, the degree of expectation that a trespasser will come on his land that is sufficient to impose on him a duty to take any additional steps to enable such a trespasser to avoid the danger and whether there are any elements in it which require recourse to the standards of a reasonable man, can best be discussed after considering what is the content of that duty when it arises. f

The duty at common law owed by an occupier to a licensee as it was explained a 100 years ago by Willis J in the two leading cases of *Indermaur v Dames*¹³ and *Gautret v Egerton*¹⁴ was restricted to a duty to warn the licensee of traps or concealed dangers actually known to the occupier but not to the licensee. What constituted an adequate warning depended on the circumstances, including the age and understanding of the licensee. Since the licensee, unlike the invitee, came on to the premises for his own purposes it was his own responsibility to avoid dangers of which he knew or could have known by the exercise of reasonable care himself. It is for this reason that I have summarised the duty as a duty to take reasonable steps to enable a licensee to avoid a danger known by the occupier to exist on his land. g
h

The result of the technique of imputing a 'licence' to trespassers of a class whom the occupier knew were in the habit of coming on to his land was to extend to them the benefit of this duty. In contrast to the common law duty owed by an occupier to an invitee the test of a breach of the duty was in modern legal parlance 'subjective' rather than 'objective'. The duty to warn extended to concealed dangers of which the occupier actually knew and not to those of which he did not know, although he i

¹¹ [1929] AC at 374-376, [1929] All ER Rep at 9, 10

¹² [1964] 1 All ER at 910, [1964] AC at 1076

¹³ (1866) LR 1 CP 274, [1861-73] All ER Rep 15

¹⁴ (1867) LR 2 CP 371

would have done if he had exercised more diligence in inspecting his land than he did.

- a** This 'subjective' duty was owed by an occupier to licensees of whose actual presence on the land and consequent exposure to danger he was unaware but ought to have foreseen because he had given them permission to go there. As respects licensees of whose presence and exposure to danger he was actually aware the content of his duty as I have summarised it differs very little in substance from Lord Hailsham LC's description in *Addie v Dumbreck*¹⁵ of conduct of an occupier which renders him
- b** liable to a trespasser leaving aside intentional injury. He stated the occupier's duty to a trespasser whom he knew to be present, in the negative form of a duty to refrain from doing an act 'with reckless disregard of the presence of the trespasser', whereas I have summarised the occupier's duty to a trespasser whom he knows to be exposed to danger, in the positive form of a duty to take reasonable steps to enable the trespasser to avoid the danger. But positive and negative descriptions of duties of this
- c** kind may be ways of describing the two sides of the same coin. In the passage immediately before that which I have quoted Lord Hailsham LC had stated the occupier's duty to his licensee in the negative form¹⁵:

'He is bound not to create a trap or to allow a concealed danger to exist upon the said premises which is known—or ought to be known—to the occupier.'

- d** Although the inclusion of the words 'or ought to be known' does, I think, overstate the accepted definition of the common law duty to licensees.

- It is possible to conceive of circumstances where the concealed danger is due to the natural condition of the land, but all the actual cases in the books are about man-made dangers and it is to these that the language of the judgments is directed. Man-made danger may be the result of an act done while the trespasser is actually present
- e** on the land, as was the case in *Addie v Dumbreck*¹⁶ itself, or an act done before the trespasser came on to the land. It can hardly be supposed that Lord Hailsham LC intended to draw a distinction between the liability of the occupier for setting the haulage machinery in motion when the child was known to be close to the pulley wheel and allowing it to continue in motion after the child was known to
- f** have approached the wheel. In either case his conduct would manifest 'a reckless disregard of ordinary humanity'. In the context of recklessness of conduct there is no rational distinction between activity and inactivity.

The practical effect of the technique of imputing a 'licence' to trespassers of whose actual presence on the land the occupier was not aware was thus to put them in the same position vis-à-vis the occupier as if he had actually known of their presence and consequent exposure to a concealed danger of which he had actual knowledge.

- g** Actual knowledge of a concealed danger, however, may involve two different mental elements: actual knowledge of an activity carried out on the land or of its physical condition, which constitutes a concealed danger to a person on the land; and actual appreciation that the known activity or condition does constitute a concealed danger. The relevance of this analysis, particularly in cases in which any
- h** activities on the land are carried out by servants of the occupier for whose fault he is vicariously liable, does not appear to have been appreciated until comparatively recently, when the current vogue for classifying the tests of legal duties as either 'subjective' or 'objective' made it desirable to identify who the relevant 'subject' was. It played no part in judicial reasoning at the time of *Addie v Dumbreck*¹⁶. The possibility of drawing a distinction between knowledge of physical facts and appreciation of danger was first suggested in argument in *Baker v Bethnal Green Corp*¹⁷. It was eventually accepted by the Court of Appeal in *Hawkins v Coulsdon & Purley Urban District Council*¹⁸ in order to impose on a corporation as occupier liability based on the actual knowledge of the physical facts from which the danger arose. It was held

¹⁵ [1929] AC at 365, [1929] All ER Rep at 4

¹⁶ [1929] AC 358, [1929] All ER Rep 1

¹⁷ [1945] 1 All ER 135

¹⁸ [1954] 1 All ER 97, [1954] 1 QB 319

that although the test of knowledge of the physical facts which constituted the concealed danger was subjective (did the occupier either personally or vicariously by his servants actually know them?), the test of appreciation of the danger resulting from the known facts was objective (would a reasonable man possessed of that knowledge of the physical facts appreciate the danger?).

If this can be characterised as an enlargement rather than a mere explanation by judicial decision of an occupier's duty to his licensees it was a development which had taken place before the Occupiers' Liability Act 1957 had substituted a statutory duty of care for the common law duty previously owed to licensees. That Act did not touch the occupier's duty to trespassers at common law. It left it to continue to be developed by judicial decision. Actual knowledge of concealed danger is a factor common to the duty previously owed at common law by an occupier to his licensees and to the duty still owed by an occupier to trespassers.

There is, in any event, a certain artificiality in ascribing an appreciation of risk to a fictitious person, a corporation—as this defendant is and as nowadays most defendants are. Knowledge of facts call for the use of eyes and ears; and these a corporation has through its employees, even the humblest. If any of them learns of the facts in the course of his employment, his knowledge is the knowledge of the corporation. But appreciation of risk of danger calls for the exercise of intelligent judgment; and it is the judgment of the corporation itself which is relevant. What human minds are to be treated as those of the corporation for the purpose of exercising that judgment? To take an example of what may have been the facts of the present case if the appellants had chosen to disclose them. The linesman when he saw the broken fence may have appreciated the risk of danger to trespassing children but have failed to report the state of the fence out of laziness or forgetfulness. Or, whether or not he himself appreciated the risk, he may have reported the state of the fence in terms which did not draw the attention of the recipient of his report to the danger involved. Or the recipient may himself have appreciated the risk but to save himself trouble decided to do nothing about it. And so on up the chain of responsibility to the employee of the corporation endowed with authority to order the fence to be repaired. Is appreciation of the risk by any one employee in this chain to be treated as appreciation of risk by the corporation itself?

One possible solution in the case of a corporation is to apply the objective standard of the reasonable man, by attributing to the fictitious person, the fictitious mind and judgment of a reasonable man. It would, however, be more consistent with the way in which English law develops, to apply to 'actual knowledge of a danger' as a factor in the duty of an occupier to trespassers the same analysis as was adopted in relation to the occupier's duty at common law to his licensees. This avoids differentiating between the real and the fictitious person as occupier and solves the metaphysical difficulties of ascribing to the latter an actual appreciation of the risk. To see the danger signal yet not to take the trouble to give some thought to it is conduct which the law ought to condemn.

My Lords, I conclude therefore that there is no duty owed by an occupier to any trespasser unless he actually knows of the physical facts in relation to the state of his land or some activity carried out on it, which constitute a serious danger to persons on the land who are unaware of those facts. He is under no duty to any trespasser to make inspections or enquiries to ascertain whether there is any such danger. Where he does know of physical facts which a reasonable man would appreciate involved danger of serious injury to the trespasser his duty is to take reasonable steps to enable the trespasser to avoid the danger. What constitute reasonable steps will depend on the kind of trespasser to whom the duty is owed. If the duty is owed to small children too young to understand a warning notice the duty may require the provision of an obstacle to their approach to the danger sufficiently difficult to surmount as to make it clear to the youngest unaccompanied child likely to approach the danger, that beyond the obstacle is forbidden territory.

Such being, as I would hold, the content of the occupier's duty to a trespasser, I

a return to the consideration of the class of trespassers to whom the duty is owed and, in particular, to the degree of expectation on the part of the occupier that the trespassers will come on to his land which, in the absence of actual knowledge of his presence, is sufficient to give rise to the duty. It is a problem which does not arise in the case of licensees to whom he has given permission to come there.

In *Quinlan's* case¹⁹ a variety of expressions were used to describe the necessary degree of expectation. The occupier must 'as good as know' that the trespasser is present at the time of the injury. His presence must be fairly described as 'extremely likely' or 'very probable'. I do not find these latter phrases helpful save as a warning that the presence of trespassers being unpredictable as compared with that of licensees, this unpredictability must not be allowed to impose on the occupier a duty to give his mind to all the possible circumstances in which a trespasser might come on to his land. If this branch of the law is based on 'ordinary humanity' it would seem c evident that there must be a relationship between the degree of expectation and the degree of danger. In the case of a minefield, as in *Adams v Naylor*²⁰, or a live electric rail, an ordinarily humane man would regard it as incumbent on him to take precautions to protect intruders against the mortal danger which these objects present although the likelihood of there being intruders was much less than that which would cause him to take precautions to protect intruders against more innocuous d perils. Furthermore, the relevant likelihood is that of the trespasser's presence at the place and time of danger. If the danger is created by an occasional or intermittent activity on the land, such as putting machines or vehicles in motion, the test of the creation of the occupier's liability to the injured trespasser is his expectation of a trespasser's presence at the point of danger at that moment of activity. Whereas e if the danger lies in some permanent condition of the land, such as a live rail, the test is his expectation of some trespasser's presence at the point of danger at any time while that condition continues to exist. Thirdly, in the case of children, the degree of attractiveness to children of something present on the land, is relevant to the occupier's expectation that child trespassers will come on to his land and will approach the point of danger, as well as being relevant to the kind of precaution he must take f to protect them from the danger.

My Lords, an occupier's expectation of a trespasser's presence, like his knowledge of a concealed danger, also involves two mental elements: actual knowledge of physical facts which indicate that trespassers are likely to come on to the land; and appreciation of the resulting likelihood. For reasons similar to those which I have indicated I think that, as the law has now developed, the test of appreciation of the likelihood of trespass is whether a reasonable man knowing only the physical facts g which the occupier actually knew, would appreciate that a trespasser's presence at the point and time of danger was so likely that in all the circumstances it would be inhumane not to give to him effective warning of the danger or, in the case of a child too young to understand a warning, not to take steps to convey to his infant intelligence that he must keep away. I do not think that a judge or jury would find any difficulty in applying this test.

h I would then seek to summarise the characteristics of an occupier's duty to trespassers on his land which distinguishes it from the statutory 'common duty of care' owed to persons lawfully on his land under the Occupiers' Liability Act 1957, and from the common law duty of care owed by one man to his 'neighbour', in the Atkinian sense, where the relationship of occupier and trespasser does not subsist between them. To do so does involve rejecting Lord Hailsham LC's formulation i of the duty in *Addie v Dumbreck*²¹ as amounting to an exclusive or comprehensive statement of it as it exists today. It takes account, as this House as the final expositor of the common law should always do, of changes in social attitudes and circumstances and gives effect to the general public sentiment of what is 'reckless' conduct as it

19 [1964] 1 All ER 897, [1964] AC 1054

20 [1944] 2 All ER 21, [1944] 1 KB 750, *aff'd* [1946] 2 All ER 241, [1946] AC 543

21 [1929] AC at 365, [1929] All ER Rep at 4

has expanded over the 40 years which have elapsed since the decision in that case.

First, the duty does not arise until the occupier has actual knowledge either of the presence of the trespasser on his land or of facts which make it likely that the trespasser will come on to his land; and has also actual knowledge of facts as to the condition of his land or of activities carried out on it which are likely to cause personal injury to a trespasser who is unaware of the danger. He is under no duty to the trespasser to make any enquiry or inspection to ascertain whether or not such facts do exist. His liability does not arise until he actually knows of them.

Secondly, once the occupier has actual knowledge of such facts, his own failure to appreciate the likelihood of the trespasser's presence or the risk to him involved, does not absolve the occupier from his duty to the trespasser if a reasonable man possessed of the actual knowledge of the occupier would recognise that likelihood and that risk.

Thirdly, the duty when it arises is limited to taking reasonable steps to enable the trespasser to avoid the danger. Where the likely trespasser is a child too young to understand or heed a written or a previous oral warning, this may involve providing reasonable physical obstacles to keep the child away from the danger.

Fourthly, the relevant likelihood to be considered is of the trespasser's presence at the actual time and place of danger to him. The degree of likelihood needed to give rise to the duty cannot, I think, be more closely defined than as being such as would impel a man of ordinary humane feelings to take some steps to mitigate the risk of injury to the trespasser to which the particular danger exposes him. It will thus depend on all the circumstances of the case: the permanent or intermittent character of the danger; the severity of the injuries which it is likely to cause; in the case of children, the attractiveness to them of that which constitutes the dangerous object or condition of the land; the expense involved in giving effective warning of it to the kind of trespasser likely to be injured, in relation to the occupier's resources in money or in labour.

My Lords, on the findings of the trial judge in the instant appeal, I find no difficulty in inferring that through the eyes or ears of one or other of their servants the appellants did know the physical facts that made it likely that little children playing in Bunces Meadow would trespass on their line and that if they did so would run a serious risk of grave if not mortal injury from the electric rail. Breach of the other characteristics of the duty which then arose, is in my view, established. I would, therefore, dismiss this appeal.

It might, however, leave this branch of the common law of England still in confusion if this House did not state categorically the respects in which the test of an occupier's duty to a trespasser differs from that stated by the majority of the Court of Appeal in *Videan v British Transport Commission*¹ and reiterated by the whole court in *Kingzett v British Railways Board*² despite the intervening adverse comment by the Privy Council in *Quinlan's case*³.

In the instant case the trial judge felt that he was bound to follow the reasoning of *Videan's case*¹ and *Kingzett's case*². The Court of Appeal⁴ felt able to decide it without recourse to *Videan's case*¹, by treating the stationmaster's failure to do anything except to warn the police when children had trespassed on the land two months before, as falling within Lord Hailsham LC's formula in *Addie v Dumbreck*⁵ as 'an act done with reckless disregard of the presence of a trespasser'. This was, I think, unduly censorious of the stationmaster as an individual. It was unnecessary to apportion among their individual servants the blame which lay on the appellants. The reckless act was that of the fictitious person, the appellants themselves, in allowing the deadly current to flow through the live rail when, through one or more of their servants they knew the physical facts which made it likely that a little child would stray from Bunces Meadow and come in contact with the rail.

The test propounded by the majority of the Court of Appeal in *Videan's case*¹ is,

1 [1963] 2 All ER 860, [1963] 2 QB 650

4 [1971] 1 All ER 897, [1971] 2 QB 107

2 (1968) 112 Sol Jo 625

5 [1929] AC at 365, [1929] All ER Rep at 4

3 [1964] 1 All ER 897, [1964] AC 1054

a in my view, wrong in three respects. (1) It draws an unwarrantable distinction between a 'static' condition of the occupier's land and an 'activity' which the occupier carries out on it. In respect of activities of the occupier on the land it accords the trespasser the status of 'neighbour' vis-à-vis the occupier despite the fact that he has forced this relationship on the occupier against the latter's will and by a wrongful act done to the occupier. (2) It treats the source of the relationship which gives rise to the occupier's duty towards a trespasser in respect of 'activities' as mere foreseeability of the trespasser's presence, just as in the case of someone lawfully on his land. This suggests that there is some duty on the occupier to make inspections or enquiries in order to acquaint himself of the likelihood of a trespasser's coming on to his land. There is no such duty. (3) It treats the duty of the occupier to the trespasser in respect of 'activities' as identical with his duty to persons lawfully on his land instead of the more restricted duty to take reasonable steps to enable the trespasser to avoid concealed dangers resulting from the existence of facts actually known to the occupier.

In the instant appeal your Lordships are concerned only with the liability of an occupier of land towards a trespasser whose presence on the land is a legal wrong committed by the trespasser on the occupier himself. This is not necessarily the same as the liability of some other person, who carries on an activity on the land with the permission of the occupier, towards a person who, although a trespasser vis-à-vis the occupier, commits no legal wrong on him who carries on the activity. There are three cases at first instance in which it has been held by judges of great eminence that a contractor, who is not the occupier of land, owes to trespassers on the land the ordinary common law duty of care owed by one man to his neighbour. That he is a trespasser vis-à-vis the occupier was treated as relevant only to the foreseeability of his presence. (See *Buckland v Guildford Gas Light and Coke Co*⁶, *Davis v St Mary's Demolition & Excavation Co*⁷ and *Creed v John McGeoch & Sons Ltd*⁸.) In *Videan's* case⁹ it was asserted baldly that there was neither rhyme nor reason why the occupier's liability to a trespasser should differ from that of a contractor. There is at least one possible reason in logic and in law. Disapproval of the ratio decidendi of *Videan's* case⁹ does not necessarily involve any conflict with the decisions in the three contractors' cases to which I have referred. The instant case is not an appropriate one in which to deal with the liability to a trespasser of persons who are not the occupiers of the land on which the trespass is committed.

Appeal dismissed.

Solicitors: *Evan Harding* (for the appellants); *Parker, Fogg & Pinsent* (for the respondent).

S A Hatteea Esq Barrister.

Practice Direction

FAMILY DIVISION

Ward of court – Practice – Proof of date of birth of the minor.

At or before the time of the first hearing of an originating summons for wardship proof of the date of birth of the minor should, wherever possible, be given by lodgment of a birth certificate (which, unless otherwise directed, need not be exhibited to an affidavit). Failing this, directions as to proof of birth will be given by the registrar. When it is established, the date of birth will be recorded in the Register of Wards.

COMPTON MILLER
Senior Registrar

18th February 1972

6 [1948] 2 All ER 1086, [1949] 1 KB 410	8 [1955] 3 All ER 123, [1955] 1 WLR 1005
7 [1954] 1 All ER 578, [1954] 1 WLR 592	9 [1963] 2 All ER 860, [1963] 2 QB 650

Note

Libman v General Medical Council

PRIVY COUNCIL

LORD HAILSHAM OF ST MARYLEBONE LC, LORD CROSS OF CHELSEA AND LORD KILBRANDON
5th, 6th, 7th, 20th OCTOBER 1971

Privy Council – Medical Act appeal – Appeal from determination of disciplinary committee of General Medical Council – Right of appeal – Nature of appeal – Circumstances in which Privy Council may reverse a decision of disciplinary committee.

Note

For appeals from the disciplinary committee of the General Medical Council, see 9 Halsbury's Laws (3rd Edn) 377, para 882, and 26 *ibid* 71, 72, para 149.

Cases referred to in opinion

Bhattacharya v General Medical Council [1967] 2 AC 259, [1967] 3 WLR 498, Digest (Cont Vol C) 664, 26c.

Felix v General Dental Council [1960] 2 All ER 391, [1960] AC 704, [1960] 2 WLR 934, 33 Digest (Repl) 567, 299.

Fox v General Medical Council [1960] 3 All ER 225, [1960] 1 WLR 1017, 124 JP 467, Digest (Cont Vol A) 521, 520a.

Sivarajah v General Medical Council [1964] 1 All ER 504, [1964] 1 WLR 112, Digest (Cont Vol B) 519, 47Aa.

Appeal

This was an appeal by Julius Libman against a determination of the disciplinary committee of the General Medical Council dated 4th March 1971 whereby the appellant was found guilty of serious professional misconduct and his registration was suspended for six months. The disciplinary committee found that the appellant, a registered medical practitioner, had committed sexual intercourse with a patient, Mrs Jean Wroe, on 11th March 1970 at his consulting room, and subsequently, both personally and through his solicitors, had made improper attempts, including the offer of sums of money, to persuade Mr and Mrs Wroe to refrain from making and pursuing a complaint of his conduct to the General Medical Council.

J P Comyn QC and *J Hamilton* for the appellant.

A B Hidden for the General Medical Council.

LORD HAILSHAM OF ST MARYLEBONE LC. This is an appeal from the disciplinary committee of the General Medical Council given on 4th March 1971 by which the appellant was found guilty of serious professional misconduct and the disciplinary committee directed the suspension of his registration for six months.

The appellant is a consultant physician of hitherto unblemished reputation who had been carrying on practice as a medical practitioner since 1929. The complainants were a married couple referred to hereafter, and respectively, as Mr and Mrs Wroe. It was conceded that, at the time of the matters complained of in the charges against the appellant, Mrs Wroe was the patient of the appellant, having been referred to him as consultant by her general practitioner, Dr Kay, for advice on an asthmatic condition which may have been partly psychological in origin. There were a number of matters in the complaint which were not sustained. The order of the disciplinary committee was based on two principal findings, the first that the appellant had sexual intercourse with Mrs Wroe on 11th March 1970 at his consulting room at 28 St John Street, Manchester; the second that he subsequently made, both personally and through his solicitors, improper attempts, including the offer of money, to

a persuade Mr and Mrs Wroe to refrain from making and pursuing a complaint of his conduct to the General Medical Council.

As regards the latter of the two adverse findings, it was common ground that the appellant had in fact offered sums up to £10,000 to Mr and Mrs Wroe as the price of their silence about the matter complained of. The appellant conceded that, in the event of the finding of the disciplinary committee on the alleged sexual intercourse of 11th March 1970 being sustained in the course of this appeal, the appeal also failed in relation to this additional adverse finding. It was also conceded by the appellant that, in the event of the findings being sustained the penalty inflicted could not be complained of on the ground of undue severity. Before dealing with the merits of the appeal it is appropriate to explain that, at the conclusion of his argument, their Lordships were invited by counsel for the appellant to make some general observations on the nature of the jurisdiction exercised by the judicial committee in proceedings of this nature. In fact, in order to give full weight to the appellant's argument, it is necessary to do so.

The discipline of the medical profession is based on the provisions of Part V of the Medical Act 1956 (ss 32-39) as amended, and in particular as amended by the Medical Act 1969. The appellate jurisdiction of the Board is defined under s 36 of the principal Act as amended by s 14 of the 1969 Act. The relevant section is s 36 (3) of the principal Act and this reads as follows:

(3) At any time within twenty-eight days of the service of a notification under subsection (1) of this section, the person on whom it was served may, in accordance with such rules as Her Majesty in Council may by Order provide for the purposes of this section, appeal to Her Majesty in Council; and the Judicial Committee Act, 1833, shall apply in relation to the Disciplinary Committee as it applies to such courts as are mentioned in section three of that Act (which provides for the reference to the Judicial Committee of the Privy Council of appeals to Her Majesty in Council).

'The power conferred by this subsection to make an Order shall include power to vary or revoke the Order by a subsequent Order made in the like manner, and any Order in Council under this subsection shall be subject to annulment in pursuance of a resolution of either House of Parliament.'

The proceedings before the disciplinary committee are governed by the General Medical Council Disciplinary Committee (Procedure) Rules Order of Council 1970¹ and the proceedings for the hearing of an appeal before the Judicial Committee by the Judicial Committee (Medical Rules) (No 2) Order 1971². Both these statutory instruments are under Parliamentary control and possess the legal force of Acts of Parliament. During the course of argument on the extent and exercise of this jurisdiction their Lordships were referred to *Felix v General Dental Council*³, a decision under the parallel provisions of the Dentists Act 1957; to *Fox v General Medical Council*⁴; to *Sivarajah v General Medical Council*⁵; and to *Bhattacharya v General Medical Council*⁶. Of these authorities, the account of the jurisdiction by Lord Radcliffe in *Fox v General Medical Council*⁷ is the fullest and perhaps the best, but their Lordships draw the following general propositions from all four decisions:

(1) The appeal lies of right by the statute and the terms of statute do not limit or qualify the appeal in any way, so that the appellant is entitled to claim that it is in a

1 SI 1970 No 596

2 SI 1971 No 393

3 [1960] 2 All ER 391 at 397, [1960] AC 704 at 716

4 [1960] 3 All ER 225, [1960] 1 WLR 1017

5 [1964] 1 All ER 504, [1964] 1 WLR 112

6 [1967] 2 AC 259 at 265

7 [1960] 3 All ER at 226-228, [1960] 1 WLR at 1020-1022

general sense nothing less than a rehearing of his case and a review of the decision. See per Lord Radcliffe in *Fox v General Medical Council*⁸.

(2) Notwithstanding the generality of the above language, the actual exercise of the jurisdiction is severely limited by the circumstances in which it can be invoked. The appeal is not by way of re-hearing in the sense that the witnesses are heard afresh or the evidence gone over again (see per Lord Radcliffe⁶). This, amongst other things, means that there is a heavy burden on an appellant who wishes to displace a verdict on the grounds that the evidence alone makes the decision unsatisfactory.

(3) Beyond a bare statement of its findings of fact, the disciplinary committee does not in general give reasons for its decision as in the case of a trial in the High Court by judge alone from which an appeal by way of rehearing lies to the Court of Appeal (see per Lord Radcliffe⁹). It follows from this that the only circumstances in which an appellate court can reverse a view of the facts taken by the disciplinary committee would be a case where, on examination, it would appear that the committee had misread the evidence to such an extent that they were not entitled to make a finding in the state of the evidence presented before them.

(4) The legal assessor who assists the committee at its hearing is not a judge, and his advice to the committee is not a summing up, and no analogy with a criminal appeal against a conviction before a judge and jury can properly be drawn. The legal assessor simply advises the committee in camera on points of law and reports his advice in open court after he has given it. The committee under its president are masters both of law and of the facts and what might amount to misdirection in law by a judge to a jury at a criminal trial does not necessarily invalidate the committee's decision. Where a criticism is made of the legal adviser's account of his advice the question is whether it can fairly be thought to have been of sufficient significance to the result to invalidate the decision. See *Fox v General Medical Council*¹⁰ and per Lord Guest in *Sivarajah v General Medical Council*¹¹.

In the result, although the jurisdiction conferred by the statute is unlimited, the circumstances in which it is exercised in accordance with the rules approved by Parliament are such as to make it difficult for an appellant to displace a finding or order of the committee unless it can be shown that something was clearly wrong either (i) in the conduct of the trial or (ii) in the legal principles applied or (iii) unless it can be shown that the findings of the committee were sufficiently out of tune with the evidence to indicate with reasonable certainty that the evidence had been misread. Or, of course, an appellant can rely cumulatively or in the alternative on any combination of the three. In the present case, for instance, counsel for the appellant relied on criticisms of the assessor's advice to supplement what he alleged was the weakness of the evidence against the appellant.

It is against this background and within this legal framework that the present appeal falls to be considered. [His Lordship then considered the grounds of appeal and concluded:] The result must be that the appeal fails, being basically an appeal against the findings of a committee on the matter of fact on which there was ample evidence to entitle them to come to the conclusion they did. In the result their Lordships have humbly advised Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Hempsons* (for the appellant); *Waterhouse & Co* (for the General Medical Council).

S A Hatteea Esq Barrister.

⁸ [1960] 3 All ER at 226, [1960] 1 WLR at 1020

⁹ [1960] 3 All ER at 227, 229, [1960] 1 WLR at 1021, 1023

¹⁰ [1960] 3 All ER 225, [1960] 1 WLR 1017

¹¹ [1964] 1 All ER at 507, [1964] 1 WLR at 116, 117

Cassell & Co Ltd v Broome and another

HOUSE OF LORDS

LORD HAILSHAM OF ST MARYLEBONE LC, LORD REID, LORD MORRIS OF BORTH-Y-GEST, VISCOUNT DILHORNE, LORD WILBERFORCE, LORD DIPLOCK AND LORD KILBRANDON

26th, 29th, 30th NOVEMBER, 1ST, 2ND, 3RD, 6TH, 7TH, 8TH, 9TH, 10TH, 13TH, 15TH, 16TH, 17TH
20TH DECEMBER 1971, 23RD FEBRUARY 1972

Libel – Damages – Exemplary or punitive damages – Principles on which exemplary damages awarded – Whether appropriate cases for award restricted to categories laid down in Rookes v Barnard^a.

c Libel – Damages – Exemplary or punitive damages – Categories in Rookes v Barnard^a – Calculation that profit would exceed compensation payable to the injured person – Necessity to show knowledge that what was done was against law and decision to persist with it because prospects of material advantage outweighed prospects of material loss – Unnecessary to show defendant had made arithmetical calculation that profit would exceed loss.

d Libel – Damages – Exemplary or punitive damages – Categories in Rookes v Barnard^a – Direction to jury – Direction that exemplary damages to be awarded ‘if, but only if’ proposed compensatory damages insufficient to punish defendant – Direction to jury that exemplary damages to be additional to compensatory damages – Whether sufficient.

e Libel – Damages – Exemplary or punitive damages – Joint defendants – Award of single sum – Degrees of blameworthiness – One defendant more blameworthy than other – No necessity to split damages between defendants according to blameworthiness – Sum to be that appropriate for least blameworthy.

f Damages – Exemplary damages – Oppressive, arbitrary or unconstitutional conduct by servants of the government – Servants of the government – Class extending to local government officials, police and others exercising governmental functions.

Damages – Exemplary damages – Deceit – Whether exemplary damages can be awarded.

Pleading – Damages – Exemplary damages – No need to plead.

g Judgment – Judicial decision as authority – Decision of House of Lords – Decision per incuriam – Whether Court of Appeal bound to follow decision.

*h A wrote a book entitled ‘The Destruction of Convoy PQ17’. The book was about one of the great naval disasters of the second world war in which a large number of merchant vessels in convoy PQ17 were destroyed and many lives lost. B was the officer commanding the naval ships escorting the convoy at the time of the disaster. The book placed the blame for the disaster on B, and contained grave imputations on his conduct. In writing the book A knew fully what he was doing and persisted with it in spite of repeated warnings from the most authoritative sources that the relevant passages in the book were defamatory of B. A’s view was that it was possible to say ‘some pretty near the knuckle things about’ B and others involved in the episode
j ‘but if one says it in a clever enough way, they cannot take action’. Nevertheless A’s thesis was stated sufficiently plainly for an experienced publisher to understand perfectly well its meaning. A’s original publishers, W K Ltd, refused to publish the book on the ground that it was ‘a continuous witch hunt of B’. They had been advised that ‘the book reeks of defamation’. A then offered the book to C Ltd who*

agreed to publish it. C Ltd were warned by W K Ltd that they had rejected the book on the ground that it was libellous. B himself also warned C Ltd on several occasions that if they published the book without substantial modification they must expect an action for libel from him. Nevertheless C Ltd went ahead and published a hardback edition of the book with a dust jacket, the advertisement on which in terms indicated that C Ltd were well aware of the full implication of the passages complained of and were prepared to sell the book on the basis of this sensational interpretation of the naval disaster. B issued a writ for libel against C Ltd and A and included in his reamended statement of claim the following plea: '[B] will assert that the defendants and each of them calculated that the money to be made out of the said book containing the passages complained of would probably exceed the damages at risk (if any) and that [B] is consequently entitled to exemplary damages'. In his summing-up the judge directed the jury that having considered whether B was entitled to compensatory damages they were to go on and ask whether B had proved that he was entitled to exemplary damages and to ask, 'What additional sum should be awarded him by way of exemplary damages?' The judge asked them to underline the word 'additional' because he wanted to know 'how much more do you award over and above the compensatory damage'. He also directed the jury that they should award a single sum by way of exemplary damages and stated that, if they were to ask whether they should award a larger sum against one of the defendants if they thought him more blameworthy, the answer to that question was No. He further explained that a single sum was to be awarded against both defendants. The jury, having found that the words complained of were defamatory and untrue, awarded B damages of £40,000 against both defendants, assessing the compensatory damages at £15,000 and the exemplary damages at £25,000. A and C Ltd appealed against the award of damages contending inter alia that the judge's direction on the question of exemplary damages failed to comply with the requirements laid down by the House of Lords in *Rookes v Barnard*^b. The Court of Appeal^c dismissed the appeal, holding that the decision of the House in *Rookes v Barnard*^b was not good law since it had been arrived at per incuriam and without argument on the point by counsel. The court further held that in any event the judge's direction complied with the requirements of *Rookes v Barnard*^b. C Ltd appealed on the question of exemplary damages to the House of Lords.

Held – (i) (Viscount Dilhorne and Lord Wilberforce dissenting) The decision of the House in *Rookes v Barnard*^b had correctly formulated the principles of law governing the circumstances in which exemplary damages, i.e. damages by way of punishment of the defendant in excess of those necessary to compensate the plaintiff for the injury done to him, might be awarded to a plaintiff in the case of certain torts; the principles enunciated in that decision were applicable to defamation cases; the decision could not be said to have been made per incuriam since it had been arrived at after a full consideration of the authorities and the House was not bound to limit its conclusions within any formulation which counsel had thought fit to formulate (see p 807 f, p 823 c, p 827 d to g, p 833 j, p 835 j to p 836 a, p 841 g and h, p 842 h, p 846 f, p 847 c, p 870 f and g, p 872 c, p 873 d and e, p 875 a and b and p 877 f, post).

Rookes v Barnard [1964] 1 All ER 367 followed.

McCarey v Associated Newspapers Ltd [1964] 3 All ER 947, *Broadway Approvals Ltd v Odhams Press Ltd* [1965] 2 All ER 523, *Fielding v Variety Incorporated* [1967] 2 All ER 497 and *Mafo v Adams* [1969] 3 All ER 1404 approved.

E Hulton & Co v Jones [1908-10] All ER Rep 29 and *Ley v Hamilton* (1935) 153 LT 384 distinguished.

Uren v John Fairfax & Sons Pty Ltd (1967) 117 CLR 118 and *Australian Consolidated Press Ltd v Uren* [1967] 3 All ER 523 considered.

^b [1964] 1 All ER 367

^c [1971] 2 All ER 187

a (ii) (Viscount Dilhorne, Lord Wilberforce and Lord Diplock dissenting) On the basis of the principles formulated in *Rookes v Barnard*^d the jury's award of £25,000 exemplary damages against the defendants should be upheld for the following reasons—

b (a) there was ample evidence to leave to the jury on which they could find that the case fell within the second category of cases laid down in *Rookes v Barnard*^d in which it was permissible to award exemplary damages, ie that the defendants' conduct had been calculated to make a profit for them which might well exceed the compensation payable to B as damages; to bring a case within the second category it was necessary to show (1) knowledge that what was proposed to be done was against the law or a reckless disregard whether what was proposed to be done was illegal or legal, and (2) a decision to carry on doing it because the prospects of material advantage outweighed the prospects of material loss; it was not necessary that the defendant should have made an arithmetical calculation that the plaintiff's damages if he sued to judgment would be smaller than the defendant's profit (see p 812 a and b, p 813 d and g to j, p 830 g and h, p 831 a to d, p 839 b and c, p 843 e to h and p 875 to p 876 c and e, post);

d (b) although not as clear as it might have been, the judge's direction was adequate to convey to the jury that they should make an award of exemplary damages 'if, but only if' they were satisfied that the sum they had in mind to award as compensation was inadequate to punish the defendants for their conduct; the emphasis placed by the judge on the word 'additional' in explaining to the jury that an award of exemplary damages would be additional to any compensatory damages was sufficient, taken in the context of the summing-up as a whole, to convey to the jury the necessary requirements for an award of exemplary damages (see p 816 a to e, p 839 h, e p 844 g and h, p 845 c and e and p 877 h, post);

f (c) when a plaintiff elected to sue more than one defendant in the same action in respect of the same publication only one sum could be awarded against the defendants by way of exemplary damages; in such circumstances the sum awarded could not be higher than the lowest sum for which any of the defendants could be held liable; the judge's direction was sufficient to make clear to the jury that, if different sums by way of exemplary damages were appropriate for each of the two defendants, they were to award the lower against both (see p 817 c to f, p 818 e and f, p 840 d to g, p 845 f, and p 877 h, post);

g (d) since the jury was the only legal and constitutional tribunal for deciding on the award of damages in libel cases an appellate court should only interfere with an award where it was so manifestly too large that no reasonable jury, properly directed, could possibly have come to it; although the award of exemplary damages was exceptionally high it was impossible to say that no jury of reasonable men could have reached that sum (see p 819 a to d, p 820 f, p 841 b, p 845 f and h, p 846 b and p 878 b, post).

h Per Lord Hailsham of St Marylebone LC, Lord Reid, Lord Wilberforce, Lord Diplock and Lord Kilbrandon. Decisions of the House of Lords are binding on the Court of Appeal and it is not open to that court to advise judges to ignore decisions of the House on the ground that they were decided per incuriam or are unworkable (see p 809 d to g, p 835 h, p 859 h, p 874 f and p 878 f, post. Furthermore (per Lord Hailsham of St Marylebone LC and Lord Diplock) although it is open to an appellate court to decline to follow one of its own previous decisions on the ground that it was decided per incuriam, the Court of Appeal is not entitled to disregard a decision of the House of Lords, nor is a judge of the High Court entitled to disregard a decision of the Court of Appeal, on that ground (see p 809 h and p 874 h, post).

i Per Lord Hailsham of St Marylebone LC, Lord Reid, Lord Diplock and Lord Kilbrandon. The first category of cases in which exemplary damages may be awarded, ie cases of oppressive, arbitrary or unconstitutional action by servants of the

government, should not be limited to servants of the government in the strict sense of the word but should be extended to others, such as local government officials or the police, who may be described as exercising governmental functions (see p 829 j to p 830 a, p 838 f, p 873 h and p 877 d, post).

Per Lord Hailsham of St Marylebone LC and Lord Diplock. The decision in *Rookes v Barnard*^e did not have the effect of extending the power to award exemplary damages to torts, such as deceit or negligence, where exemplary damages could not previously have been awarded (see p 828 g and h and p 874 f, post); dictum of Lord Widgery LJ in *Mafo v Adams* [1969] 3 All ER at 1410 disapproved.

Per Lord Hailsham of St Marylebone LC. The jury should normally be asked to award a single sum whether as solatium, ie full compensation to the plaintiff, or as exemplary damages. If, in order to avoid a second trial, they are asked a second question, they should be asked, in the event of their awarding exemplary damages, what smaller sum they would have awarded if they had confined themselves to solatium (see p 833 h, post).

Per Lord Hailsham of St Marylebone LC. In accordance with current practice exemplary damages need not be pleaded (see p 834 h, post).

Decision of the Court of Appeal sub nom *Broome v Cassell & Co Ltd* [1971] 2 All ER 187 affirmed on different grounds.

Notes

For the award of exemplary damages, see 11 Halsbury's Laws (3rd Edn) 223-225, para 391, and for cases on the subject, see 17 Digest (Repl) 76, 11-13.

For appeals in relation to excessive damages in actions for libel, see 24 Halsbury's Laws (3rd Edn) 121, para 225, and for damages against joint tortfeasors, see *ibid* 115, para 213, and for cases on these subjects, see 17 Digest (Repl) 180-189, 752-859, 175-177, 691-717.

Cases referred to in opinions

Addie (R) & Sons (Collieries) Ltd v Dumbreck [1929] AC 358, [1929] All ER Rep 1, 98 LJPC 119, 140 LT 650; *rvsg* sub nom *Dumbreck v Robert Addie & Sons (Collieries) Ltd* 1928 SC 547, 36 Digest (Repl) 120, 604.

Addis v Gramophone Co Ltd [1909] AC 488, [1908-10] All ER Rep 1, 78 LJKB 1122, 101 LT 466, 17 Digest (Repl) 74, 1.

Ashby v White (1703) 2 Ld Raym 938, Holt KB 524, 6 Mod Rep 45, 1 Salk 19; *rvsd* on other grounds (1704) 1 Bro Parl Cas 62, 17 Digest (Repl) 79, 22.

A-G for New South Wales v Perpetual Trustee Co Ltd [1955] 1 All ER 846, [1955] AC 457, [1955] 2 WLR 707, 119 JP 312, Digest (Cont Vol A) 978, *372a.

Australian Consolidated Press Ltd v Uren [1967] 3 All ER 523, [1969] AC 590, [1967] 3 WLR 1338, Digest (Cont Vol C) 285, 13b.

Bell v Midland Ry Co (1861) 10 CBNS 287, 30 LJCP 273, 4 LT 293, 17 Digest (Repl) 105, 200.

Benham v Gambling [1941] 1 All ER 7, [1941] AC 157, 110 LJKB 49, 164 LT 290, 36 Digest (Repl) 231, 1227.

Bocock v Enfield Rolling Mills Ltd [1954] 3 All ER 94, [1954] 1 WLR 1303, [1954] 2 Lloyd's Rep 103, Digest (Cont Vol A) 471, 763a.

Broadway Approvals Ltd v Odhams Press Ltd [1965] 2 All ER 523, [1965] 1 WLR 805, Digest (Cont Vol B) 493, 1910a.

Bulli Coal Mining Co v Osborne [1899] AC 351, [1895-99] All ER Rep 506, 68 LJPC 49, 80 LT 430, 33 Digest (Repl) 788, 618.

Chapman v Ellesmere (Lord) [1932] 2 KB 431, [1932] All ER Rep 221, 101 LJKB 376, 146 LT 538, 17 Digest (Repl) 175, 698.

Clark v Newsam (1847) 1 Exch 131, 16 LJEx 296, 9 LTOS 199, 11 JP 840, 17 Digest (Repl) 176, 704.

^e [1964] 1 All ER 367

- a** *Crouch v Great Northern Ry Co* (1856) 11 Exch 742, 25 LJEx 137, 26 LTOS 293, 8 Digest (Repl) 16, 79.
Dawson v McClelland [1899] 2 IR 486, 50 Digest (Repl) 445, 1431.
Dougherty v Chandler (1946) 46 SR (NSW) 370.
Egger v Viscount Chelmsford (or Davies) [1964] 3 All ER 406, [1965] 1 QB 248, [1964] 3 WLR 714, Digest (Cont Vol B) 493, 1998a.
- b** *English and Scottish Co-op Properties Mortgage and Investment Society Ltd v Odhams Press Ltd* [1940] 1 All ER 1, [1940] 1 KB 440, 109 LJKB 273, 162 LT 82, 32 Digest (Repl) 88, 1103.
Fay v Parker (1873) 53 NH 342.
Fielding v Variety Incorporated [1967] 2 All ER 497, [1967] 2 QB 841, [1967] 3 WLR 415, Digest (Cont Vol C) 632, 2127b.
- c** *Forsdike v Stone* (1868) LR 3 CP 607, 37 LJCP 301, 18 LT 722, 17 Digest (Repl) 193, 902.
Greenlands Ltd v Wilmshurst and London Association for Protection of Trade [1913] 3 KB 507, 83 LJKB 1, 109 LT 487; *rvsd* HL sub nom *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15, [1916-17] All ER Rep 452, 17 Digest (Repl) 175, 697.
Heydon's Case (1612) 11 Co Rep 5a, 77 ER 1150, 17 Digest (Repl) 175, 692.
- d** *Hill v Goodchild* (1771) 5 Burr 2790, 98 ER 465, 17 Digest (Repl) 175, 691.
Huckle v Money (1763) 2 Wils 205, 95 ER 768, 17 Digest (Repl) 188, 832.
Hulton (E) & Co v Jones [1910] AC 20, [1908-10] All ER Rep 29, 79 LJKB 198, 101 LT 831, 32 Digest (Repl) 18, 84.
James v Baird 1916 SC 510.
Jones v Secretary of State for Social Services, Hudson v Secretary of State for Social Services p 145 ante, [1972] 2 WLR 210.
- e** *Leith v Pope* (1779) 2 Wm Bl 1327, 96 ER 277, 17 Digest (Repl) 188, 836.
Lewis v Daily Telegraph Ltd, Same v Associated Newspapers Ltd [1963] 2 All ER 151, [1964] AC 234, [1963] 2 WLR 1063; *affg* [1962] 2 All ER 698, [1963] 1 QB 340, [1962] 3 WLR 50, 32 Digest (Repl) 85, 1073.
Ley v Hamilton (1935) 153 LT 384; *rvsg* (1934) 151 LT 360, 17 Digest (Repl) 188, 838.
- f** *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 42 LT 334, 44 JP 392, 17 Digest (Repl) 80, 30.
Loudon v Ryder [1953] 1 All ER 741, [1953] 2 QB 202, [1953] 2 WLR 537, 17 Digest (Repl) 76, 13.
McCarey v Associated Newspapers Ltd [1964] 3 All ER 947, [1965] 2 QB 86, [1965] 2 WLR 45, Digest (Cont Vol B) 492, 1769a.
M'Grath v Bourne (1876) IR 10 CL 160, 17 Digest (Repl) 184, *652.
- g** *Mafo v Adams* [1969] 3 All ER 1404, [1970] 1 QB 548, [1970] 2 WLR 72, Digest (Cont Vol C) 706, 583a.
Manson v Associated Newspapers Ltd [1965] 2 All ER 954, [1965] 1 WLR 1038, Digest (Cont Vol B) 494, 2121a.
Mechanical and General Inventions Co Ltd and Lehwess v Austin and the Austin Motor Co Ltd [1935] AC 346, [1935] All ER Rep 22, 104 LJKB 403, 153 LT 153, 51 Digest (Repl) 863, 4134.
- h** *Mediana, (Owners) v Comet (Owners etc), The Mediana* [1900] AC 113, [1900-3] All ER Rep 126, 69 LJP 35, 82 LT 95, 9 Asp MLC 41, 17 Digest (Repl) 76, 10.
Merest v Harvey (1814) 5 Taunt 442, [1814-23] All ER Rep 454, 1 Marsh 139, 128 ER 761, 17 Digest (Repl) 105, 203.
- j** *Minister of Social Security v Amalgamated Engineering Union* [1967] 1 All ER 210, [1967] AC 725, [1967] 2 WLR 516, Digest (Cont Vol C) 704, 4585a.
Morey v Woodfield [1963] 3 All ER 533n, [1964] 1 WLR 16n, Digest (Cont Vol A) 1190, 1051b.
Praed v Graham (1889) 24 QBD 53, 59 LJQB 230, 38 WR 103, 17 Digest (Repl) 101, 160.
Rookes v Barnard [1964] 1 All ER 367, [1964] AC 1129, [1964] 2 WLR 269, Digest (Cont Vol B) 217, 13a.

Scott v Musial [1959] 3 All ER 193, [1959] 2 QB 429, [1959] 3 WLR 437, Digest (Cont Vol A) 464, 165b.

Sears v Lyons (1818) 2 Stark 317, 2 Digest (Repl) 302, 98.

Smith v Streatfeild [1913] 3 KB 764, [1911-13] All ER Rep 362, 82 LJKB 1237, 109 LT 173, 17 Digest (Repl) 176, 706.

Smith's Newspapers Ltd v Becker (1932) 47 CLR 279, 6 ALJ 195, [1933] ALR 196, 33 Digest (Repl) 541, *192.

Uren v John Fairfax & Sons Pty Ltd (1967) 117 CLR 118, [1967] ALR 25, Digest (Cont Vol C) 285, *6d.

Ward v James [1965] 1 All ER 568, [1966] 1 QB 289, [1965] 2 WLR 461, [1965] 1 Lloyd's Rep 145, Digest (Cont Vol B) 219, 783a.

Wilkes v Wood (1763) Lofft 1, 98 ER 489, 17 Digest (Repl) 105, 194.

Williams v Currie (1845) 1 CB 841, 135 ER 774, 17 Digest (Repl) 105, 204.

Williams v Settle [1960] 2 All ER 806, [1960] 1 WLR 1072, Digest (Cont Vol A) 313, 685a.

Young v Bristol Aeroplane Co Ltd [1944] 2 All ER 293, [1944] KB 718, 113 LJKB 513, 171 LT 113; *aff'd* HL [1946] 1 All ER 98, [1946] AC 163, 115 LJKB 63, 174 LT 39, Digest (Cont Vol A) 967, 698a.

Yousouppoff v Metro-Goldwyn-Meyer Pictures Ltd (1934) 50 TLR 581, 32 Digest (Repl) 11, 26.

Appeal

This was an appeal by Cassell & Co Ltd against an order of the Court of Appeal (Lord Denning MR, Salmon and Phillimore LJJ) dated 4th March 1971 and reported [1971] 2 All ER 187 dismissing an appeal by the appellants against so much of the verdict and judgment for the first respondent, John Egerton Broome ('Captain Broome'), before Lawton J and a jury on 17th February 1970, as awarded Captain Broome £25,000 by way of exemplary damages for libel, in addition to an award of £15,000 by way of compensatory damages, against the appellants and second respondent, David Irving ('Mr Irving'), the publishers and author respectively of a book entitled 'The Destruction of Convoy PQ17' in which the libels were contained. The facts are set out in the opinion of Lord Hailsham of St Marylebone LC.

R J Parker QC and *Robert Alexander* for the appellants.

David Hirst QC and *A J Bateson* for Captain Broome.

Mr Irving did not appeal and was not represented.

Their Lordships took time for consideration.

23rd February. The following opinions were delivered.

LORD HAILSHAM OF ST MARYLEBONE LC.

NATURE OF THE PROCEEDINGS

My Lords, this appeal arises out of two consolidated actions for libel on the publication of a book. The first action was in respect of the 60 proof copies of the book, the second in respect of the principal or hardback edition of the book. We were told that there are separate proceedings still pending in respect of a paperback edition, published under licence by separate publishers. This paperback edition was mentioned at all stages in the proceedings as being potentially relevant to the question of damages. The House is not otherwise concerned with it.

The plaintiff in the action (the first respondent to this appeal) is a retired captain in the Royal Navy of unblemished reputation, who, at the time of the matters referred to in the book, held the rank of commander, and occupied the responsible position of officer commanding the escorts in the ill-fated convoy PQ17. He held active command throughout the war, and ended his wartime naval career with his present rank of captain in command of the battleship Ramillies. The subject-matter of the book, and its title, was 'The Destruction of Convoy PQ17' which, as is well known, was one of the great naval disasters of the war, in which all but 11 out of over 35 merchant vessels were sunk on their way to the Soviet Union and about 153 merchant seamen killed by enemy action and a vast quantity of war material lost. The

- a defendants in the action were respectively the author of the book, David Irving, who is the second respondent in the appeal, and was not represented before us, and the publishers of the book, Cassell & Co Ltd, who are the appellants.

THE RESULT OF THE TRIAL

- The trial of the action took, we were told, 17 days before Lawton J and a jury. In the result, on 17th February 1970, the jury found a verdict for the plaintiff and awarded against both defendants (1) the sum of £1,000 in respect of publication of the proof copies of the book, counsel for the plaintiff having waived any claim to exemplary damages on the proof copies, (2) £14,000 described as 'compensatory damages' in respect of the hardback edition, and, (3) in respect of the hardback edition a further sum of £25,000, described as 'by way of exemplary damages'. Judgment was entered for the sum of £40,000 against both defendants. The present appeal relates solely to the above sum awarded 'by way of exemplary damages' of £25,000.

- So far as relevant to this appeal, the entire proceedings before Lawton J were conducted by all the counsel concerned and summed up by the judge to the jury on the basis of the remarks of Lord Devlin in *Rookes v Barnard*¹ and of the direction following Lord Devlin's remarks by Widgery J in *Manson v Associated Newspapers Ltd*². This was not surprising since all the other members of the House of Lords had expressly concurred in Lord Devlin's opinion on this point, although without adding reasons of their own, and the opinion in *Rookes v Barnard*³ which was strictly an intimidation case, although obviously intended to apply generally, had been expressly applied to defamation proceedings by the Court of Appeal in *McCarey v Associated Newspapers Ltd*⁴ by Willmer, Pearson and Diplock LJ; in *Broadway Approvals Ltd v Odhams Press Ltd*⁵ by Sellers, Davies and Russell LJ; in *Fielding v Variety Incorporated*⁶, by Lord Denning MR, Harman and Salmon LJ; and in *Mafo v Adams*⁷, a case of deceit and other causes of action, the principles enunciated in *Rookes v Barnard*³ were accepted as applicable where the evidence justified it by Sachs, Widgery LJ and Plowman J.

- Except for two important passages and one minor passage of which complaint is made, and to which I will come later, Lawton J's direction to the jury was unexceptionable as an exposition of the law as it has been declared in the House of Lords by an unanimous House in *Rookes v Barnard*³ and applied by the Master of the Rolls, ten Lords Justices and one puisne judge in the above cases in the Court of Appeal and as it had been expounded by Widgery J in his direction to the jury in *Manson v Associated Newspapers Ltd*².

g

THE APPEAL TO THE COURT OF APPEAL⁸

- At the end of the 17 day trial the costs of the proceedings which, as between party and party, followed the event, must have already been enormous. Both defendants accepted the verdict on liability. The defendant Irving appealed on all the damages awarded. The present appellants appealed on the award of £25,000 'by way of exemplary damages'. The appeal lasted nine days before the Court of Appeal⁸ (Lord Denning MR, and Salmon and Phillimore LJ) and judgment was given on 4th March 1971 dismissing both appeals with costs, which must by this time, with the costs of the trial, even on a party and party basis, have greatly exceeded the amount of the award. Before the appellate committee of this House the appeal

- j 1 [1964] 1 All ER 367 at 407, 408, [1964] AC 1129 at 1220-1223
 2 [1965] 2 All ER 954, [1965] 1 WLR 1038
 3 [1964] 1 All ER 367, [1964] AC 1129
 4 [1964] 3 All ER 947, [1965] 2 QB 86
 5 [1965] 2 All ER 523, [1965] 1 WLR 805
 6 [1967] 2 All ER 497 [1967] 2 QB 841
 7 [1969] 3 All ER 1404, [1970] 1 QB 548
 8 [1971] 2 All ER 187, [1971] 2 WLR 853

lasted 13 working days, thus again greatly increasing the sum at stake, although by this time the defendant Irving had given up the struggle. a

JUDGMENT OF THE COURT OF APPEAL⁹

The Court of Appeal⁹ took a somewhat unusual course. On the view which they formed of the matter, which, as will appear, I have come to share although with greater hesitation than they expressed, they were for dismissing the appeal on the grounds that the criticisms of the direction by Lawton J failed, and that the mere size of the award was not one which, on accepted principles, could be attacked. If they had stopped there, it is possible, and perhaps likely, that the proceedings would have come to an end. It is doubtful if leave to appeal to this House would have been given, and if it had not, the two remaining parties would have been spared the costs of the 13 days' hearing in your Lordships' House. Even if leave to appeal had been given in the above circumstances a great deal of the time occupied before us would have been saved. b

The Court of Appeal⁹, however, did not stop at dismissing the appeal on these grounds. Whether or not they were encouraged by the zeal of plaintiff's counsel, they put in the forefront of their judgments the view that *Rookes v Barnard*¹⁰ was wrongly decided by the House of Lords and was not binding even on the Court of Appeal. It was, so they said, arrived at per incuriam and without argument from counsel. It ignored, they claimed, two previous decisions, in the House of Lords, *Ley v Hamilton*¹¹ and *E Hulton & Co v Jones*¹², which had approved awards of punitive or exemplary damages on lines inconsistent with Lord Devlin's opinion in *Rookes v Barnard*¹⁰. They felt themselves fortified in this view with the somewhat cool reception in the Commonwealth of *Rookes v Barnard*¹⁰, particularly in the Australian Supreme Court decision in *Uren v John Fairfax & Sons Pty Ltd*¹³ which had been affirmed, so far as regards Australian law, by the Judicial Committee of the Privy Council in the associated case of *Australian Consolidated Press Ltd v Uren*¹⁴. Neither Lord Denning MR nor Salmon LJ seem to have been in any way inhibited or embarrassed by the fact that each had been party to at least one of the decisions of the Court of Appeal applying *Rookes v Barnard*¹⁰ without question. Not content with all this, all three members of the Court of Appeal went further still and, besides declaring *Rookes v Barnard*¹⁰ to have been decided per incuriam and ultra vires, proceeded to say that it was 'unworkable', and, in the meantime, therefore, 'judges should direct juries in accordance with the law as it was understood before *Rookes v Barnard*¹⁰' which the court considered, to use the phrase of Lord Denning MR, as 'settled'. c

As sent to us by the Court of Appeal⁹, therefore, the appeal before us raised several questions of wide ranging importance. Quite apart from the merits of the respective litigants, these questions include the status of judgments and the relevance of precedent in this House, the circumstances when, if at all, decisions of this House may be questioned by the Court of Appeal, and judges of first instance directed by the Court of Appeal to disregard them. There is also the whole question of exemplary damages as canvassed in *Rookes v Barnard*¹⁰ and subsequent decisions. What began as a simple proceeding between a plaintiff and two defendants has assumed, at the expense of two of the litigants, the dimensions of a constitutional question and a general enquiry into one aspect (and perhaps more than one aspect) of the law of damages. d

THE COURSE TAKEN BY THE COURT OF APPEAL⁹

In view of their importance it is unavoidable that before entering into the merits e

⁹ [1971] 2 All ER 187, [1971] 2 WLR 853

¹⁰ [1964] 1 All ER 367, [1964] AC 1129

¹¹ (1935) 153 LT 384

¹² [1910] AC 20, [1908-10] All ER Rep 29

¹³ (1967) 117 CLR 118

¹⁴ [1967] 3 All ER 523, [1969] AC 590 f

a of the appeal I should discuss in a few paragraphs both the propriety and the desirability of the course taken by the Court of Appeal¹⁵. I desire to do so briefly and with studied moderation.

b From the point of view of the litigants it is obvious, I would have thought, that, on the view taken by the Court of Appeal¹⁵, the course taken was unnecessary. Private litigants have been put to immense expense, of which most must be borne by the loser, discussing broad issues of law unnecessary for the disposal of their dispute. If the Court of Appeal¹⁵ felt, as they were well entitled to do, that in the light of the Australian and other Commonwealth decisions *Rookes v Barnard*¹⁶ ought to be looked at again by the House of Lords, either generally or under the practice declaration of 1966¹⁷ they were perfectly at liberty to say so. More, they could have suggested that so soon as a case at first instance arose in which the ratio decidendi of *Rookes v Barnard*¹⁶ was unavoidably involved, the parties concerned might wish to make use of the so-called 'leap-frogging' procedure now available to them under the Administration of Justice Act 1969, and thus avoid one stage in our three-tier system of appeals. But to impose on these litigants, to whom the question was, on the court's view, unnecessary, the inevitable burden of further costs after all they had been through up to date was not, in my view, defensible.

d Moreover, it is necessary to say something of the direction to judges of first instance to ignore *Rookes v Barnard*¹⁶ as 'unworkable'. As will be seen when I come to examine *Rookes v Barnard*¹⁶ in the latter part of this opinion, I am driven to the conclusion that when the Court of Appeal described the decision in *Rookes v Barnard*¹⁶ as decided 'per incuriam' or 'unworkable' they really only meant that they did not agree with it. But, in my view, even if this were not so, it is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way and, if it were open to the Court of Appeal to do so, it would be highly undesirable. The course taken would have put judges of first instance in an embarrassing position, as driving them to take sides in an unedifying dispute between the Court of Appeal or three members of it (for there is no guarantee that other Lords Justices would have followed them and no particular reason why they should) and the House of Lords. But, much worse than this, litigants would not have known where they stood. None could have reached finality short of the House of Lords, and, in the meantime, the task of their professional advisers of advising them either as to their rights, or as to the probable cost of obtaining or defending them, would have been, quite literally, impossible. Whatever the merits, chaos would have reigned until the dispute was settled, and, in legal matters, some degree of certainty is at least as valuable a part of justice as perfection.

g The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young v Bristol Aeroplane Co Ltd*¹⁸ offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom. Even this House, since it has taken freedom to review its own decisions, will do so cautiously. That this is so is apparent from the terms of the declaration of 1966 itself where Lord Gardiner LC said¹⁷:

j 'Their lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

15 [1971] 2 All ER 187, [1971] 2 WLR 853

16 [1964] 1 All ER 367, [1964] AC 1129

17 See Note [1966] 3 All ER 77, [1966] 1 WLR 1234

18 [1944] 2 All ER 293, [1944] KB 718

Their lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so. In this connexion they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law. This announcement is not intended to affect the use of precedent elsewhere than in this House.' a

It is also apparent from the recent case of *Jones v Secretary of State for Social Services*¹⁹, where the decision in *Minister of Social Security v Amalgamated Engineering Union*²⁰ came up for review under the 1966 declaration¹, that the House will act sparingly and cautiously in the use made of the freedom assumed by this declaration. In addition, the last sentence of the declaration¹ as quoted above clearly affirms the continued adherence of this House to the doctrine of precedent as it has been hitherto applied to and in the Court of Appeal. b

THE MERITS OF THE APPEAL

It is now possible to turn to the merits of the case so far as these were canvassed before us on the assumption of the continued authority of the *Rookes v Barnard*² decision. Before us the appellants made three contentions: (i) that there was no evidence to be left to the jury that the conditions were fulfilled to bring the case within one of the three 'categories' of case listed by Lord Devlin in *Rookes v Barnard*³ as being appropriate for an award of punitive damages, and in particular the second, which was admittedly the only relevant category; (ii) that, even on the assumption that the first contention was wrong, Lawton J had misdirected the jury in at least two important matters; (iii) that in any event the award of £25,000 was excessive, and could not be sustained. In order to understand these contentions it is necessary to say something about the facts. c

THE FACTS ON WHICH THE BOOK WAS FOUNDED

The fate of the PQ 17 convoy is one of the most publicised, as well as one of the most tragic, naval operations of the second world war. The evidence showed that it had been written about many times, notably by Captain Roskill, RN, the official naval historian, and by the late Mr Godfrey Winn, whose book was said to have sold half a million copies. It is unnecessary to recapitulate the facts here. They are graphically described in the judgment of Lord Denning MR⁴. d

It is sufficient to say that the primary cause of the disaster flowed from an order to the convoy to scatter, which made the ships in it an easy prey to the aircraft and submarines by which they were attacked. This order to scatter was issued by the Admiralty in Whitehall and was due to a faulty appreciation by the Naval Staff, in particular, as is now known, by the then First Sea Lord himself, that the German battleship Tirpitz was at sea, and to a decision, also by the then First Sea Lord, to take the responsibility for the order on himself rather than leave the decision to the discretion of the naval officers on the spot. The naval officers on the spot, including Admiral Hamilton in command of the cruiser squadron, and Captain Broome, had no option but to obey, and the convoy was thus left to fan out on individual courses covering a vast area of sea. e

So far there can be no controversy. But the two naval officers, rightly considering that the order to scatter must denote the approach of a superior hostile surface force f

¹⁹ Page 145 ante, [1972] 2 WLR 210

²⁰ [1967] 1 All ER 210, [1967] AC 725

¹ See Note [1966] 3 All ER 77, [1966] 1 WLR 1234

² [1964] 1 All ER 367, [1964] AC 1129

³ [1964] 1 All ER at 410, 411, [1964] AC at 1226, 1227

⁴ [1971] 2 All ER 187, [1971] 2 WLR 853 g

- a sailed west in company. Admiral Hamilton was acting under precise orders from the Admiralty. Captain Broome was not. Captain Broome had proposed and Admiral Hamilton accepted that he should put himself under command of the Admiral commanding the cruisers. That this decision was courageous there can be no doubt. What has been subsequently disputed was whether it was as wise as it was certainly brave. Some have thought that it was no more than the inevitable reaction of gallant and experienced naval officers to the threat of surface action. Others have thought that its effect was to remove from the area of the convoy the only naval elements, which might have countered the U boat and air attacks, and thus to contribute to the extent of the convoy's losses. Which of these two views be correct it is not appropriate here to discuss. But what is relevant to the present appeal is that those who criticised the decision had previously fastened the responsibility on Admiral Hamilton.
- c It was one of the distinctive features of Mr Irving's book (which it may have shared with a German work with whose author he had collaborated) that it attempted to place responsibility for the withdrawal of the destroyers entirely or mainly on the shoulders of Captain Broome. This was a difficult thesis to sustain since Captain Broome was the junior officer of the two, and had only 'proposed' the course which both forces ultimately pursued. It also involved the propositions, both disputable, that the decision was wrong in the light of the information then available, and that the absence of the destroyers made a significant difference to the loss of life and material.
- d

From the start Captain Broome contended that the passages in the book relating to himself which it is not necessary to set out at length were defamatory. In his statement of claim he said that they meant and were intended and understood to mean:

- e ' . . . that [Captain Broome] was disobedient, careless, incompetent, indifferent to the fate of the merchants ships and/or by virtue thereof had wrongly withdrawn his destroyer force from the convoy and/or taken it closer to the German airfields than he had been ordered to and had thereby been largely responsible for or contributed extensively to the loss of the aforesaid ships and the effective destruction of more than two-thirds of the Convoy P.Q.17.'
- f In addition, at the trial it was contended that the ordinary and natural meaning of one of the relevant passages was that Captain Broome was a coward and for this reason 'needed no second bidding' to desert the convoy. The defendants both disputed that the book bore any of these meanings, but contended that without them the passages in the book were true. It is evident from their verdict and from the magnitude of the award of damages that the jury rejected the contentions of the defence, although how far and to what extent must be to some extent a matter of speculation.
- g

THE MATERIAL BEFORE THE JURY

- h From the commencement of the trial it was contended for Captain Broome that notwithstanding the limitations of *Rookes v Barnard*⁵, he was entitled to 'exemplary' or 'punitive' damages. The trial judge⁶ ruled (although on this point he was subsequently overruled by the Court of Appeal⁷) that, if so, he was bound to include a plea to this effect in his statement of claim, and the pleading consequently introduced into the statement of claim by way of reamendment affords a convenient summary of the way the case was then put. The pleader wrote:

- j 'The plaintiff will assert that the defendants and each of them calculated that the money to be made out of the said book containing the passages complained of would probably exceed the damages at risk (if any) and that the plaintiff is consequently entitled to recover exemplary damages.'

5 [1964] 1 All ER 367, [1964] AC 1129

6 [1971] 1 All ER 262

7 [1971] 2 All ER 187, [1971] 2 WLR 853

He then went on to give particulars. If established, the plea clearly puts the case within the second of the three exceptional categories listed by Lord Devlin in *Rookes v Barnard*⁸. The question for the judge was whether there was evidence to leave to the jury on which they could find that the case was indeed to be placed in this category. If there was such evidence, and if the jury were not misdirected, inclusion within the second category would have entitled (although not compelled) them to make some award on this account.

The appellants contended before the Court of Appeal⁹ and before us that there was no such evidence. In my opinion, this contention wholly fails. To convince us, they would in practice have to establish that there was no evidence on which a properly directed jury could find that at the time of publication they were fully aware the words bore and were intended and understood to bear the meanings, attached to them, in the statement of claim, since, if at the time of publication the words were known to bear these meanings, they were false to the knowledge of the appellants and published with that knowledge for profit. In my view, the meanings, or most of them, are sufficiently obvious from a casual reading of the book, and the inadequate attempts by the author or the publishers to provide an alternative meaning or an escape route by which they could argue the alternative before a jury by small modifications or carefully phrased ambiguities, are less an indication of innocence or naiveté than a clear-sighted appreciation of the danger that they faced. Mr Irving was not represented before us, but his case was strenuously advanced before the Court of Appeal⁹, and in another context (to be discussed later) we had to consider his case when counsel for the appellants expressly accepted as accurate Lord Denning MR's colourful account of his behaviour. It is abundantly plain from this account that Mr Irving at least knew, and carefully planned, what he was doing, that he went on with it in spite of repeated warnings from the most authoritative sources, that he conceived the book 'as a book with a difference as all men [that is including Captain Broome] were shown to be cowards', and that he prided himself on being able to say—

'some pretty near the knuckle things about these people [he was directly referring to Captain Broome's threat of proceedings] but if one says it in a clever enough way, they cannot take action'.

The rules of evidence preclude us from taking these admissions of his state of mind as evidence against the appellants. But, in my opinion, the 'near the knuckle things' said about Captain Broome in the course of this book, including the allegation that he was a coward, were said sufficiently plainly for an experienced publisher to know perfectly well what their meaning was and the fact that they were said 'in a clever enough way' should have told them plainly that they were said with deliberate intent to convey the meanings without incurring heavy damages.

But the case against the appellants does not stop at the obvious meanings to be attached to the passages in the book. Even if, which I could not easily accept, they did not understand the drift of the book at a first reading, they acquired the right to publish and they went on actually to publish in circumstances from which the jury were clearly entitled to infer that they went ahead with the most cold-blooded and clear-sighted appreciation of what they were doing.

The appellants were not the first publishers selected by Mr Irving. His original publishers were William Kimber Ltd, who ultimately refused to publish the book on the ground that the book was 'a continuous witch hunt of Captain Broome' having been advised by Captain Roskill, who gave evidence for Captain Broome, and perhaps by others, that 'the book reeks of defamation'. In the absence of evidence by either defendant at the trial, it is impossible to say how much of this was known to the

8 [1964] 1 All ER 367 at 410, 411, [1964] AC 1129 at 1226, 1227

9 [1971] 2 All ER 187, [1971] 2 WLR 853

a appellants. But it is certain that Mr William Kimber warned the appellants in unmistakable terms that his house had rejected the book precisely on the grounds that it was libellous, amongst others of Captain Broome. The undisputed response of the appellants was either flippant or cynical. Moreover, Captain Broome himself had warned them on several occasions that, if they published the book, as they did, in substantially the form in which he had seen it, they must expect an action for libel from himself. That they took these threats seriously can be seen from their reaction to the latest of them which followed the issue of the proof copies. On receipt of this, the appellants placed a stop on the book in the following terms:

'Will you please note that absolutely and positively not one single copy, on any pretext whatsoever, is to be removed from the House without reference to me.'

c In attempts to sell the serial rights their efforts were 'shot down' by three national Sunday newspapers presumably on the same grounds.

d What the full explanation of their subsequent publication may have been will never be known, since the appellants did not elect to give evidence. But, in the absence of any explanation, the jury were perfectly entitled to infer that they had calmly calculated that the risks attendant on publication did not outweigh the chances of profit. What is certain is that, insofar as they were aware that the passages complained of could be reasonably understood to bear the meanings attached to them by Captain Broome, including the allegation of cowardice, they published them knowing them in this sense to be false, since no effort was made at any stage to suggest that there was any material on which a reasonable publisher could base the belief that the passages complained of, if they bore these meanings, were true. In his judgment in the Court of Appeal¹⁰ Lord Denning MR lists other features of the case against the appellants on which the jury were entitled to base inferences. With most of these, except the reference to the paperback edition, which, contrary to what he says (perhaps per incuriam), was not published by the appellants but under licence by another publisher, I find myself in agreement. In particular, I concur in what was said in the Court of Appeal¹⁰ about the dust cover of the book, which, making every allowance for the popular style in such productions, and putting the most favourable interpretation on every phrase in it, seems, to my mind, in the absence of explanation, to indicate that the appellants were well aware of the full implication of the passages complained of and were prepared to sell the book on this sensational interpretation. In such circumstances to argue that there was no evidence from which the jury could infer that—

g 'the appellants had calculated that the money to be made out of the book containing the passages complained of would probably exceed the damages at risk (if any)'

h was, to my mind a somewhat forlorn hope, and nothing which counsel for the appellants said in the course of his strenuous and ably conducted argument has convinced me to the contrary. I will refer to the passage from Lord Devlin's speech in *Rookes v Barnard*¹¹ relating to the categories later for its proper interpretation, but I cannot see how, on any view, if these facts were proved to the satisfaction of a jury, properly directed, they are not sufficient to enable the jury to base inferences bringing the publication within the second category.

j THE DIRECTION ON THE RELATION BETWEEN THE TWO AWARDS

There was much more substance in, and I find much greater difficulty in deciding on, the appellants' second contention, which was based, not on Lord Devlin's three

¹⁰ [1971] 2 All ER 187, [1971] 2 WLR 853

¹¹ [1964] 1 All ER 367 at 410, 411, [1964] AC 1128 at 1226, 1227

listed categories, but on his exposition of the general conditions under which exemplary damages may be awarded after the conclusion of the three 'considerations' listed in the report¹², which, he says, ought always to be borne in mind. At this point, Lord Devlin said¹³:

"Thus a case for exemplary damages must be presented quite differently from one for compensatory damages; and the judge should not allow it to be left to the jury unless he is satisfied that it can be brought within the categories which I have specified. But the fact that the two sorts of damage differ essentially does not necessarily mean that there should be two awards. In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may of course be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then they can award some larger sum. [The italics are mine.] If a verdict given on such direction has to be reviewed on appeal, the appellate court will first consider whether the award can be justified as compensation, and, if it can, there is nothing further to be said. If it cannot, the court must consider whether or not the punishment is in all the circumstances excessive. There may be cases in which it is difficult for a judge to say whether or not he ought to leave to the jury a claim for exemplary damages. In such circumstances and in order to save the possible expense of a new trial, I see no objection to his inviting the jury to say what sum they would fix as compensation and what additional sum, if any, they would award if they were entitled to give exemplary damages. That is the course which he would have to take in a claim to which the Law Reform (Miscellaneous Provisions) Act, 1934, applied."

In my opinion, this passage contains a most valuable and important contribution to the law of exemplary damages which, prior to *Rookes v Barnard*¹⁴, had not, so far as I am aware, been adequately stressed in any previous case, and which, in my view, would retain, and possibly even increase, its value even if the categories in *Rookes v Barnard*¹⁴ were to be wholly rejected.

In essence the doctrine is that the award of a punitive element in damages, if it is ever permissible, must also remain discretionary, and, in order to give effect to the second of the three 'considerations'¹⁵, the judge should always warn a jury that they need not award anything, and must not do so unless they are satisfied that a purely compensatory award (in a sense which I will explain) is inadequate. It follows that whatever they do award should only be a sum which has taken into account the award of damages already notionally allowed as compensation, including, where appropriate, the 'aggravated' element required by a defendant's bad conduct, and should never exceed the amount by which the required penalty (if that is the right word) exceeds the required compensation. I shall revert to this feature of *Rookes v Barnard*¹⁴ later. But what is said in substance by the appellants in this case is that the summing-up failed to give effect to this important and, in my view, vital principle.

The learned judge directed the jury over two days and much that he said was irrelevant to the question of exemplary damages. Of what was relevant to exemplary damages, most was a direction to the jury about the second category and the evidence in the case relevant to it. This reflected the balance of argument by counsel during the case and it appears from a remark in the judgment of Phillimore LJ in the Court of Appeal¹⁶ that, in some sense at least, both counsel agreed that, dependent on the view which the jury took of the facts, Lawton J should leave the question of exemplary

¹² [1964] 1 All ER at 411, [1964] AC at 1227, 1228

¹³ [1964] 1 All ER at 411, [1964] AC at 1228

¹⁴ [1964] 1 All ER 367, [1964] AC 1129

¹⁵ [1964] 1 All ER at 411, [1964] AC at 1227

¹⁶ [1971] 2 All ER at 214, [1971] 2 WLR at 887

a damages to the jury. But there were two passages in the summing-up relevant to the present issue. The first was a passage on the first day of the summing-up when the judge, having directed the jury that punitive damages were in the nature of a fine, went on to give two examples from the criminal law carrying the moral that the punishment must neither be excessive nor inadequate to the gravity of the offence and said:

b 'If you are going to punish a man to show him that libel does not pay, provided, of course, it comes within Mr. Justice Widgery's definition [he was referring to *Manson v Associated Newspapers Ltd*¹⁷], what you do must be reasonable in all the circumstances, bearing in mind that it is a penalty.'

c The second, and more important, of the passages was on the second day of the summing-up when, after leaving an agreed list of questions to the jury, the learned judge said:

d '... as you will see, the issue of damages has been divided into two questions. The first one is No. 3, "What compensatory damages do you award the plaintiff?" You will remember that compensatory damages are compensation for something, they are not given to you. When you come to consider that question you must remember that this is a joint publication by [the appellants] and Mr. Irving. You do not award two different sums. You award one sum and you will leave the lawyers to work out what it means, but it is one sum. Do you all follow that? Then having decided what are the proper additional compensatory damages then you will go on and consider the fourth question, namely, "Has [Captain Broome] proved that he is entitled to exemplary damages?". It is for him to prove that he is entitled to it, not for the defendants to prove that he is not.

e This question has got to be divided up into a number of subsidiary questions and the reason for this is problems of law which arise, but you do not have to concern yourselves with those. That is my responsibility. There are two defendants and, as I have been at pains to point out to you during my summing-up, the case against each defendant on the issue of punitive damages is different, so you will have to consider the case against each defendant separately. I suggest you start with Mr. Irving and then go on to [the appellants]. In respect of each of them you will ask yourselves this question: "Has [Captain Broome] proved his entitlement against that defendant?". If the answer is Yes then you will have to go on and assess how much punitive damages should be awarded. If the answer is No he will get no punitive damages. At least that will be your finding. What the law is is another matter, but that will be your finding. Having carried out that

f operation in relation to Mr. Irving you should carry out exactly a similar operation in relation to [the appellants]. Remember all the time that letters written by Mr. Irving or to Mr. Irving, other than by [the appellants], are not evidence against [the appellants]. I cannot stress that too much. You will have to ask yourselves: "Has he proved that he is entitled to punitive damages against [the appellants]?". If the answer is No that is that. If the answer is Yes you will have to assess the damages. I have put all that into an omnibus lawyers' series of questions. I could have put it all into one question, but I came to the conclusion that it would probably be better for you. I will read paragraph 4 again. "Has [Captain Broome] proved that he is entitled to exemplary damages? If Yes, has he proved his entitlement against one or both of the defendants? If one only, against which one?". Then you see the last question under this heading, "What additional sum should be awarded him by way of exemplary damages?". Would

g you be good enough to underline the word "additional", because I want to know, and learned counsel want to know, if you do decide to award punitive damages, how much more do you award over and above the compensatory damage.'

h

i

What was said against this passage on behalf of the appellants was that this summing-up was defective in that it did not make it absolutely plain to the jury that before making any punitive award against the defendants they must first take into account and assess the punitive effect of any compensatory award (including any element of 'aggravated' damage) and only award such amount (if any) by which the appropriate penalty exceeded such award.

I am bound to say that I have found the greatest difficulty in accepting the summing-up on this point as adequate, and my difficulties were increased by two passages in the final speech of counsel for Captain Broome which, as counsel for the appellants persuasively argued, seemed to indicate that the respective awards of compensatory and punitive damages were entirely separate assessments and that one should not be balanced against the other. Insofar as counsel said this, and he appears to have done so, he was, in my opinion, entirely wrong. In the end, however, I have come to the conclusion that the judge's direction was just adequate to convey the impression intended in the passage of Lord Devlin's speech¹⁸ which had been accurately read to the jury by counsel for Mr Irving and that the jury were not in fact misled. In coming to this conclusion I have been impressed, as was the Court of Appeal¹⁹, by the stress the judge laid on the word 'additional' in the passage cited, by the fact that the form of the questions left to the jury (which did not include as it should have done, the words 'if any' in that relating to punitive damages) was agreed by counsel and by the fact that the line of the judge's summing-up was entirely in accord with the case for the appellants as it was put to the jury on their behalf, and that everyone seems to have assumed that the result of the jury's answers was that which in fact obtained. I desire, however, to say that the direction on this point, if sufficient, as I am constrained to say it was, was only barely sufficient, and that I trust that in future cases of this kind trial judges will stress the matter a good deal more clearly and with greater emphasis than was done here. In the present case I do not think that the judge can be blamed for putting the matter compendiously in a form which seems to have misled no one, which accorded with the way and with the emphasis with which it had been put to the jury on behalf of the appellants, and which, according to Phillimore LJ's observation²⁰ referred to above had, in some sense, been agreed.

A SINGLE AWARD OR TWO?

Less meritorious, in my view, was the second criticism of the direction put before us. This was in effect that the judge did not correctly direct the jury as to the principles on which a joint award of exemplary damages can be made against two or more defendants guilty of the joint publication of a libel in respect of which their relevant guilt may be different, and their means of different amplitude. With high regard for the judgments of Lord Denning MR and of Salmon LJ, I differ from both in what they said on this aspect of the matter, both as to the effect of the judge's summing-up and to what it ought to be in such cases. Lord Denning MR said¹:

'There is, of course, a difficulty. How is a jury to assess the one figure against two defendants? Are they to fix it at a high sum which they think the more blameworthy ought to pay or a low sum for the least blameworthy? That must be left to the jury. They may, if they choose, fix a figure in between. The judge can, I think, tell them that they can fix it as against the more blameworthy, expecting him to pay it; and leave the least blameworthy (if he is called on to pay) to recover contribution. In this case the judge left it to them without any specific direction. That was, I think, quite legitimate; and is no ground for disturbing the verdict.' [The italics are mine.]

Lord Denning MR then added:

¹⁸ [1964] 1 All ER at 411, [1964] AC at 1228

¹⁹ [1971] 2 All ER 187, [1971] 2 WLR 853

²⁰ [1971] 2 All ER at 214, [1971] 2 WLR at 887. See footnote 16, p 814, ante

¹ [1971] 2 All ER at 201, [1971] 2 WLR at 873

a 'In any case, however, I think [the appellants] are not at liberty to take this point. They did not ask judge or jury to split the damages. The judge told counsel the question he was going to put to the jury; and asked for their comments. That was the time for counsel to ask for the exemplary damages to be split. Not having asked, it is too late to ask in this court.'

b Salmon LJ appears to have thought that the award should reflect the amount due by the most guilty of the tortfeasors and he said²:

c '... it is well settled that where there are several defendants who have all committed a joint tort, there can be only one award of one sum of damages against all of them: *Greenlands Ltd v Wilmshurst*³. It may bear hardly on one or more of the defendants. The moral may be that you must be as careful in choosing your companions in tort as you are in choosing your companions when you go out shooting.' [The italics are again mine.]

d With respect to both judgments which, as will be seen, are arguably not quite consistent with one another, I think the effect of the law is exactly the opposite and that awards of punitive damages in respect of joint publications should reflect only the lowest figure for which any of them can be held liable. This seems to me to flow inexorably both from the principle that only one sum may be awarded in a single proceeding for a joint tort, and from the authorities which were cited to us by counsel for the appellants in detail in the course of his argument. Counsel referred us to *Heydon's case*⁴, *Clark v Newsam*⁵, *Hill v Goodchild*⁶, *Dawson v McClelland*⁷, *Greenlands Ltd v Wilmshurst*⁸, *Smith v Streatfeild*⁹, *Chapman v Lord Ellesmere*¹⁰ per Slessor LJ, *Dougherty v Chandler*¹¹, *Egger v Viscount Chelmsford*¹² and to the current edition of *Gatley*¹³. I think that the inescapable conclusion to be drawn from these authorities is that only one sum can be awarded by way of exemplary damages where the plaintiff elects to sue more than one defendant in the same action in respect of the same publication, and that this sum must represent the highest *common* factor, that is the *lowest* sum for which any of the defendants can be held liable on this score. Although we were concerned with exemplary damages, I would think that the same principle applies generally and in particular to aggravated damages, and that dicta or apparent dicta to the contrary can be disregarded. As counsel conceded, however, plaintiffs who wish to differentiate between the defendants can do so in various ways, for example, by electing to sue the more guilty only, by commencing separate proceedings against each and then consolidating, or, in the case of a book or newspaper article, by suing separately in the same proceedings for the publication of the manuscript to the publisher by the author. Defendants, of course, have their ordinary contractual or statutory remedies for contribution or indemnity so far as they may be applicable to the facts of a particular case. But these may be in applicable to exemplary damages.

g Having established this principle, counsel for the appellants went on to argue that the judge had misdirected the jury, seeking to encourage us in this belief by the submission that, if he had persuaded at least two members of the Court of Appeal

2 [1971] 2 All ER at 210, [1971] 2 WLR at 882

3 [1913] 3 KB 507

4 (1612) 11 Co Rep 5a

5 (1847) 1 Exch 131

6 (1771) 5 Burr 2790

7 [1899] 2 IR 486

8 [1913] 3 KB 507, especially at 521

9 [1913] 3 KB 764 at 769, [1911-13] All ER Rep 362 at 364

10 [1932] 2 KB 431 at 471, [1932] All ER Rep 221 at 237

11 (1946) 46 SR (NSW) 370

12 [1964] 3 All ER 406 at 411, [1965] 1 QB 248 at 262

13 Libel and Slander, 6th Edn, para 1390

to defend it on one of two possibly inconsistent and erroneous bases, the learned judge might well have succeeded in making the jury accept one of them as the ground of their award. a

The passage in the summing-up on which the appellants relied for this purpose was as follows. It occurs immediately after the passage already quoted in which the judge directs the jury to regard the exemplary damages as a sum additional to the compensatory award. Lawton J went on: b

'You may be saying to yourselves: if we do take the view that both these defendants should pay something by way of punitive damages, should we take into consideration the relative culpability of each one? Again, and I merely say this by way of illustration, and certainly not by way of guidance to you, say, for example you took the view that Mr. Irving was more to blame than [the appellants], or to be fair, you took the view that [the appellants] being an experienced firm of publishers were more to blame than this young man, Mr. Irving, should you make [the appellants] pay a larger sum by way of punitive damages than Mr. Irving? The answer to that is No. [The italics are mine.] Whatever damages, if any, you decide should be awarded by way of punitive damages must be the same sum in respect of both Mr. Irving and [the appellants], if you find them both liable to pay punitive damages. Have I made that clear?' c
d

This direction is in many ways defective as a piece of clear English prose. In particular, it contains an ambiguity, later cured by an exchange in the presence of the jury between counsel and the bench as to whether the jury is to award a single sum against both defendants or two sums, each against one of the defendants. But, on the crucial point whether this sum, when awarded, should represent the higher or the lower figure for which the jury found either guilty, I myself find no difficulty in thinking that the jury would have been clear that they were to award the lower. I would hope that on other occasions this would be made even plainer, but I find it difficult to criticise an experienced judge for not being absolutely crystal clear on this point at the end of a two day direction over a wide range of different topics following a 17 day trial. I would not disturb the verdict on these grounds. e

I also consider that, having agreed to the form of the questions left to the jury, it was not really open to the appellants to contend, on appeal, that the awards should be split. In any case I am fortified in my view of the matter by the fact that I find the same difficulty as did the Court of Appeal¹⁴ in differentiating in any way between the moral culpability of the two defendants. Mr Irving may have been the author of the defamatory matter. But the appellants published it, on the jury's finding, with their eyes open as to what it contained. It may be that Mr Irving had fewer means, and, if the jury were looking on the exemplary damages from the point of view of deterring him, they could have awarded a smaller sum. But there seems to have been no evidence concerning the means of either party, and I do not see how at this late date we can properly be invited to speculate. The enterprise was essentially a joint one, and if the appellants had not all the information available to Mr Irving, they had enough to make sure that they knew exactly what they were doing. It is difficult to know on what principle the jury could have differentiated between the two defendants. f
g
h

WAS THE AWARD EXCESSIVE?

The final point taken for the appellants was that the award of £25,000 exemplary damages or, as it was equally properly and possibly better put, the total award of £40,000 (which included the exemplary element) was so far excessive of what 12 reasonable men could have awarded that it ought to be set aside and a new trial ordered. I cannot disguise from myself that I found this an extremely difficult point in the case, and have only decided that the verdict should not be disturbed with great i

hesitation because I am very conscious of the fact that I would certainly have awarded far less myself, and possibly, to use a yardstick which some judges have adopted as a rule of thumb, less than half the £25,000.

A number of factors lead me, however, to the belief that the verdict should not be disturbed. The first, and paramount, consideration in my mind is that the jury is, where either party desires it, the only legal and constitutional tribunal for deciding libel cases, including the award of damages. I do not think the judiciary at any level should substitute itself for a jury, unless the award is so manifestly too large, as were the verdicts in *Lewis v Daily Telegraph Ltd*¹⁵, or manifestly too small, as in *English and Scottish Co-op Properties Mortgage and Investment Society Ltd v Odhams Press Ltd*¹⁶, that no sensible jury properly directed could have reached the conclusion. I do not think much depends on the exact formula used to describe the test to be applied, whether the traditional language 'so large [or small] as that twelve sensible men could not reasonably have given them' (per Lord Esher MR in *Praed v Graham*¹⁷) or that of Palles CB in *M'Grath v Bourne*¹⁸ cited by Lord Wright in *Mechanical and General Inventions Co Ltd and Lehwess v Austin and the Austin Motor Co Ltd*¹⁹, that 'no reasonable proportion existed between it and the circumstances of the case'. The point is that the law makes the jury and not the judiciary the constitutional tribunal, and if Parliament had wished the roles to be reversed in any way, Parliament would have said so at the time of the Administration of Justice (Miscellaneous Provisions) Act 1933, since s 6 of that Act expressly excepts defamation actions (otherwise than in a limited class of case) from the general change which it then authorised.

In addition to the above cases counsel for Captain Broome cited *Youssoupoff v Metro-Goldwyn-Meyer Pictures Ltd*²⁰, *Bocock v Enfield Rolling Mills Ltd*¹, *Scott v Musial*², *Morey v Woodfield*³, *McCarey v Associated Newspapers Ltd*⁴ and *Broadway Approvals Ltd v Odhams Press Ltd*⁵. I do not see anything in the above cases which alters the principle involved, nor am I aware of anything in the nature of exemplary damages to alter it in this limited class of case. It may very well be that, on the whole, judges, and the legal profession in general, would be less generous than juries in the award of damages for defamation. But I know of no principle of reason which would entitle judges, whether of appeal or at first instance, to consider that their own sense of the proprieties is more reasonable than that of a jury, or which would entitle them to arrogate to themselves a constitutional status in this matter which Parliament has deliberately withheld from them, for aught we know, on the very ground that juries can be expected to be more generous on such matters than judges. I speak with the greater conviction because my own view is that the legal profession is right to be cautious in such matters and juries are wrong if they can be said to be more generous. But that is not the law and I do not think that judges who hold my view are any more entitled to change the law on this topic than they have been in the past.

Counsel very rightly drew our attention to observations of Lord Devlin in *Rookes v Barnard*⁶ when he said:

'I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that the weapon is used with

¹⁵ [1963] 2 All ER 151, [1964] AC 234

¹⁶ [1940] 1 All ER 1, [1940] 1 KB 440

¹⁷ (1889) 24 QBD 53 at 55

¹⁸ (1876) IR 10 CL 160 at 164

¹⁹ [1935] AC 346 at 378, [1935] All ER Rep 22 at 37

²⁰ (1934) 50 TLR 581 at 583, 584

¹ [1954] 3 All ER 94, [1954] 1 WLR 1303

² [1959] 3 All ER 193 at 194, [1959] 2 QB 429 at 436

³ [1963] 3 All ER 533n, [1964] 1 WLR 16n

⁴ [1964] 2 All ER 947, [1965] 2 QB 86

⁵ [1965] 2 All ER at 536, 537, [1965] 1 WLR at 818, 820

⁶ [1964] 1 All ER at 411, [1964] AC at 1227

restraint. It may even be that the House may find it necessary to follow the precedent it set for itself in *Benham v. Gambling*⁷, and place some arbitrary limit on awards of damages that are made by way of punishment.' a

I regard *Benham v Gambling*⁷ as setting an absolutely necessary but wholly arbitrary rule to solve an absolutely insoluble problem, and I do not think it could readily be extended to exemplary damages for libel simply on the ground that judges do not agree with juries on quantum. I do not think the first sentence in Lord Devlin's observation means more than that the House will use its legitimate powers to interfere with awards by juries with particular regard to the need for preserving liberty, which he was concerned to express, and, if it means that the House was conferring on itself greater powers than it previously possessed, I would have regarded it as an usurpation of the function of the legislature as a whole. We were also referred to the observations of the Court of Appeal in *Ward v James*⁸. If the passage quoted there means more than that court, in exercising its undoubted right to interfere with unreasonable verdicts, will have more regard than heretofore to the general level of damages in cases of a similar nature, and particularly personal injury cases, it may need further consideration. b

The second reason which leads me to decline to interfere with the jury's verdict in this case is the peculiar gravity of the facts of this case. I share with Phillimore LJ the view that the jury must have found that⁹— c

'these were grave libels perpetrated quite deliberately and without regard to their truth by a young man and a firm of publishers interested solely in whether they would gain by the publication of this book. They did not care what distress they caused.' d

It is true, and I have been constrained to say, that I would have treated this heinous offence against public decency with far less severity than did the jury in this case. But, at the end of the hearing, I found myself as unable to say as were the three eminent judges in the Court of Appeal¹⁰ that no 12 reasonable jurors could have come to a different conclusion from myself. These matters are very highly subjective, and I do not feel myself entitled to substitute my own subjective sense of proportion for that of the constitutional tribunal appointed by law to determine such matters. e

I should add, lest I be thought to have overlooked the point that, to avoid the expense and anxieties of a new trial counsel on both sides agreed to leave to us, in case the appeal should succeed, the assessment of any sum to be awarded. I doubt myself how satisfactory this would have been but, quite obviously, before we embarked on such a task we should have to be first satisfied that the original verdict could not stand, and to this preliminary issue the agreement between counsel is necessarily irrelevant. f

THE DECISION IN *ROOKES V BARNARD*¹¹

These considerations really conclude the result of this appeal. It must, in my view, be dismissed. But, lest other litigants be put to expense and uncertainty comparable to that which the parties to this case have, in my view, unnecessarily suffered, it is now unavoidable that I should deal at length with the wider issues in the law of damages on which the Court of Appeal¹⁰ founded the greater part of its judgment. Before I do so I ought to remark that, although counsel for the appellants took the point that the trial judge should have withdrawn the question of the paperback edition from the jury, I regard the way in which he left it to them as so favourable to the appellants as not to justify a new trial on that ground alone. g

The judgment of the Court of Appeal¹⁰ was based on the simple proposition that h

7 [1941] 1 All ER 7, [1941] AC 157

8 [1965] 1 All ER 568 at 575, [1966] 1 QB 289 at 301

9 [1971] 2 All ER at 215, [1971] 2 WLR at 887

10 [1971] 2 All ER 187, [1971] 2 WLR 853

11 [1964] 1 All ER 367, [1964] AC 1129 j

a the decision in *Rookes v Barnard*¹² so far as it affected punitive or exemplary damages was made per incuriam and without prior argument by counsel and that judges should in future ignore it as unworkable, and that, in directing juries, judges of first instance should return to the status quo ante *Rookes v Barnard*¹² as if that case had never been decided at all. I have already said, and will not repeat, what I think about the propriety of the Court of Appeal¹³ in doing this at all, and the appropriateness, in view of the consequences to the parties, of their doing it in this case. I now proceed to consider how far their opinions are correct.

b I make no complaint of their view that *Rookes v Barnard*¹² clearly needs reconsideration by this House, if only because of the reception it has received in Australia, Canada and New Zealand. I view with dismay the doctrine that the common law should differ in different parts of the Commonwealth, which is the effect of the decision in *Australian Consolidated Press Ltd v Uren*¹⁴ and anything one can do in this case to bring the various strands of thought in different Commonwealth countries together ought to be done. Moreover, as I shall show, many of Lord Devlin's statements¹⁵ have been misunderstood, particularly by his critics, and the view of the House may well have suffered to some extent from the fact that its reasons were given in a single speech. Whatever the advantages of a judgment of an undivided court delivered by a single voice, the result may be an unduly fundamentalist approach to the actual language employed. Phrases which were clearly only illustrative or descriptive can be treated in isolation from their context, as being definitive or exhaustive. I am convinced that this has happened here and that to some extent at least, the purpose and nature of Lord Devlin's exposition has been misunderstood.

THE LAW BEFORE ROOKES V BARNARD¹²

e Whatever else may be said, the Court of Appeal's judgment¹³ is based on one assumption which is plainly incorrect. This assumption is, to quote its most characteristic expression on the lips of Lord Denning MR¹⁶: 'Prior to *Rookes v Barnard*¹², the law as to exemplary damages was settled.' In point of fact, it was nothing of the kind. Lord Denning MR went on immediately to quote from Mayne and MacGregor on Damages the following passage¹⁷:

f 'Such damages are variously called punitive damages, vindictive damages, exemplary damages, and even retributory damages. They can apply only where the conduct of the defendant merits punishment, which is only considered to be so when his conduct is wanton, as when it discloses fraud, malice, violence, cruelty, insolence, or the like, or, as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights . . . Such damages are recognised to be recoverable in appropriate cases in defamation . . .'

g If Lord Denning MR had gone on to quote from a subsequent passage¹⁸ of the same edition he would have read the following passage, inconsistent with his construction of the foregoing, under the heading 'A Double Rationale' which should, I hope, have disabused him of the idea that the law of punitive damages was in fact settled prior to *Rookes v Barnard*¹². The passage is as follows¹⁸:

'3. A DOUBLE RATIONALE

'Through all these various cases, however, runs another thread, giving a very different explanation of the position. For indeed it cannot be said that English law has committed itself finally and fully to exemplary damages, and many of the above

i 12 [1964] 1 All ER 367, [1964] AC 1129

13 [1971] 2 All ER 187, [1971] 2 WLR 853

14 [1967] 3 All ER 523, [1969] AC 590

15 In *Rookes v Barnard* [1964] 1 All ER 367, [1964] AC 1129

16 [1971] 2 All ER at 197, [1971] 2 WLR at 868

17 12th Edn (1961), paras 207, 208

18 Para 212

cases point to the rationale not of punishment of the defendant but of extra compensation for the plaintiff for the injury to his feelings and dignity. This is, of course, not exemplary damages at all. It is another head of non-pecuniary loss to the plaintiff. [The italics are mine.]

Indeed, in the well-known American textbook on the law of damages by the late Professor Charles T McCormick, published in 1935 by the West Publishing Co of Minnesota, occurs the following passage to the same effect¹⁹:

'In England, where exemplary damages had their origin, it is still not entirely clear whether the accepted theory is that they are a distinct and strictly punitive element of the recovery, or they are merely a swollen or "aggravated" allowance of compensatory damages permitted in cases of outrage. It is only in America that the cases have clearly separated exemplary from compensatory damages, and it is only here that the doctrine, thus definitely isolated, has been attacked and criticised.'

More characteristic than either of these passages and more illustrative of the confusion which reigned before *Rookes v Barnard*²⁰ is the paragraph on the subject in Lord Simonds's edition of Halsbury's Laws of England¹:

'*Exemplary damages.* Where the wounded feeling and injured pride of a plaintiff, or the misconduct of a defendant, may be taken into consideration, the principle of *restitutio in integrum* no longer applies. Damages are then awarded not merely to recompense the plaintiff for the loss he has sustained by reason of the defendant's wrongful act, but to punish the defendant in an exemplary manner, and vindicate the distinction between a wilful and an innocent wrongdoer. Such damages are said to be "at large", and, further, have been called exemplary, vindictive, penal, punitive, aggravated, or retributory.'

This passage clearly shows the extraordinary confusion of terminology reflecting differences in thinking and principle which existed up to 1964. Apart from anything else, 'aggravated' damages, classed as compensatory by Mayne and MacGregor, and by Professor McCormick, are assimilated to exemplary or punitive damages as such, as is the phrase damages 'at large'—an expression so indefinite in its connotation that counsel for the appellants in argument felt able to include within it (as this passage suggests inappropriately) even the general damages for pain and suffering in a personal injuries case. Clearly, before *Rookes v Barnard*²⁰, the thinking and the terminology alike called aloud for further investigation and exposition, and, since in such cases it is the classic function of this House to make such reviews, I cannot accept the simpliste doctrine of the Court of Appeal² either that there was no need to make it, or that the only thing to restore clarity is to go back to the state of the law as it was in 1963. In passing, I may say that I do not attach so much importance as did the Court of Appeal² to the circumstances that the two categories mentioned by Lord Devlin had never been discussed in argument by counsel. The cases and textbooks on exemplary damages had been exhaustively read, and when this House undertakes a careful review of the law it is not to be described as acting per incuriam or ultra vires if it identifies and expounds principles not previously apparent to the counsel who addressed it or to the judges and textbook writers whose divergent or confusing expressions led to the necessity for the investigation. Of course, in a sense, it would be easy enough to direct a jury under the old law if one simply said to them that any conduct of which they chose on rational grounds to disapprove would give rise to an award of exemplary damages and that any sum they chose to think appropriate as the penalty would be acceptable. But no one in recent years has ever

¹⁹ Page 278

²⁰ [1964] 1 All ER 367, [1964] AC 1129

¹ 11 Halsbury's Laws (3rd Edn) 223, para 391

² [1971] 2 All ER 187, [1971] 2 WLR 853

a thought this, although it is noteworthy that as recently as 1891 the author of Sedgwick's 'A Treatise on the Measure of Damages' was writing³:

b 'Until comparatively recent times juries were as arbitrary judges of the amount of damages as of the facts . . . Even as late as the time of Lord Mansfield it was possible for counsel to state the law to be that "The Court cannot measure the ground on which the jury find damages that may be thought large: they may find upon facts within their own knowledge" . . . The doctrine of exemplary damages is thus seen to have originated in a survival in this limited class of cases of the old arbitrary power of the jury.' [The italics are mine.]

c Clearly modern juries must be given adequate professional guidance and the object of Lord Devlin's opinion in *Rookes v Barnard*⁴ was to enable them to have it. Speaking for myself, and whatever view I formed of the categories, I would find it impossible to return to the chaos which is euphemistically referred to by Phillimore LJ⁵ as 'the law as it was before *Rookes v Barnard*'⁴.

d Before I examine the actual decision in *Rookes v Barnard*⁴ I would now propose to make two sets of observations of a general character. The first relates to the context in which damages must be awarded, the second to the terminology to be used in particular classes of case.

THE SUBJECTIVE ELEMENT IN DAMAGES

e Of all the various remedies available at common law, damages are the remedy of most general application at the present day, and they remain the prime remedy in actions for breach of contract and tort. They have been defined as 'the pecuniary compensation, obtainable by success in an action, for a wrong which is either a tort or a breach of contract'. They must normally be expressed in a single sum to take account of all the factors applicable to each cause of action and must of course be, expressed in English currency⁶.

f In almost all actions for breach of contract, and in many actions for tort, the principle of *restitutio in integrum* is an adequate and fairly easy guide to the estimation of damage, because the damage suffered can be estimated by relation to some material loss. It is true that where loss includes a pre-estimate of future losses, or an estimate of past losses which cannot in the nature of things be exactly computed, some subjective element must enter in. But the estimate is in things commensurable with one another, and convertible at least in principle to the English currency in which all sums of damages must ultimately be expressed.

g In many torts, however, the subjective element is more difficult. The pain and suffering endured, and the future loss of amenity, in a personal injuries case are not in the nature of things convertible into legal tender. The difficulties arising in the paraplegic cases, or, before *Benham v Gambling*⁷, in estimating the damages for loss of expectation of life in a person who died instantaneously, are only examples of the intrinsically impossible task set judges or juries in such matters. Clearly the £50,000 award upheld in *Morey v Woodfield*⁸ could never compensate the victim of such an accident. Nor, so far as I can judge, is there any purely rational test by which a judge can calculate what sum, greater or smaller, is appropriate. What is surprising is not that there is difference of opinion about such matters, but that in most cases professional opinion gravitates so closely to a conventional scale. Nevertheless, in all actions in which damages, purely compensatory in character, are awarded for suffering, from

i 3 8th Edn, pp 502 et seq

4 [1964] 1 All ER 367, [1964] AC 1129

5 [1971] 2 All ER at 214, [1971] 2 WLR at 887

6 Mayne and McGregor on Damages, 12th Edn, para 1

7 [1941] 1 All ER 7, [1941] AC 157

8 [1963] 3 All ER 533n, [1964] 1 WLR 16n

the purely pecuniary point of view the plaintiff may be better off. The principle of *restitutio in integrum*, which compels the use of money as its sole instrument for restoring the status quo, necessarily involves a factor larger than any pecuniary loss. a

In actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of *restitutio in integrum* has necessarily an even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge. As Windeyer J well said in *Uren v John Fairfax & Sons Pty Ltd*⁹: b

‘It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages *because* he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways—as a vindication of the plaintiff to the public, and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.’ c

This is why it is not necessarily fair to compare awards of damages in this field with damages for personal injuries. Quite obviously, the award must include factors for injury to the feelings, the anxiety and uncertainty undergone in the litigation, the absence of apology, or the reaffirmation of the truth of the matters complained of, or the malice of the defendant. The bad conduct of the plaintiff himself may also enter into the matter, where he has provoked the libel, or where perhaps he has libelled the defendant in reply. What is awarded is thus a figure which cannot be arrived at by any purely objective computation. This is what is meant when the damages in defamation are described as being ‘at large’. In a sense, too, these damages are of their nature punitive or exemplary in the loose sense in which the terms were used before 1964, because they inflict an added burden on the defendant proportionate to his conduct, just as they can be reduced if the defendant has behaved well—as for instance by a handsome apology—or the plaintiff badly, as for instance by provoking the defendant, or defaming him in return. In all such cases it must be appropriate to say with Lord Esher MR in *Praed v Graham*¹⁰: d

‘. . . in actions of libel . . . the jury in assessing damages are entitled to look at the whole conduct of the defendant [I would personally add “and of the plaintiff”] from the time the libel was published down to the time they give their verdict. They may consider what his conduct has been before action, after action, and in court during the trial.’ e

It is this too which explains the almost indiscriminate use of ‘at large’, ‘aggravated’ ‘exemplary’, and ‘punitive’ before *Rookes v Barnard*¹¹. To quote again from Professor McCormick’s work, it was originally only in America that the distinction between ‘aggravated’ damages (which take into account the defendant’s bad conduct for compensating the plaintiff’s injured feelings) and ‘punitive’ or ‘exemplary’ damage was really drawn. My own view is that no English case, and perhaps even in no statute, where the word ‘exemplary’ or ‘punitive’ or ‘aggravated’ occurs before 1964 can one be absolutely sure that there is no element of confusion between the two elements in damages. It was not until Lord Devlin’s speech in *Rookes v Barnard*¹¹ that the expressions ‘aggravated’ on the one hand and ‘punitive’ or ‘exemplary’ on the other acquired separate and mutually exclusive meanings as terms of art in English law. f

⁹ (1967) 117 CLR 118 at 150

¹⁰ (1889) 24 QBD at 55

¹¹ [1964] 1 All ER 367, [1964] AC 1129 g

- a The next point to notice is that it has always been a principle in English law that the award of damages when awarded must be a single lump sum in respect of each separate cause of action. Of course, where part of the damage can be precisely calculated, it is possible to isolate part of it in the same cause of action. It is also possible and desirable to isolate different sums of damages receivable in respect of different torts, as was done here in respect of the proof copies. But I must say I view with some distrust the arbitrary subdivision of different elements of general damages for the same tort, as was done in *Loudon v Ryder*¹², and even, subject to what I say later, what was expressly approved by Lord Devlin in *Rookes v Barnard*¹³ for the laudable purpose of avoiding a new trial. In cases where the award of general damages contains a subjective element, I do not believe it is desirable or even possible simply to add separate sums together for different parts of the subjective element, especially where, as was done by agreement in this case, the subjective element relates under different heads to the same factor, in this case the bad conduct of the defendant. I would think with Lord Atkin in *Ley v Hamilton*¹⁴:

'The "punitive" element is not something which is *or can* [the italics are mine] be added to some known factor which is non-punitive',

- d or in the words of Windeyer J in *Uren v John Fairfax & Sons Pty Ltd*¹⁵:

'The variety of the matters which, it has been held, may be considered in assessing damages for defamation must in many cases mean that the amount of a verdict is the product of a mixture of *inextricable* considerations.' [The italics again are mine.]

- e In other words the whole process of assessing damages where they are 'at large' is essentially a matter of impression and not addition. When exemplary damages are involved, and even though, in theory at least, it may be possible to winnow out the purely punitive element, the dangers of double counting by a jury or a judge are so great that, even to avoid a new trial, I would have thought the dangers usually outweighed the advantages. Indeed, although it must be wholly illegitimate to speculate
- f in such a matter, the thought crossed my mind more than once during the hearing that it may even have happened in this case.

TERMINOLOGY

- This brings me to the question of terminology. It has been more than once pointed out the language of damages is more than usually confused. For instance, the term 'special damage' is used in more than one sense to denominate actual past losses
- g precisely calculated (as in a personal injuries action), or 'material damage actually suffered' as in describing the factor necessary to give rise to the cause of action in cases, including cases of slander, actionable only on proof of 'special damage'. If it is not too deeply embedded in our legal language, I would like to see 'special damage' dropped as a term of art in its latter sense and some phrase like 'material loss' substituted.
- h But a similar ambiguity occurs in actions of defamation, the expressions 'at large', 'punitive', 'aggravated', 'retributory', 'vindictive' and 'exemplary' having been used in, as I have pointed out, inextricable confusion.

- In my view it is desirable to drop the use of the phrase 'vindictive' damages altogether, despite its use by the county court judge in *Williams v Settle*¹⁶. Even when a purely punitive element is involved, vindictiveness is not a good motive for awarding punishment. In awarding 'aggravated' damages the natural indignation of the court
- i at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a

¹² [1953] 1 All ER 741, [1953] 2 QB 202

¹³ [1964] 1 All ER at 411, [1964] AC at 1228

¹⁴ (1935) 153 LT 384 at 386

¹⁵ (1967) 117 CLR at 150

¹⁶ [1960] 2 All ER 806, [1960] 1 WLR 1072

generous rather than a more moderate award to provide an adequate solatium. But that is because the injury to the plaintiff is actually greater and as the result of the conduct exciting the indignation demands a more generous solatium. Likewise the use of 'retributory' is objectionable because it is ambiguous. It can be used to cover both aggravated damages to compensate the plaintiff and punitive or exemplary damages purely to punish the defendant or hold him up as an example.

As between 'punitive' or 'exemplary', one should, I would suppose, choose one to the exclusion of the other, since it is never wise to use two quite interchangeable terms to denote the same thing. Speaking for myself, I prefer 'exemplary', not because 'punitive' is necessarily inaccurate, but 'exemplary' better expresses the policy of the law as expressed in the cases. It is intended to teach the defendant and others that 'tort does not pay' by demonstrating what consequences the law inflicts rather than simply to make the defendant suffer an extra penalty for what he has done, although that does, of course, precisely describe its effect.

The expression 'at large' should be used in general to cover all cases where awards of damages may include elements for loss of reputation, injured feelings, bad or good conduct by either party, or punishment, and where in consequence no precise limit can be set in extent. It would be convenient if, as the appellants' counsel did at the hearing, it could be extended to include damages for pain and suffering or loss of amenity. Lord Devlin uses the term in this sense in *Rookes v Barnard*¹⁷, when he defines the phrase as meaning all cases where 'the award is not limited to the pecuniary loss that can be specifically proved'. But I suspect that he was there guilty of a neologism. If I am wrong, it is a convenient use and should be repeated.

Finally, it is worth pointing out, although I doubt if a change of terminology is desirable or necessary, that there is danger in hypostatizing 'compensatory', 'punitive', 'exemplary' or 'aggravated' damages at all. The epithets are all elements or considerations which may, but with the exception of the first need not, be taken into account in assessing a single sum. They are not separate heads to be added mathematically to one another.

ANALYSIS OF *ROOKES V BARNARD*¹⁸

This being said, it is necessary to analyse the decision in *Rookes v Barnard*¹⁸, a case, it must be remembered, of intimidation and not libel. The only actual decision on damages must be looked for in the passage where Lord Devlin says¹⁹:

'I doubt whether the facts disclosed in the summing-up show even a case for aggravated damages; a different impression may be obtained when the facts are fully displayed on a new trial. At present there seems to be no evidence that the respondents were motivated by malevolence or spite against the appellant. They wronged him, not primarily to hurt him, but so as to achieve their own ends. If that had not been their dominating motive, then what they did would not have been done in furtherance of a trade dispute and the whole case has been fought on the basis that it was. It is said that they persisted in believing that their closed shop position was endangered by the appellant's conduct, even when their official leaders told them that it was not. Be it so; pig-headedness will not do. Again, in so far as disclosed in the summing-up, there was no evidence of offensive conduct or of arrogance or insolence. It was, I think, suggested that some impolite observations were made about the appellant, but that is not enough; in a dispute of this sort feelings run high and more than hard words are needed for aggravated damages. Counsel for the appellant relied strongly on the flagrant breach of contract with B.O.A.C. and the respondents' open disregard of their pledges and their lack of consideration. But this was not conduct

¹⁷ [1964] 1 All ER at 407, [1964] AC at 1221

¹⁸ [1964] 1 All ER 367, [1964] AC 1129

¹⁹ [1964] 1 All ER at 414, [1964] AC at 1232

a that affected the appellant. He was no more distressed or humiliated by it than any of B.O.A.C.'s passengers whose convenience, it might be said, and interests were brushed aside by the respondents in their determination to secure their object.'

Although, as will be seen, I prefer much of what Lord Devlin said on the subject of exemplary damages to what has been said by his subsequent critics, and propose b to follow it, the decision in *Rookes v Barnard*²⁰ must be viewed in the light of these conclusions. It is not verbally inspired. But it is a careful and valuable decision not lightly to be set aside.

c The passages which have given rise to criticism and discussion²¹ can be divided conveniently into the following parts. The first part consists in exposition of the authorities and principles²² where Lord Devlin begins to draw his conclusions. These conclusions, which form the second portion of his opinion, include the three 'alleged categories'¹, the three 'considerations'² and finally³ the commentary and exposition of the consequences of what he has said and these occupy the rest of the passage under discussion.

WAS THE DECISION PER INCURIAM?

d Now, I think I must protest at the outset at the theory that Lord Devlin (or those members of the House who agreed with him) was speaking 'per incuriam'. I have already dealt with the argument that his conclusions did not follow the actual submissions of counsel on either side. Lord Devlin was, of course, perfectly well aware that, in drawing these conclusions from the authorities, he was making new law in the sense in which new law is always made when an important new precedent is established. Thus, he said⁴:

e 'I am well aware that what I am about to say will, if accepted, impose limits not hitherto expressed on such awards and that there is powerful, though not compelling, authority for allowing them a wider range. I shall not therefore conclude what I have to say on the general principles of law without returning to the authorities and making it clear to what extent I have rejected the f guidance which they may be said to afford.'

But a judge is always entitled to do this when the exact limits, rationale, and the extent of a principle is being discussed, and when those limits, rationale, and extent have never been authoritatively defined.

g Nor can it be said fairly that he had ignored *Ley v Hamilton*⁵. In fact he quoted from it at length and treated it, making allowance for the confusion in the legal terminology at the time to which I have already drawn attention, as a case of 'aggravated' damages. I think he was right in so doing; although I also think Salmon LJ was almost certainly right in thinking⁶ that the inverted commas in which Lord Atkin⁷ puts 'punitive' are not a guide to its meaning. The word is in inverted commas for the same reason that 'real' in the earlier passage is in inverted commas. They are quotation marks and Lord Atkin⁷ was quoting the actual words in the judgment of h Maugham LJ⁸ which he was criticising.

20 [1964] 1 All ER 367, [1964] AC 1129

21 [1964] 1 All ER at 407-413, [1964] AC at 1220-1231

22 [1964] 1 All ER at 407-409, [1964] AC at 1220-1225

1 [1964] 1 All ER at 409-411, [1964] AC at 11225-11227

2 [1964] 1 All ER at 411, 412, [1964] AC at 1227-1230

3 [1964] 1 All ER at 412, 413, [1964] AC at 1230, 1231

4 [1964] 1 All ER at 410, [1964] AC at 1226

5 (1935) 153 LT 384

6 [1971] 2 All ER at 207, [1971] 2 WLR at 879

7 In *Ley v Hamilton* (1835) 153 LT at 386

8 In *Ley v Hamilton* in the Court of Appeal (1934) 151 LT 360 at 374

It is a fairer criticism of Lord Devlin to say that he did not mention *E Hulton & Co v Jones*⁹. Both counsel for the plaintiff in argument in that case and Lord Loreburn LC, in his speech¹⁰ which may have been *ex tempore*, reflect a view of the law of damages for libel apparently at variance with the law as Lord Devlin has now declared it to be. But, as I shall show, the difference is more apparent than real. It is difficult to square either counsel for the plaintiff's argument or the passage of Lord Loreburn LC's speech with the explicit admission made in the Court of Appeal and repeated in the facts stated¹¹, that the use of the name 'Artemus Jones' by the editor and author was innocent, and it is on this basis that the case is normally cited as an authority. Judging the use made of the case in the Court of Appeal by their own criteria of Lord Devlin, the case is certainly not a binding authority on the law of exemplary damages. It was never argued as such, although the observations of Lord Loreburn LC can be fairly used as testimony, and even as persuasive authority, for the state of legal thinking at the time. In law, however, if Lord Devlin be right, the law of exemplary damages was still evolving, and *Hulton v Jones*⁹ made no pretence at altering or defining it, nor did either counsel in the case argue the case in terms which raised the question in its present form.

DID ROOKES V BARNARD¹² EXTEND EXEMPLARY DAMAGES TO FRESH TORTS?

Having rejected the theory that Lord Devlin's speech can be pushed aside as having been delivered *per incuriam*, I hope I may now equally dispose of another misconception. I do not think that he was under the impression either that he had completely rationalised the law of exemplary damages, nor by listing the 'categories' was he intending, I would think, to add to the number of torts for which exemplary damages can be awarded. Thus I disagree with the dictum of Widgery LJ in *Mafo v Adams*¹³ (which, for this purpose, can be treated as an action for deceit) when he said:

'As I understand LORD DEVLIN's speech, the circumstances in which exemplary damages may be obtained have been drastically reduced, but the range of offences in respect of which they may be granted has been increased, and I see no reason since *Rookes v. Barnard*¹² why, when considering a claim for exemplary damages, one should regard the nature of the tort as excluding the claim.'

This would be a perfectly logical inference if Lord Devlin imagined that he was substituting a completely rational code by enumerating the categories and stating the considerations. It is true, of course, that actions for deceit could well come within the purview of the second category. But I can see no reason for thinking that Lord Devlin intended to extend the category to deceit, and counsel on both sides before us were constrained to say that, although it may be paradoxical, they were unable to find a single case where either exemplary or aggravated damages had been awarded for deceit, despite the fact that contumelious, outrageous, oppressive, or dishonest conduct on the part of the defendant is almost inherently associated with it. The explanation may lie in the close connection that the action has always had with breach of contract (see the discussion in Mayne and MacGregor¹⁴).

WHERE SOLATIU M IS ENOUGH

The true explanation of *Rookes v Barnard*¹² is to be found in the fact that, where damages for loss of reputation are concerned, or where a simple outrage to the individual or to property is concerned, aggravated damages in the sense I have explained can, and should in every case lying outside the categories, take care of the

9 [1910] AC 20, [1908-10] All ER Rep 29

10 [1910] AC at 24, [1908-10] All ER Rep at 47

11 [1910] AC at 20

12 [1964] 1 All ER 367, [1964] AC 1129

13 [1969] 3 All ER at 1410, [1970] 1 QB at 558

14 Chapter 41, especially at para 968

a exemplary element, and the jury should neither be encouraged nor allowed to look beyond as generous a solatium as is required for the *injuria* simply in order to give effect to feelings of indignation. It is not that the exemplary element is excluded in such cases. It is precisely because in the nature of things it is, and should be, included in every such case that the jury should neither be encouraged nor allowed to look for it outside the solatium and then to add to the sum awarded another sum by way of penalty additional to the solatium. To do so would be to inflict a double penalty for the same offence.

b The surprising thing about *Rookes v Barnard*¹⁵ is not that Lord Devlin restricted the award of exemplary damages viewed as an addition to or substitution for damages by way of solatium to the three so-called categories, but that he allowed the three so-called categories to exist by way of exception to the general rule. That he did this is due at least in part to the fact that he felt himself bound by authority to do so, but partly also because he thought that there were cases where, over and above the figure awarded for loss of reputation, for injured feelings, for outraged morality, and to enable a plaintiff to protect himself against future calumny or outrage of a similar kind, an additional sum was needed to vindicate the strength of the law and act as a supplement to its strictly penal provisions¹⁶.

d IS *ROOKES V BARNARD*¹⁵ UNWORKABLE?

I confess I am quite unable to see why such a view of the matter is 'unworkable'. As I have already pointed out, it has been worked in fact for nearly eight years. On the contrary, by insisting on a single sum being awarded for outrageous behaviour in nearly every case of tort, and allowing the jury full vent to their legitimate feelings within the proportions set by the injury involved, it seems to me that judge and jury are set an inherently less difficult task than if they were told first to take into account the aggravating factors, and then to impose an additional 'fine' for the size of which they have neither the qualifications, nor any measure by which they can limit their discretion, particularly since neither counsel nor the judge can mention particular figures which can have any relevance to the actual case. The difficulty consists, not in working the system of aggravated and purely compensatory damages, where they apply, as they do in almost every case of contumelious conduct under Lord Devlin's opinion, but in working a system of punitive damages alongside the system of aggravated and compensatory damage. This difficulty exists whether Lord Devlin's limitation to the categories be right or wrong and, if it were wrong, would exist in every case, and not only in a small minority of cases. The difficulty resides in the fact that the thinking underlying the two systems is as incompatible as oil and vinegar, the one based on what the plaintiff ought to receive, the other based on what is reasonable, but otherwise uninstructed, men and women think the defendant ought to pay.

THE MEANING OF THE CATEGORIES

h As regards the meaning of the particular categories, I have come to the conclusion that what Lord Devlin said was never intended to be treated as if his words were verbally inspired, and much of the criticism of them which has succeeded reports of the case has been based on interpretations which are false to the whole context and unduly literal even when taken in isolation from it.

j The one category exhaustively discussed before us was the second, since the first could obviously have no application to the instant case. But I desire to say of the first that I would be surprised if it included only servants of the government in the strict sense of the word. It would, in my view, obviously apply to the police, despite *A-G for New South Wales v Perpetual Trustee Co Ltd*¹⁷, and almost as certainly to local

15 [1964] 1 All ER 367, [1964] AC 1129

16 Cf what Lord Devlin says [1964] 1 All ER at 410, 412, [1964] AC at 1226, 1230

17 [1955] 1 All ER 846, [1955] AC 457

and other officials exercising improperly rights of search or arrest without warrant, and it may be that in the future it will be held to include other abuses of power without warrant by persons purporting to exercise legal authority. What it will not include is the simple bully, not because the bully ought not to be punished in damages, for he manifestly ought, but because an adequate award of compensatory damages by way of solatium will necessarily have punished him. I am not prepared to say without further consideration that a private individual misusing legal powers of private prosecution or arrest as in *Leith v Pope*¹⁸, where the defendant had the plaintiff arrested and tried on a capital charge, might not at some future date be assimilated into the first category. I am not prepared to make an exhaustive list of the emanations of government which might or might not be included. But I see no reason to extend it beyond this field, to simple outrage, malice or contumelious behaviour. In such cases a properly directed jury will not find it necessary to differentiate between what the plaintiff ought to receive and the defendant ought to pay, since the former will always include the latter to the extent necessary to vindicate the strength of the law.

When one comes to the second category we reach a field which was more exhaustively discussed in the case before us. It soon became apparent that a broad rather than a narrow interpretation of Lord Devlin's words was absolutely essential, and that attempts to narrow the second category by a quotation out of context of one sentence from the passage wherein it is defined simply will not do. Lord Devlin founded his second category on a sequence of cases beginning with *Bell v Midland Ry Co*¹⁹, and on the judgment of Maule J in *Williams v Currie*²⁰ and the dictum of Martin B in *Crouch v Great Northern Ry Co*¹. None of these were examples of precise calculation of the balance sheet type. Then he said²:

'[I]f the motive of making a profit is a factor also that is taken into account in damages for libel; one man should not be allowed to sell another man's reputation for profit. Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. *This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object,—perhaps some property which he covets,—which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.*' [The italics are mine.]

Even a casual reading of the above passage shows that the sentence:

'Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity'

is not intended to be exhaustive but illustrative, and is not intended to be limited to the kind of mathematical calculations to be found on a balance sheet. The sentence must be read in its context. The context occurs immediately after the sentence ending: 'one man should not be allowed to sell another man's reputation for profit', where the word 'calculation' does not occur. The context also includes the final sentence: 'Exemplary damages can properly be awarded whenever it is necessary to teach a

¹⁸ (1779) 2 Wm Bl 1327

¹⁹ (1861) 10 CBNS 287

²⁰ (1845) 1 CB 841 at 848

¹ (1856) 11 Exch 742 at 759

² [1964] 1 All ER at 410, 411, [1964] AC at 1227

a wrongdoer that tort does not pay.' The whole passage must be read sensibly as a whole, together with the authorities on which it is based.

It is true, of course, as was well pointed out by Widgery J in *Manson v Associated Newspapers Ltd*³, that the mere fact that a tort, and particularly a libel, is committed in the course of a business carried on for profit is not sufficient to bring a case within the second category. Nearly all newspapers, and most books, are published for profit. What is necessary in addition is (i) knowledge that what is proposed to be done is against the law or a reckless disregard whether what is proposed to be done is illegal or legal, and (ii) a decision to carry on doing it because the prospects of material advantage outweigh the prospects of material loss. It is not necessary that the defendant calculates that the plaintiff's damages if he sues to judgment will be smaller than the defendant's profit. This is simply one example of the principle. The defendant may calculate that the plaintiff will not sue at all because he has not the money (I suppose the plaintiff in a contested libel action like the present must be prepared nowadays to put at least £30,000 at some risk), or because he may be physically or otherwise intimidated. What is necessary is that the tortious act must be done with guilty knowledge for the motive that the chances of economic advantage outweigh the chances of economic, or perhaps physical, penalty.

d At this stage one must examine some of the counter-arguments which found favour in the Court of Appeal⁴. How, it may be asked, about the late Mr Rachman, who is alleged to have used hired bullies to intimidate statutory tenants by violence or threats of violence into giving vacant possession of their residences and so placing a valuable asset in the hands of the landlord? My answer must be that if this is not a cynical calculation of profit and cold-blooded disregard of a plaintiff's rights, I do not know what is. It is also argued that the second category does not take care of the case of a man who pursues a potential plaintiff to ruin out of sheer hatred and malice. The answer is that it does not do so because this is already taken care of in the full compensation or solatium for the injuria involved in which the jury can give full rein to their feeling of legitimate indignation without going outside the bounds of compensatory damages in the sense in which I have explained the phrase, that is, damages of sufficient size to enable the plaintiff to point to the size of the award to indicate the baselessness of the false charge, and damages for the outrage inflicted in exact proportion as it was unprovoked, unatoned for, or malicious. I would have thought the second category was ample to cover any form of injury committed within the scope of those torts for which aggravated and exemplary damages may be awarded where the motive was material advantage. *Mafo v Adams*⁵ is not really an answer to the contrary, although I would have thought that the damages there awarded for inconvenience, breach of covenant, and loss of a regulated tenancy were perhaps at present day values too small for the wrong committed. What was at issue in *Mafo v Adams*⁵ was the award of exemplary damages in an action for deceit (see from Sachs LJ⁶) and this, in the event, was never decided. What was decided in that case was that the plaintiff had not discharged the onus of proof that the defendant's motives were such as to bring the case within the second category. h This is clear from the fact that both Sachs and Widgery LJ⁷ based their judgments on a passage from the decision of the county court judge, where he said: 'The defendant's reasons for his actions are obscure' (see per Sachs LJ⁷, and per Widgery LJ⁸). I am far from saying that insofar as it could have been shown that the defendant was actuated by hope of gain, and if the action had been one of trespass, exemplary damages could not have been awarded under the second category, and even though

j ³ [1965] 2 All ER at 960, [1965] 1 WLR at 1045

⁴ [1971] 2 All 187, [1971] 2 WLR 853

⁵ [1969] 3 All ER 1404, [1970] 1 QB 548

⁶ [1969] 3 All ER at 1407, [1970] 1 QB at 555

⁷ [1969] 3 All ER at 1408, [1970] 1 QB at 556

⁸ [1969] 3 All ER at 1411, [1970] 1 QB at 559

in the absence of authority I am of opinion that exemplary damages cannot be awarded in an action for deceit, I cannot claim that that matter has been finally determined. a

The main criticisms of Lord Devlin's speech are thus shown to have been unfounded. That he went beyond the existing law he had no doubt, and nor have I. But, as I have shown, he was entitled to do so. It may very well be that, in deciding in favour of the two exceptional categories, he was making an unnecessary concession to tradition. But he made the concession after a careful analysis of the authorities and, speaking for myself, and given the cautious approach indicated in Lord Gardiner LC's practice declaration⁹, and by a majority of this House in *Jones v Secretary of State for Social Services*¹⁰, I do not think there is any reason for disturbing them. I regard the Australian cases, and in particular *Uren v John Fairfax & Sons Pty Ltd*¹¹, as deciding no more than that on the particular facts of that case the award of exemplary damages was not acceptable. Insofar as they claim to establish that exemplary damages can be awarded for any contumelious disregard of the plaintiff's rights I may not, of course, comment so far as regards the law of Australia, but, so far as regards the law of England, I would say that an adequate award of compensatory damages in such a case must of necessity include, and perhaps more than include, any punitive or exemplary element. The proposition, as a proposition, would have been perfectly acceptable so long as the looser terminology prevalent before *Rookes v Barnard*¹² was in use. So far as regards the more strict terminology now to be employed, the proposition is not to be treated as acceptable in the English courts. b

Before turning to the so-called 'considerations' I desire to say a word concerning the decision in *Williams v Settle*¹³ and *Loudon v Ryder*¹⁴, on which Lord Devlin also commented. *Williams v Settle*¹³ was a case under s 17 (3) of the Copyright Act 1956. I agree with Lord Devlin that it is for consideration in the light of subsequent cases whether that section, which does not use the phrase 'exemplary damages', does in fact give a right to damages which are exemplary in the narrower sense used since *Rookes v Barnard*¹². If it does, the case should be regarded as a second category case, since the defendant's motive was profit. If it does not, and if it is to be regarded as still authoritative, *Williams v Settle*¹³ can only be regarded as an extreme example of aggravated damages, although the language of the county court judge was so strong as to lead me to think that I would not myself have been prepared to make so large an award. c

*Loudon v Ryder*¹⁴ is the earliest instance which I have been able to find where a split award was made of exemplary and compensatory damages for the same tort, and the split was made in circumstances which are not altogether plain from the report, after an award of a lump sum had been announced. What would have happened if Devlin J had summed up to the jury in favour of a generous award of aggravated damages on the lines of his later speech in *Rookes v Barnard*¹² is, of course, a question which no one can possibly answer. The answer might well have been, substituting 'trespass' for 'defamation', what Windeyer J said in *Uren v John Fairfax & Sons Pty Ltd*¹⁵: d

"Telling the jury in a defamation action that compensation is to be measured having regard to aggravating circumstances the result of the defendant's conduct might not result in a verdict different from that which they would return if they were told that because of that conduct they could give damages by way of example." e

9 See Note [1966] 3 All ER 77, [1966] 1 WLR 1234 f

10 Page 145 ante, [1972] 2 WLR 210 g

11 (1967) 117 CLR 118

12 [1964] 1 All ER 367, [1964] AC 1129

13 [1960] 2 All ER 806, [1960] 1 WLR 1072

14 [1953] 1 All ER 741, [1953] 2 QB 202

15 (1967) 117 CLR at 152 h

- a** What is certain is that the summing-up by Devlin J in that case could not, as Lord Devlin himself surmised, now survive the analysis by Lord Devlin in *Rookes v Barnard*¹⁶ of the theoretical basis of exemplary damages in the sense in which the term should now be employed.

THE 'CONSIDERATIONS'

- b** I turn now to Lord Devlin's three 'considerations'. It is worth pointing out that neither the Court of Appeal¹⁷ nor any of the counsel who appeared before us attacked these as such. Nor, so far as I am aware, have these been attacked in the cases in which Commonwealth judges have felt constrained to criticise *Rookes v Barnard*¹⁶. This alone would be a good reason against a simple return to the status quo ante proposed by the Court of Appeal¹⁷, because the first and second 'considerations' coupled with the passage from which I have already quoted¹⁸ are themselves, and
- c** quite independently of the 'categories', an important, and I think original, contribution to the law on exemplary damages. Whilst, as I have indicated, I cannot myself follow what Lord Devlin says on the second category so far as regards the right of appellate courts to interfere with jury awards on principles different from the traditional, nor, I think, with the proposal that *Benham v Gambling*¹⁹ offers a precedent for arbitrary limits imposed by the judiciary in defamation cases, I regard it as
- d** extremely important that, for the future, judges should make sure in their direction to juries that the jury is fully aware of the danger of an excessive award. A judge should first rule whether evidence exists which entitles a jury to find facts bringing a case within the relevant categories, and, if it does not, the question of exemplary damages should be withdrawn from the jury's consideration. Even if it is not withdrawn from the jury, the judge's task is not complete. He should remind the jury
- e** (i) that the burden of proof rests on the plaintiff to establish the facts necessary to bring the case within the categories; (ii) that the mere fact that the case falls within the categories does not of itself entitle the jury to award damages purely exemplary in character; they can and should award nothing unless (iii) they are satisfied that the punitive or exemplary element is not sufficiently met within the figure which they have arrived at for the plaintiff's solatium in the sense I have explained and (iv) that,
- f** in assessing the total sum which the defendant should pay, the total figure awarded should be in substitution for and not in addition to the smaller figure which would have been treated as adequate solatium, that is to say, should be a round sum larger than the latter and satisfying the jury's idea of what the defendant ought to pay. (v) I would also deprecate, as did Lord Atkin in *Ley v Hamilton*²⁰, the use of the word 'fine' in connection with the punitive or exemplary element in damages, where it is
- g** appropriate. Damages remain a civil, not a criminal remedy, even where an exemplary award is appropriate, and juries should not be encouraged to lose sight of the fact that, in making such an award they are putting money into a plaintiff's pocket, and not contributing to the rates, or to the revenue of central government.

- If this be correct, the agreed list of questions submitted to the jury in the present case is not the ideal procedure for ensuring that the jury keep their verdict within
- h** bounds. They should normally be asked to award a single sum whether as solatium or as exemplary damages. If, in order to avoid a second trial, they are asked a second question, they should be asked, in the event of their awarding exemplary damages, what smaller sum they would have awarded if they had confined themselves to solatium in the sense explained.

- j** It follows from what I have said that I am not prepared to follow the Court of Appeal¹⁷ in its criticisms of *Rookes v Barnard*¹⁶, which I regard as having imposed valuable limits on the doctrine of exemplary damages as they had hitherto been understood in English law and clarified important questions which had previously

16 [1964] 1 All ER 367, [1964] AC 1129

17 [1971] 2 All ER 187, [1971] 2 WLR 853

18 [1964] 1 All ER at 409, [1964] 1 AC at 1225

19 [1941] 1 All ER 7, [1941] AC 157

20 (1935) 153 LT 384 at 386

been undiscussed or left confused. From one point of view, there is much to be said for the interpretation put on Lord Devlin's speech by Windeyer J in *Uren v John Fairfax & Sons Pty Ltd*¹ immediately before the passage I have just quoted:

'What the House of Lords has now done is, as I read what was said, to produce a more distinct terminology. Limiting the scope of terms that often were not distinguished in application makes possible an apparently firm distinction between aggravated compensatory damages and exemplary or punitive damages.'

But it is not to be inferred from this that the ruling in *Rookes v Barnard*² is a pure question of semantics. It may well be true that in most individual cases the precise terminology in which the question is asked of the jury may not make much difference to the amount of the award. Both Windeyer J in the passage just cited and Lord Devlin³ were evidently of this view. But the following positive advantages can be gained from adhering to the rules he laid down, if properly interpreted: (1) The danger of double counting, of adding a pure 'fine' to what has already been awarded as solatium, without regarding the deterrent or punitive effect of the latter, has been eliminated, or at least reduced to a minimum. (2) In all cases where the categories do not apply, the jury must be told to confine the punitive or deterrent element in their thinking within the limits of a fair solatium. In other words, to borrow the language, though not the sentiments, expressed in *Forsdike v Stone*⁴ the jury must be told to consider *only* what the plaintiff should receive after giving full allowance to the need to re-establish his reputation and for the outrage inflicted on him, and *not* what the defendant should pay independently of this consideration. (3) In cases where the categories do apply, juries can be given directions a little more informative and regulatory than was the case up to and including the new analysis.

*Rookes v Barnard*² has not perhaps proved quite the definitive statement of the law which was hoped when it was decided. This is often the case. I remember with suitably mixed feelings of filial piety and inherited caution, that in his judgment in *R Addie & Sons (Collieries) Ltd v Dumbreck*⁵ my father believed he was putting a final end to doubts about the limits of occupiers' liability to trespassers, licensees, and invitees. But the way forward lies through a considered precedent and not backwards from it. I would hope very much that, in the light of observations made on *Rookes v Barnard*² in this case, Commonwealth courts might see fit to modify some of their criticisms of it. I do not know how far it can be of value in the United States of America where it seems to me that the decisions of the Supreme Court have been influenced greatly by the terms of the First Amendment to the Constitution, and by the unsatisfactory rules prevalent in American courts as to the recovery of costs. However that may be, we cannot depart from *Rookes v Barnard*² here. It was decided neither per incuriam nor ultra vires this House; we could only depart from it by tearing up the doctrine of precedent, and this was not the object of this House in assuming the powers adopted by the practice declaration of 1966⁶.

Least I should have been thought to have forgotten it, I would observe that the Court of Appeal⁷ overruled the decision of Lawton J⁸ that a claim for exemplary damages should be pleaded. I am content to accept their view on the basis of the present practice. But in the light of the decision of this House in the instant case I propose to refer to the Rule Committee the question whether in the light of *Rookes v Barnard*² and the present decision the present practice should not be altered.

1 [1967] 117 CLR at 152

2 [1964] 1 All ER 367, [1964] AC 1129

3 [1964] 1 All ER at 412, [1964] AC at 1230

4 (1868) LR 3 CP 607 at 611

5 [1929] AC 358, [1929] All ER Rep 1

6 See Note [1966] 3 All ER 77, [1966] 1 WLR 1234

7 [1971] 2 All ER 187, [1971] 2 WLR 853

8 [1971] 1 All ER 262

- a There is much to be said for the view that a defendant against whom a claim of this kind is made ought not to be taken by surprise.

My Lords, it follows from what I have said in my opinion this appeal should be dismissed and that costs should follow the event.

- b **LORD REID.** My Lords, the appellants published a book 'The Destruction of Convoy PQ17' which according to their advertisement on the dust jacket was the result of five intensive years of meticulous research by the author. It contained many statements about the conduct of Captain Broome who was the naval officer in command of the convoy. He sued the appellants and the author for damages for libel. After a trial which lasted for some 17 days a number of questions were left to the jury. They found that the words complained of were defamatory of Captain Broome. and were not true in substance and in fact. They were asked what compensatory damages they awarded, and they awarded £15,000. Then they were asked 'Has the plaintiff proved that he is entitled to exemplary damages?' Their answer was Yes against both defendants. Next they were asked 'What additional sum should be awarded him by way of exemplary damages?' Their answer was £25,000. So judgment was entered against both defendants for £40,000.

- d Others of your Lordships have dealt in detail with these statements and I do not think it necessary to say more than that in my opinion the jury were well entitled to find that they conveyed imputations of the utmost gravity against the character and conduct of Captain Broome as a naval officer. Indeed the appellants do not now seek to disturb the award of £15,000 as 'compensatory damages'. Their contention before your Lordships is twofold: first that the jury were not entitled to award any exemplary damages and secondly that the amount awarded under this head was much too great. As no objection was taken at the time to the form of the question there cannot now be any objection to the jury having been asked in this case to consider separately compensatory and exemplary damages.

- e The whole matter of exemplary damages was dealt with in this House in *Rookes v Barnard*⁹ in a speech by Lord Devlin with which all who sat with him, including myself, concurred. The Court of Appeal¹⁰ dealing with the present case held that if they applied the law as laid down in *Rookes v Barnard*⁹ the appellants' appeal must fail and the jury's verdict must stand. They could have stopped there, but they chose to go on and attack the decision of this House as bad law. They were quite entitled to state their views and reasons for reaching that conclusion but very unfortunately Lord Denning MR, apparently with the concurrence of his two colleagues, went on to say¹¹:

- g 'This case may, or may not, go on appeal to the House of Lords. I must say a word, however, for the guidance of judges who will be trying cases in the meantime. I think the difficulties presented by *Rookes v Barnard*⁹ are so great that the judges should direct the juries in accordance with the law as it was understood before *Rookes v Barnard*⁹. Any attempt to follow *Rookes v Barnard*⁹ is bound to lead to confusion.'

- h It seems to me obvious that the Court of Appeal¹⁰ failed to understand Lord Devlin's speech, but whether they did or not I would have expected them to know that they had no power to give any such direction and to realise the impossible position in which they were seeking to put those judges in advising or directing them to disregard a decision of this House. That aberration of the Court of Appeal has made it necessary to re-examine the whole subject and incidentally has greatly increased the expense to which the parties to this case have been put.

- i The very full argument which we have had in this case has not caused me to

9 [1964] 1 All ER 367, [1964] AC 1129

10 [1971] 2 All ER 187, [1971] 2 WLR 853

11 [1971] 2 All ER at 201, 202, [1971] 2 WLR at 873

change the views which I held when *Rookes v Barnard*¹² was decided or to disagree with any of Lord Devlin's main conclusions. But it has convinced me that I and my colleagues made a mistake in simply concurring with Lord Devlin's speech. With the passage of time I have come more and more firmly to the conclusion that it is never wise to have only one speech in this House dealing with an important question of law. My main reason is that experience has shown that those who have to apply the decision to other cases and still more those who wish to criticise it seem to find it difficult to avoid treating sentences and phrases in a single speech as if they were provisions in an Act of Parliament. They do not seem to realise that it is not the function of noble and learned Lords or indeed of any judges to frame definitions or to lay down hard and fast rules. It is their function to enunciate principles and much that they say is intended to be illustrative or explanatory and not to be definitive. When there are two or more speeches they must be read together and then it is generally much easier to see what are the principles involved and what are merely illustrations of it.

I am bound to say that, in reading the various criticisms of Lord Devlin's speech to which we have been referred, I have been very surprised at the failure of its critics to realise that it was intended to state principles and not to lay down rules. But I suppose that those of us who merely concurred with him ought to have foreseen that this might happen and to have taken steps to prevent it. So I shall try to repair my omission by stating now in a different way the principles which I, and I believe also Lord Devlin, had in mind. I do not think that he would have disagreed with any important part of what I am now about to say.

Damages for any tort or or ought to be fixed at a sum which will compensate the plaintiff, so far as money can do it, for all the injury which he has suffered. Where the injury is material and has been ascertained it is generally possible to assess damages with some precision. But that is not so where he has been caused mental distress or when his reputation has been attacked—where to use the traditional phrase he has been held up to hatred, ridicule or contempt. Not only is it impossible to ascertain how far other people's minds have been affected, it is almost impossible to equate the damage to a sum of money. Any one person trying to fix a sum as compensation will probably find in his mind a wide bracket within which any sum could be regarded by him as not unreasonable—and different people will come to different conclusions. So in the end there will probably be a wide gap between the sum which on an objective view could be regarded as the least and the sum which could be regarded as the most to which the plaintiff is entitled as compensation.

It has long been recognised that in determining what sum within that bracket should be awarded, a jury, or other tribunal, is entitled to have regard to the conduct of the defendant. He may have behaved in a high-handed, malicious, insulting or oppressive manner in committing the tort or he or his counsel may at the trial have aggravated the injury by what they there said. That would justify going to the top of the bracket and awarding as damages the largest sum that could fairly be regarded as compensation.

Frequently in cases before *Rookes v Barnard*¹² when damages were increased in that way but were still within the limit of what could properly be regarded as compensation to the plaintiff, it was said that punitive, vindictive or exemplary damages were being awarded. As a mere matter of language that was true enough. The defendant was being punished or an example was being made of him by making him pay more than he would have had to pay if his conduct had not been outrageous. But the damages although called punitive were still truly compensatory; the plaintiff was not being given more than his due.

On the other hand when we came to examine the old cases we found a number which could not be explained in that way. The sums awarded as damages were more—sometimes much more—than could on any view be justified as compensatory, and courts, perhaps without fully realising what they were doing, appeared to have

¹² [1964] 1 All ER 367, [1964] AC 1129

a permitted damages to be measured not by what the plaintiff was fairly entitled to receive but by what the defendant ought to be made to pay as punishment for his outrageous conduct. That meant that the plaintiff, by being given more than on any view could be justified as compensation, was being given a pure and undeserved windfall at the expense of the defendant, and that insofar as the defendant was being required to pay more than could possibly be regarded as compensation he was being subjected to pure punishment.

b I thought and still think that that is highly anomalous. It is confusing the function of the civil law which is to compensate with the function of the criminal law which is to inflict deterrent and punitive penalties. Some objection has been taken to the use of the word 'fine' to denote the amount by which punitive or exemplary damages exceed anything justly due to the plaintiff. In my view the word 'fine' is an entirely accurate description of that part of any award which goes beyond anything justly due to the plaintiff and is purely punitive.

c Those of us who sat in *Rookes v Barnard*¹³ thought that the loose and confused use of words like 'punitive' and 'exemplary' and the failure to recognise the difference between damages which are compensatory and damages which go beyond that and are purely punitive had led to serious abuses, so we took what we thought was the best course open to us to limit those abuses. Theoretically we might have held that as purely punitive damages had never been sanctioned by any decision of this House (as to which I shall say more later) there was no right under English law to award them. But that would have been going beyond the proper function of this House. There are many well established doctrines of the law which have not been the subject of any decision by this House. We thought we had to recognise that it had become an established custom in certain classes of case to permit awards of damages which e could not be justified as compensatory, and that that must remain the law. But we thought and I still think it well within the province of this House to say that that undesirable anomaly should not be permitted in any class of case where its use was not covered by authority. In order to determine the classes of case in which this anomaly had become established it was of little use to look merely at the words which had been used by the judges because, as I have said, words like 'punitive' and f 'exemplary' were often used with regard to damages which were truly compensatory. We had to take a broad view of the whole circumstances.

I must now deal with those parts of Lord Devlin's speech which have given rise to difficulties. He set out two categories of cases which in our opinion comprised all or virtually all the reported cases in which it was clear that the court had approved of an award of a larger sum of damages than could be justified as compensatory. Critics g appear to have thought that he was inventing something new. That was not my understanding. We were confronted with an undesirable anomaly. We could not abolish it. We had to choose between confining it strictly to classes of cases where it was firmly established, although that produced an illogical result, or permitting it to be extended so as to produce a logical result. In my view it is better in such cases to be content with an illogical result than to allow any extension.

h It will be seen that I do not agree with Lord Devlin's view that in certain classes of case exemplary damages serve a useful purpose in vindicating the strength of the law. That view did not form an essential step in his argument. Concurrence with the speech of a colleague does not mean acceptance of every word which he has said. If it did there would be far fewer concurrences than there are. So I did not regard disagreement on this side issue as preventing me from giving my concurrence.

i I think that the objections to allowing juries to go beyond compensatory damages are overwhelming. To allow pure punishment in this way contravenes almost every principle which has been evolved for the protection of offenders. There is no definition of the offence except that the conduct punished must be oppressive, high-handed, malicious, wanton or its like—terms far too vague to be admitted to any criminal

code worthy of the name. There is no limit to the punishment except that it must not be unreasonable. The punishment is not inflicted by a judge who has experience and at least tries not to be influenced by emotion; it is inflicted by a jury without experience of law or punishment and often swayed by considerations which every judge would put out of his mind. And there is no effective appeal against sentence. All that a reviewing court can do is to quash the jury's decision if it thinks the punishment awarded is more than any 12 reasonable men could award. The court cannot substitute its own award. The punishment must then be decided by another jury and if they too award heavy punishment the court is virtually powerless. It is no excuse to say that we need not waste sympathy on people who behave outrageously. Are we wasting sympathy on vicious criminals when we insist on proper legal safeguards for them? The right to give punitive damages in certain cases is so firmly embedded in our law that only Parliament can remove it. But I must say that I am surprised by the enthusiasm of Lord Devlin's critics in supporting this form of palm tree justice.

Lord Devlin's first category is set out in the passage where he said¹⁴:

'The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category,—I say this with particular reference to the facts of this case,—to oppressive action by private corporations or individuals.'

This distinction has been attacked on two grounds: first, that it only includes Crown servants and excludes others like the police who exercise governmental functions but are not Crown servants and, secondly, that it is illogical since both the harm to the plaintiff and the blameworthiness of the defendant may be at least equally great where the offender is a powerful private individual. With regard to the first I think that the context shows that the category was never intended to be limited to Crown servants. The contrast is between 'the government' and private individuals. Local government is as much government as national government, and the police and many other persons are exercising governmental functions. It was unnecessary in *Rookes v Barnard*¹⁵ to define the exact limits of the category. I should certainly read it as extending to all those who by common law or statute are exercising functions of a governmental character.

The second criticism is I think misconceived. I freely admit that the distinction is illogical. The real reason for the distinction was, in my view, that the cases showed that it was firmly established with regard to servants of 'the government' that damages could be awarded against them beyond any sum justified as compensation, whereas there was no case except one that was overruled where damages had been awarded against a private bully or oppressor to an amount that could not fairly be regarded as compensatory, giving to that word the meaning which I have already discussed. I thought that this House was therefore free to say that no more than that was to be awarded in future.

We are particularly concerned in the present case with the second category. With the benefit of hindsight I think I can say without disrespect to Lord Devlin that it is not happily phrased. But I think the meaning is clear enough. An ill disposed person could not infrequently deliberately commit a tort in contumelious disregard of another's rights in order to obtain an advantage which would outweigh any compensatory damages likely to be obtained by his victim. Such a case is within this category. But then it is said, suppose he commits the tort not for gain but simply out of malice why should he not also be punished. Again I freely admit there is no logical reason. The reason for excluding such a case from the category is simply that firmly established authority required us to accept this category however little we might like it, but did not require us to go farther. If logic is to be preferred to the desirability of cutting down the scope for punitive damages to the greatest extent

¹⁴ [1964] 1 All ER at 410, [1964] AC at 1226

¹⁵ [1964] 1 All ER 367, [1964] AC 1129

a that will not conflict with established authority then this category must be widened. But as I have already said I would, logic or no logic, refuse to extend the right to inflict exemplary damages to any class of case which is not already clearly covered by authority. On that basis I support this category.

b In my opinion, the conduct of both defendants in this case was such that the jury were clearly entitled, if properly directed, to hold that it brought them within the second category. Again, I do not intend to cover ground already covered by my noble and learned friends. So I say no more than that the jury were fully entitled to hold that the appellants knew when they committed this tort that passages in this book were highly defamatory of Captain Broome and could not be justified as true and that it could properly be inferred that they thought that it would pay them to publish the book and risk the consequences of any action Captain Broome might take. It matters not whether they thought that they could escape with moderate damages or that the enormous expense involved in fighting an action of this kind would prevent Captain Broome from pressing his claim.

c It was argued that to allow punitive damages in this case would hamper other publishers or limit their freedom to conduct their business because it can always be inferred that publishers publish any book because they expect a profit from it. But punitive damages could not be given unless it was proved that they knew that passages in the book were libellous and could not be justified or at least deliberately shut their eyes to the truth. I would hope that no publisher would publish in such circumstances. There is no question of curtailing the freedom of a reputable publisher.

d The next passage in Lord Devlin's speech which has caused some difficulty is what has been called the 'if, but only if' paragraph¹⁶. I see no difficulty in it but again I shall set out the substance of it in my own words. The difference between compensatory and punitive damages is that in assessing the former the jury or other tribunal must consider how much the plaintiff ought to receive whereas in assessing the latter they must consider how much the defendant ought to pay. It can only cause confusion if they consider both questions at the same time. The only practical way to proceed is first to look at the case from the point of view of compensating the plaintiff. He must not only be compensated for proved actual loss but also for any injury to his feelings and for having had to suffer insults, indignities and the like. And where the defendant has behaved outrageously very full compensation may be proper for that. So the tribunal will fix in their minds what sum would be proper as compensatory damages. Then if it has been determined that the case is a proper one for punitive damages the tribunal must turn its attention to the defendant and ask itself whether the sum which it has already fixed as compensatory damages is or is not adequate to serve the second purpose of punishment or deterrence. If they think that that sum is adequate for the second purpose as well as for the first they must not add anything to it. It is sufficient both as compensatory and as punitive damages. But if they think that sum is insufficient as a punishment then they must add to it enough to bring it up to a sum sufficient as punishment. The one thing which they must not do is to fix sums as compensatory and as punitive damages and add them together. They must realise that the compensatory damages are always part of the total punishment.

e f g h i It was argued that the jury were not properly directed by the trial judge on this matter. I agree with your Lordships that that argument must fail. A judge's direction to a jury is not to be considered in vacuo. It must be read in light of all the circumstances as they then existed and I cannot believe that the jury were left in any doubt as to how they must deal with this matter.

j Next there are questions arising from the fact there were two defendants. When dealing with compensatory damages the law is quite clear. There was one tort of which both defendants were guilty. So one sum is fixed as compensation and judgment is given for that sum against both defendants leaving it to the plaintiff to sue whichever he chooses and then leaving it to the defendant who has paid to recover a

contribution if he can from the other. But when we come to punitive damages the position is different. Although the tort was committed by both only one may have been guilty of the outrageous conduct or if two or more are so guilty they may be guilty in different degrees or owing to one being rich and another poor punishment proper for the former may be too heavy for the latter.

Unless we are to abandon all pretence of justice, means must be found to prevent more being recovered by way of punitive damages from the least guilty than he ought to pay. We cannot rely on his being able to recover some contribution from the other. Suppose printer, author and publisher of a libel are all sued. The printer will probably be guiltless of any outrageous conduct but the others may deserve punishment beyond compensatory damages. If there has to be one judgment against all three then it would be very wrong to allow any element of punitive damages at all to be included because very likely the printer would have to pay the whole and the others might not be worth suing for a contribution. The only logical way to deal with the matter would be first to have a judgment against all the defendants for the compensatory damages and then to have a separate judgment against each of the defendants for such additional sum as he should pay as punitive damages. I would agree that that is impracticable. The fact that it is impracticable to do full justice appears to me to afford another illustration of how anomalous and indefensible is the whole doctrine of punitive damages. But as I have said before we must accept it and make the best we can of it.

So, in my opinion, the jury should be directed that, when they come to consider what if any addition is to be made to the compensatory damages by way of punitive damages, they must consider each defendant separately. If one any of the defendants does not deserve punishment or if the compensatory damages are in themselves sufficient punishment for any one of the defendants, then they must not make any addition to the compensatory damages. If each of the defendants deserves more punishment than is involved in payment of the compensatory damages then they must determine which deserves the least punishment and only add to the compensatory damages such additional sum as that defendant ought to pay by way of punishment. I do not pretend that that achieves full justice but it is the best we can do without separate awards against each defendant.

It was argued that here again there was misdirection of the jury because all that was not made plain to them. But again I agree with your Lordships that in the whole circumstances we ought not to hold the direction of the learned trial judge to be inadequate. Again the jury can have been in no doubt as to what was required of them.

There remains what is perhaps the most difficult question in this case—whether the additional award of £25,000 as punitive damages is so excessive that we can interfere. I think it was much too large, but that is not the test. I would like to be able to hold that the court has more control over an award of punitive damages than it has over an award of compensatory damages. As regards the latter it is quite clear that a court can only interfere if satisfied that no 12 reasonable men could have awarded so large a sum and the reason for that is plain. The court has no power to substitute its own assessment for the verdict of a jury. If it interferes it can only send the matter back to another jury. So before it can interfere it must be well satisfied that no other jury would award so large a sum. I do not see how this House could arrogate to itself any wider power with regard to punitive damages. We could not deprive the plaintiff of his right to a new trial so we must adhere to the established test. Any diminution or abolition of the functions of a jury in libel cases can only come from Parliament. If this case brings nearer the day when Parliament does take action I for one shall not be sorry.

Whether or not we can interfere with this award is a matter which is not capable of much elaboration. In considering how far 12 reasonable men might go, acting as jurors commonly do act, one has to bear in mind how little guidance the court is entitled to give them. All that they can be told is that they must not award a sum

a which is unreasonable. In answer to questions whether anything more definite could properly be said neither counsel in this case was able to make any suggestion and I have none to offer. The evidence in this case is such that the jury could take an extremely unfavourable view of the conduct of both defendants. I do not say that they ought to have done so, but they were entitled to do so. And they must have done so. I find it impossible to say that no jury of reasonable men, inexperienced but doing
b their best with virtually no guidance, could reach the sum of £25,000. Or, to put it in another way, I would feel no confidence that if the matter were submitted to another jury they must reach a substantially different result. So with considerable regret I must hold that it would be contrary to our existing law and practice if this House refused to uphold this verdict.

c It is true that in this case the parties agreed that if the verdict for £25,000 were quashed they would leave it to this House to substitute another figure. But that agreement cannot justify us in doing otherwise than we would have done if the parties had stood on their legal rights. The obvious reason for that agreement was a common desire to avoid the enormous expense of a new trial. This is not the first occasion on which I have felt bound to express my concern about the undue proximity and expense of libel actions. I would not blame any individuals. It may arise from
d the conduct of a trial before a jury being more expensive than a trial before a judge. If so that is an additional argument for taking these cases away from juries. Or it may be that it suits wealthy publishers of newspapers, books and periodicals that the cost of fighting a libel action is so great that none but a person with large financial backing can sue them effectively.¹ Whatever be the reason the costs of this case have already reached a figure which many laymen would call scandalous. I think that those in a position to take effective action might take note.

e Finally, I must say something about a strange misconception which appears in the judgments of the Court of Appeal¹⁷ in this case. Somehow they reached the conclusion that the decision of this House in *Rookes v Barnard*¹⁸ was made per incuriam, was ultra vires, and had produced an unworkable position. It must be noted that in at least three earlier cases the Court of Appeal were able without difficulty or question
f to apply that decision (*McCarey v Associated Newspapers Ltd*¹⁹, *Broadway Approvals Ltd v Odhams Press Ltd*²⁰ and *Fielding v Variety Incorporated*¹). What has caused their change of mind does not appear but I must deal with their new view. As regards the present position being unworkable, of course many difficulties remain in this branch of the law, but these difficulties are an inheritance from the confusion of the past. I have dealt fairly fully with the proper interpretation of *Rookes v Barnard*¹⁸ and it appears to me that that decision removes many old difficulties and creates few, if
g any, new ones.

I need not deal separately with the novel idea that a decision of this House can be ultra vires because that charge appears to be consequential on the charge that this House acted per incuriam in reaching its decision. It is perfectly legitimate to think and say that we were wrong but how anyone could say we acted per incuriam in face
h of the passage² in which reference is made to *Ley v Hamilton*³ I fail to understand.

This charge is really based on what appears to me to be a misreading by the Court of Appeal of two decisions of this House, *E Hulton & Co v Jones*⁴ and *Ley v Hamilton*³. *Hulton's* case⁴ has always been regarded as the leading authority for the proposition that a defamatory description intended to apply to a fictional person may in fact be a libel on a real person and therefore a subject for damages. I see nothing in the speeches in this House to indicate that punitive damages in the modern sense were
i being considered. It was said that there was an element of recklessness in the failure of the defendants to realise that there was a real Artemus Jones and that this justified

17 [1971] 2 All ER 187, [1971] 2 WLR 853

18 [1964] 1 All ER 367, [1964] AC 1129

19 [1964] 3 All ER 947, [1965] 2 QB 86

20 [1965] 2 All ER 523, [1965] 1 WLR 805

1 [1967] 2 All ER 497, [1967] 2 QB 841

2 [1964] 1 All ER at 412, 413, [1964] AC at 1230

3 (1935) 153 LT 384

4 [1910] AC 20, [1908-10] All ER Rep 29

a rather high sum of damages but I see nothing to indicate any view that the damages went beyond anything that could be justified as compensation and could only be justified as being punitive in the modern sense.

*Ley v Hamilton*⁵ requires rather fuller consideration. But again I see nothing to indicate that this House held that the damages went beyond compensation or that there had been outrageous conduct justifying a punitive award which went beyond compensation. The majority in the Court of Appeal certainly held that the £5,000 damages awarded was punitive in the modern sense. They held that the real damage was trifling and the rest punishment. Greer LJ said⁶ that if Mr Hamilton had been prosecuted for criminal libel it was inconceivable that he would have been fined £5,000. Maugham LJ said⁷ that the damages could not be described as a fair and reasonable compensation but were in the nature of a fine. In this House only Lord Atkin delivered a speech. I read it as intended to show that elements properly included in compensatory damages were far wider than the majority in the Court of Appeal had thought and that the whole of this £5,000 was in fact justified as being compensatory. He said⁸:

"The fact is that the criticism with great respect seems based upon an incorrect view of the assessment of damages for defamation. They are not arrived at as the Lord Justice seems to assume by determining the "real" damage and adding to that a sum by way of vindictive or punitive damages. It is precisely because the "real" damage cannot be ascertained and established that the damages are at large. It is impossible to track the scandal, to know what quarters the poison may reach: it is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation. No doubt in newspaper libels juries take into account the vast circulations which are justly claimed in present times. The "punitive" element is not something which is or can be added to some known factor which is non-punitive. In particular it appears to present no analogy to punishment by fine for the criminal offence of publishing a defamatory libel."

By saying that compensation for insult or the pain of a false accusation cannot be weighed at all closely and that there was nothing here analogous to punishment by fine, he was to my mind making it as clear as words can make it that the whole of this £5,000 was truly compensatory in character. So I think that Lord Devlin was perfectly right in saying that there is no decision of this House which recognises punitive damages in the modern sense of something which goes beyond compensation. Where the Court of Appeal⁹ went wrong was in failing to realise that in the older cases damages were frequently referred to as exemplary or punitive although they were in reality compensatory.

On the whole matter I would dismiss this appeal.

LORD MORRIS OF BORTH-Y-GEST. My Lords, at the trial of this action questions arose whether, if the plaintiff, Captain Broome, succeeded, he was entitled to recover exemplary damages in addition to compensatory damages. The law relating to exemplary damages was considered in your Lordships' House in 1964 and was laid down in the decision in *Rookes v Barnard*¹⁰. That decision bound the learned judge. It bound the Court of Appeal⁹. It continues to be binding authority in all courts unless and until it appears to your Lordships to be right to depart from it.

In presiding at the trial the learned judge set himself loyally and faithfully to follow the binding authority of the decision. His directions to the jury followed the approach laid down in the decision though it is contended that in regard to one or two matters there was faulty exposition which was sufficiently serious to vitiate

5 (1935) 153 LT 384

6 (1934) 151 LT 360 at 369

7 (1934) 151 LT at 374

8 (1935) 153 LT at 386

9 [1971] 2 All ER 187, [1971] 2 WLR 853

10 [1964] 1 All ER 367, [1964] AC 1129

a the award made by the jury of exemplary damages. These matters call for separate consideration. If the contentions concerning them do not succeed, there remains an issue whether the award of the jury was excessive and should be set aside. If it is held that there was nothing amiss at the trial and that the law as laid down in your Lordships' House¹¹ was properly applied by the learned judge it would be an unhappy conclusion if it were now held that the trial had in fact been conducted on wrong or at least on unnecessary lines but that this had only been so because the law which had to be followed had been wrongly laid down. If that were the conclusion it is by no means certain that it would be possible to avoid ordering a new trial which would then be conducted on the basis of the law as newly laid down. But a result so lamentable (and for the parties so calamitous) must be contemplated as at least a possibility if it is decided that the law was wrongly declared in 1964 and must now be changed or changed back again.

c Before considering this aspect of the matter further I must express my view in regard to the main contentions which are raised by the appellants. They for their part do not in any way question the validity of *Rookes v Barnard*¹². Their appeal relates only to the award of exemplary damages. The jury found that the words complained of in the hardback edition were defamatory of Captain Broome and that the words were not true in substance or in fact. They found similarly in regard to the proof copies. They awarded compensatory sums respectively of £14,000 and £1,000. No challenge as to such results is made. No criticism is advanced in regard to the very careful summing-up of the learned judge dealing with the facts and with the issues as to liability. No suggestion is made that the awards of compensation can be attacked as being excessive or unreasonable.

e The learned judge left three questions to the jury on the issue of exemplary damages. First they were asked whether Captain Broome had proved that he was entitled to exemplary damages. Here the learned judge was carefully following *Rookes v Barnard*¹². There may be exemplary damages if a defendant has formed and been guided by the view that though he may have to pay some damages or compensation because of what he intends to do yet he will in some way gain (for the category is not confined to money-making in the strict sense) or may make money out of it, to an extent which he hopes and expects will be worth his while. I do not think that the word 'calculated' was used to denote some precise balancing process. The situation contemplated is where someone faces up to the possibility of having to pay damages for doing something which may be held to have been wrong but where nevertheless he deliberately carries out his plan because he thinks that it will work out satisfactorily for him. He is prepared to hurt somebody because he thinks that he may well gain by so doing even allowing for the risk that he may be made to pay damages. As the learned judge put it in reference to defamation there may be exemplary damages in cases where someone wilfully or knowingly or recklessly peddles untruths for profit. There must be evidence fit to be left to the jury but if there is then it is for the jury to decide whether there is entitlement to exemplary damages on the basis to which I have referred.

h It was contended on behalf of the appellants that there was no evidence fit to be left to the jury in this case on this issue. In my view this contention wholly fails. There was ample evidence. It was painstakingly recounted in the summing-up of the learned judge. It is helpfully referred to and summarised in the judgment of Lord Denning MR¹³. It is reviewed in the speech of Lord Hailsham LC which I have had the advantage of reading in advance.

i Similar considerations apply to the question which was put to the jury and which they answered by saying that entitlement to exemplary damages was proved against both defendants. It is in regard to the next question and answer that the greatest

¹¹ In *Rookes v Barnard* [1964] 1 All ER 367, [1964] AC 1129

¹² [1964] 1 All ER 367, [1964] AC 1129

¹³ [1971] 2 All ER 187, [1971] 2 WLR 853

doubts and difficulties in my view arise. Being asked, what additional sum should be awarded him by way of exemplary damages? the answer of the jury was £25,000. So there were three awards: one being (for the hardback edition) the compensatory figure of £14,000; another being the exemplary damages figure of £25,000. For the total of £40,000 judgment was entered.

I must confess that for my part I should greatly regret it if the practice became general of having a separate award of exemplary damages in this manner (I will return to this question later). But the learned judge was only following the guidance specifically given in *Rookes v Barnard*¹⁴. There it was said¹⁵ that the fact that the two sorts of damage differ essentially does not necessarily mean that there should be two awards. But it was said that there may be cases in which it is difficult for a judge to say whether he ought or ought not to leave a claim for exemplary damages to the jury. I can quite see that in such a case it will be easier for an appellate court (where an issue is raised whether there was evidence which could justify an award of exemplary damages) if there are two awards. The award of exemplary damages could be set aside without the necessity for a new trial if the appellate court considered that the evidence was not such as to have been fit for the consideration of the jury so as to entitle them to award exemplary damages. For this reason it was stated in *Rookes v Barnard*¹⁴ that if a judge is in doubt whether he ought to leave a claim for exemplary damages to a jury then he could invite them to say 'what sum they would fix as compensation and what additional sum, if any, they would award if they were entitle to give exemplary damages'. It was this course that the learned judge followed in the present case. But if this course is followed the words 'if any' become of importance. They were not included in the question which was put to the jury.

There are three very important issues which arise. (1) Did the learned judge give an adequate direction to the jury to ensure that they understood that they should only award an 'additional' sum if they were satisfied that the amount they were awarding as compensatory damage was in itself not enough to punish the defendants? (2) Did the learned judge give an adequate direction to meet the situation where (as in this case) there are two defendants? and (3) In any event is the sum of £40,000 excessive as an award of exemplary damages and a figure which no reasonable jury could award—with the result that although the purely compensatory part £15,000 is not challenged the award of an additional £25,000 must be set aside? (1) The relevant sentences in the summing-up have been referred to in the speech of Lord Hailsham LC and I need not set them out. I would have been happier if the direction on this point (which came towards the end of what I venture to think was a masterly review of the case) had been ampler and more explicit than it was. But the learned judge did emphasise the word 'additional'. He asked the jury to underline it. He said that they should underline it because both the court and counsel would want to know 'if you do decide to award punitive damages, how much more do you award over and above the compensatory damage'. Even so it would have been better to have made it abundantly clear that the punitive element is not to be considered in isolation: an enforced obligation to pay a large sum by way of compensation has itself a punitive impact. So a jury ought fully to understand that only if a sum awarded as compensation is inadequate as a punishment should any larger sum be awarded.

Much earlier in his summing-up the learned judge had dealt with this matter in an introductory way. He told the jury that they were being asked—

'not only to give Captain Broome compensatory damages, that is, a reasonable sum for the injury to his reputation and the exacerbation of his feelings: but in addition to fine [the appellants] and Mr. Irving for having done what they have done. The money which you decide—if you do decide—to award by way of punitive damages will not go into the National Exchequer. It will have to go into Captain Broome's pocket.'

¹⁴ [1964] 1 All ER 367, [1964] AC 1129

¹⁵ [1964] 1 All ER at 411, [1964] AC at 1228

a Here again there was an omission to emphasise that an award of compensation must always and inevitably be a part of the 'fine' in cases where the imposition of a 'fine' is warranted.

Although a study of the shorthand note of what was said has led me to the view that there should have been amplification in the way to which I have referred, the important question now is whether it should be held that the jury were misled with the result that their award cannot stand. The emphasis placed on the word
b 'additional' could not have been lost sight of by the jury. Additional to what? Quite clearly, additional to the amount of compensation awarded. The jury were asked 'how much more' they would award. The 'more' was to be 'over and above' the compensation. It surely must have been clear to the jury that any 'more' that they decided on or any 'additional' sum would have to be paid by those against whom they awarded it on top of the sum that they were first awarding. Here was a jury that
c listened to the case over a period of 17 days. They deliberated for nearly five hours. They awarded a sum of £25,000 to be 'additional' to their award of £15,000. They knew that the total was £40,000. Thereafter they heard both counsel agree that there should be a single judgment for that amount. No suggestion was made (or I think could possibly have been made) that the £25,000 included the £15,000. I would find
d it difficult to accept that at the stage in their deliberations when they were considering whether the present appellants and Mr Irving should be punished by being made to pay money they should at that stage have left out of account one part of the money that they themselves were awarding. If having decided that it was a case for punishment the jury were considering the monetary sum which, as such punishment, should be paid the point would surely have been raised by one member if not by all members
e of the jury: are we not punishing them enough by saying that they must pay £15,000? They could have recorded that as their view had they entertained it. I am not prepared to assume that something which at that stage must really have been quite obvious was overlooked by the jury.

(2) There is nothing in regard to this question which I could usefully add to what Lord Hailsham LC has said in reviewing the authorities and in formulating his
f conclusion. I express my concurrence.

(3) The approach which should be followed by an appellate court in considering whether an award of damages made by a jury should be assailed on the ground that the sum awarded is excessive has been clearly defined in authoritative decisions. They are referred to in the speech of Lord Hailsham LC. I am bound to say that the figure of £40,000 appears to me to be a high figure. Certainly it must be a very
g unusual case in which on a correct application of the law as laid down in *Rookes v Barnard*¹⁶ the amount which defendants must pay should so greatly exceed the amount which is reasonably to be received by the plaintiff by way of compensation. It is this disparity between the £40,000 and the £15,000 that has caused disquiet as to whether the jury may have been caused or allowed to be under a misunderstanding. But if the conclusion is reached that the jury knew what they were about and chose
h their figures advisedly then I do not think that I ought to conclude that their 'additional' figure of £25,000 was so high that no reasonable jury could award it. To translate injury to and attack on reputation into monetary terms is at all times a difficult exercise. But it was the same jury that fixed the 'additional' figure of £25,000 that also—without being impeached for so doing—fixed the compensatory figure of £15,000. If they did not go wide when fixing the latter why should it be determined
i that they went wide in fixing the former. The conclusion which I think can be drawn is that the jury took a very serious view of the conduct and attitude of the defendants. If, after hearing all the relevant features of the case probed and examined over a period of 17 days and hearing the evidence of such of the parties as decided to call or give evidence, the jury did take a very serious view there was evidence which entitled them to do so. They may have regarded the conduct and attitude of each of the

defendants with equally sharp disfavour. If it was their considered collective view that the defamation was grave and that publication was deliberately undertaken by those who had regard for their own advantage but none for the honour and renown of one whom they traduced then the jury were warranted in deciding that such conduct should be heavily penalised. Whatever might have been my personal assessment had I been on the jury I have not been persuaded that it must be decided that the penalty imposed was beyond the limit to which a reasonable jury could go. Nor can it be said with any assurance that an estimation of a figure by a learned judge would necessarily have superior validity. A learned judge has experience and knowledge of other cases but in a matter so elusive as fixing in monetary terms a reflection of feelings of disapproval there is no norm. It may be difficult to give guidance but a judge should be able to express to a jury the same guidance as he would give to himself.

For the reasons which I have given I consider that the appeal should be dismissed. As I have indicated, the appellants in no way sought to impugn the decisions in *Rookes v Barnard*¹⁷. Such ardour in criticism as may have been evinced in the Court of Appeal¹⁸ by counsel for Captain Broome became tempered and modified by the reflection that an assault on *Rookes v Barnard*¹⁷ was not essential for his success in this appeal and that the overturning of *Rookes v Barnard*¹⁷ might at least possibly involve the jettisoning of all the proceedings to date and a complete new trial on a fresh basis. But as so much was said about *Rookes v Barnard*¹⁷ and because in the printed case of the respondent, Captain Broome, the first reason set out was that your Lordships' House should depart from its decision in *Rookes v Barnard*¹⁷ (insofar as that decision altered the law on exemplary damages generally or at least in defamation cases) I must record my opinion.

In *Rookes v Barnard*¹⁷ one submission that was made was that exemplary damages could not be awarded in that case. Other submissions led to a somewhat general consideration of the law relating to exemplary damages. The report of the arguments¹⁹ shows that certain authorities and certain textbooks were referred to and were examined. There were citations of some 30 cases. In the result the House examined and reviewed the law and came to certain conclusions. The House was not bound to limit those conclusions within any formulation which counsel had thought fit to formulate.

It would be idle to deny that a very considerable pruning operation was decided on. It may be that there are some who would not have pruned so much and so drastically. It may be that there are some who would have pruned more severely. What was done was done in the hope of removing from the law 'a source of confusion between aggravated and exemplary damages'. It may be that there are some who feel that though the previous law (built up, as the common law is, as a result of particular decisions given in particular sets of circumstances) was in very many respects imprecise and even illogical yet it was somehow found in practice to work and to be no serious cause of confusion. It may be that there are some who consider that manifest variations and divergencies in terminology did not reflect any really fundamental differences of approach: that for example when in *The Mediana (Owners) v Comet (Owners)*²⁰ Lord Halsbury LC made a reference, although only a passing and incidental one, to punitive damages:

'I put aside cases of trespass where a high-handed procedure or insolent behaviour has been held in law to be a subject of aggravated damages, and the jury might give what are called punitive damages'

17 [1964] 1 All ER 367, [1964] AC 1129

18 [1971] 2 All ER 187, [1971] 2 WLR 853

19 [1964] AC at 1158-1164

20 [1900] AC 113 at 118, [1900-3] All ER Rep 126 at 129

a he had much the same conception in mind as had Lord Atkinson when in *Addis v Gramophone Co Ltd*²¹, he made an incidental reference to circumstances of malice, fraud, defamation or violence which would sustain an action of tort in which a person might no doubt 'recover exemplary damages, or what is sometimes styled vindictive damages' or as had Lord Loreburn LC when he said in *Hulton v Jones*¹:

b 'In the second place the jury were entitled to say this kind of article is to be condemned. There is no tribunal more fitted to decide in regard to publications, especially publications in the newspaper Press, whether they bear a stamp and character which ought to enlist sympathy and to secure protection. If they think that the licence is not fairly used and that the tone and style of the libel is reprehensible and ought to be checked, it is for the jury to say so . . .'

c But even if some of the thoughts above referred to are in fact entertained, do they give warrant for re-opening now the debate that led to the decision in *Rookes v Barnard*². I do not think so. I do not think that the power that was referred to in the statement of 26th July 1966³ was intended to encourage a tendency periodically to chop and change the law. In branches of the law where clarification becomes necessary there may well be decisions which as a matter of policy are not universally welcome or where some may think that some variant of the decision one way or the other would have been more acceptable. But this does not mean that decisions of this House should readily be reviewed whenever a case presents itself which is covered by a decision. There must be something much more.

d In his book on damages⁴ Professor Street poses the question whether awards of exemplary damages are ever justified. He outlines seven arguments against them and with mathematical impartiality seven arguments in their favour concluding
e that one cannot say whether or not exemplary damages are desirable. Whatever general views may be entertained or whatever inclination there may be in different personal views I see no advantage in refusing at this juncture to recognise that a deliberate pronouncement was made in *Rookes v Barnard*².

f Although I consider that no reason has been shown for denying to that pronouncement the authority of a decision of this House it is not inconsistent with this approach to express the hope that a necessity for a separate and isolated assessment of exemplary damages will be rare. In the search for authority only one case was found prior to *Rookes v Barnard*² in which there was such a result. That was *Loudon v Ryder*⁵ now overruled. The present case is I think the first one subsequent to *Rookes v Barnard*² in which such a separate award has actually been made.

g In the older cases the 'vindictive' or 'exemplary' or 'punitive' aspect merely became one element in a composite whole. Thus the law as it was in 1877 was summarised in Mr Mayne's *Treatise on Damages*⁶. He pointed to the difference between damages in cases of contract (where they were only a compensation) and in cases of tort. In the latter 'if there were no circumstances of aggravation they 'are generally the same'. But where he said:

h ' . . . the injury is to the person, or character, or feelings, and the facts disclose fraud, malice, violence, cruelty, or the like, they operate as a punishment, for the benefit of the community, and as a restraint to the transgressor.'

In the various cases cited⁷ one amount only of damages was assessed. For a later general summary of the law (as it was in 1895) reference may be made to Sir Frederick

j 21 [1909] AC 488 at 496, [1908-10] All ER Rep 1 at 5

1 [1910] AC 20 at 25, [1908-10] All ER Rep 29 at 47

2 [1964] 1 All ER 367, [1964] AC 1129

3 See Note [1966] 3 All ER 77, [1966] 1 WLR 1234

4 Principles of the Law of Damages, 1962, at pp 34-36

5 [1953] 1 All ER 741, [1953] 2 QB 202

6 3rd Edn, p 37

7 See pp 36, 37, 514, 515, 516

Pollock's book on torts⁸. He refers to cases where there is great injury without the possibility of measuring compensation by any numerical rule. In such cases he said:

'...juries have been not only allowed but encouraged to give damages that express indignation at the defendant's wrong rather than a value set upon the plaintiff's loss. Damages awarded on this principle are called exemplary or vindictive.'

He went on to explain that—

'the kind of wrongs to which they are applicable are those which, besides the violation of a right or the actual damage, import insult or outrage.'

The cases cited, to which I need not refer in detail, again appear to me to be cases in which only one figure of damages was assessed.

When juries came to award damages in such cases of tort they did therefore give and indeed were 'encouraged' to give a sum which marked displeasure or indignation or which was to serve as a deterrent or as an example or which vindicated the law or which was a way of punishing the defendant. But juries were not invited to isolate such element as was purely punitive. I do not expect that they did in practice. In some cases their displeasure or indignation would operate as a kind of topping-up process. But if the process by which they had arrived at a figure could have been analysed (which normally it could not have been) while it would probably have been found that there had been nothing in the nature of a mathematical addition of separate sums yet it would have been recognised that some (wholly unascertainable) part of the whole must have been purely punitive. Stated otherwise such (unascertained) part was a fine. Logical analysis forces the conclusion therefore that in the result there would in a civil action have been punishment for conduct not particularised in any criminal code and that such punishment had taken the form of a fine not receivable by the state but as a sort of bonus by a private individual who would apart from it be solaced for the wrong done to him. There may be much to be said for making it permissible in a criminal court to order in certain cases that a convicted person should pay compensation. There is much to be said against a system under which a fine becomes payable in a civil court without any of the safeguards which protect those charged with crimes. If therefore the working of the law before *Rookes v Barnard*⁹ is exposed to a relentless logical examination it has to be conceded that some features of it were not in principle acceptable. Yet it may be that no serious injustice resulted. And indeed as we have been told the life of the law often lies not in logic but in experience. It would however be an unfortunate and bizarre result if a wholly laudable attempt to rationalise the law had brought it about that the element which it was most sought to suppress was so brought into sharp relief that it attained a significance never before exhibited.

I would regard the present case as exceptional in the sense that the jury must have considered that the conduct of the defendants merited very special condemnation. In other than an exceptional case where exemplary damages are to be awarded I would hope that a jury would be unlikely to award a total sum which exceeded its purely compensatory component element to an extent in any way comparable to that which is revealed in the present case.

I would dismiss the appeal.

VISCOUNT DILHORNE. My Lords, the main issues to be determined in this appeal are (1) whether what was said by my noble and learned friend Lord Devlin in *Rookes v Barnard*⁹ with regard to exemplary damages, and with which all the other members of the House then sitting agreed, correctly states the law; (2) if it does, whether Lawton J erred in leaving the question of exemplary damages to the

a jury; (3) having left it to them, whether he misdirected them with regard thereto; and (4) whether the sum of £40,000 awarded by them, of which £25,000 was exemplary damages, was so excessive that that verdict cannot be allowed to stand. I propose to consider the first of these questions last. Although *Rookes v Barnard*¹⁰ was not concerned with damages for libel, I consider the other questions on the assumption that what was said in that case is not to be regarded as obiter in relation to libel cases and is to be regarded as binding on all inferior courts.

b Lord Devlin expressed the view¹¹ that there were only three categories of cases in which exemplary damages could be awarded, namely:—(1) where there had been oppressive, arbitrary or unconstitutional action by servants of the government; (2) where the defendant's conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff; and (3) where exemplary damages are expressly authorised by statute.

c The appellants contended that this case did not come within the second category. They called no evidence at the trial and the question whether it should have been left to the jury to consider exemplary damages, depends on whether there was evidence given or adduced on behalf of the plaintiff on which the jury were entitled to infer and conclude that the defendant's conduct was of that character.

d I do not think that Lord Devlin ever envisaged that, to bring a case within the second category, the plaintiff would have to show that there had been something in the nature of a mathematical calculation by the defendant, an assessment of the profit likely to ensue from the publication of defamatory matter and an estimation of the risk of being sued and the damages likely to be awarded if an action was brought. If a plaintiff had to prove that, it would be seldom that he would be in a position to do so. Newspapers and books are usually published for profit and that fact does not by itself make the publisher liable to pay exemplary damages. I think that Widgery J was right when he said in *Manson v Associated Newspapers Ltd*¹²:

e '... it is perfectly clear, from those authorities [*McCarey v Associated Newspapers Ltd*¹³ and *Broadway Approvals Ltd v Odhams Press Ltd*¹⁴], that in a case in which a newspaper quite deliberately publishes a statement which it either knows to be false or which it publishes recklessly, careless whether it be true or false, and on the calculated basis that any damages likely to be paid as a result of litigation will be less than the profit which the publication of that matter will give, then LORD DEVLIN's conditions are satisfied and exemplary damages are permissible.'

f He went on to say that he proposed to tell the jury that they could consider exemplary damages—

g 'if, having considered what material there is before them, they are driven to the inference that this was an article published by the defendants when conscious of the fact that it had no solid foundation and with the cynical and calculated intention to use it for what it was worth, on the footing that it would produce more profit than any possible penalty in damages was likely to be.'

h I think too that Lawton J put the matter correctly when he said in the course of his summing-up:

'A man is liable to pay damages on a punitive basis if he wilfully and knowingly, or recklessly peddles untruths for profit.'

i In my opinion, there was ample evidence on which the jury was entitled to come to the conclusion that the case came within the second category. On 9th December

10 [1964] 1 All ER 367, [1964] AC 1129

11 [1964] 1 All ER at 410, 411, [1964] AC at 1226, 1227

12 [1965] 2 All ER 954 at 957, [1965] 1 WLR 1038 at 1040, 1041

13 [1964] 3 All ER 947, [1965] 2 QB 86

14 [1965] 2 All ER 523, [1965] 1 WLR 805

1966 Mr Irving, the author, sent the manuscript of the book to the appellants with a letter in which he said that Captain Broome had threatened legal action if the manuscript was published, and on 23rd December he sent them a long letter in which he quoted an extract from a letter he had received from Kimbers, the publishers to whom he had first submitted the manuscript. That extract stated:—

‘... if the book goes to a legal man as it is, he could only tell you that half is libellous. We could not possibly publish the book as it is ...’

The manuscript submitted to the appellants was identical with that which Kimbers had seen. Perusal of it by any intelligent publisher must, even without the advantage of having the views of another publisher, have led to the conclusion that it contained many very grave and serious libels on Captain Broome and the jury were fully entitled to conclude that the appellants realised this.

Mr Kimber gave evidence that about 8th March 1967 he had telephoned Mr Parker, a director of the appellants and told him that they had had one or two threats of libel actions if they published the book; to which Mr Parker’s response was ‘In that case we will tighten up the indemnity clause in Mr Irving’s agreement’. On 27th December 1967 Captain Broome wrote to the appellants saying that the manuscript was ‘unquestionably libellous’. They replied saying that in the light of his comments ‘drastic revisions’ had been made. In fact, as the appellants must have known, the revisions that were made did not materially affect the passages defamatory of Captain Broome. On 16th February 1968 the business director of the appellants circulated a memorandum in the following terms, to all concerned:

‘It is anticipated that early copies of THE DESTRUCTION OF CONVOY P.Q 17 will start coming into the House on March 5th. Will you please note that absolutely and positively not one single copy, on any pretext whatsoever, is to be removed from the House without reference to me. Mr. Mitchell: Would you please notify the printer that this book is to be treated on a maximum security basis and ensure that not one single copy slips through their net.’

Shortly thereafter the appellants circulated proof copies of the book. Why they did so after the circulation of this memorandum is not known for no evidence was given for them. In the absence of any explanation the jury were, in my view, entitled to draw the inference that they had decided to publish the book, despite Captain Broome’s threats of action, knowing that passages in the book were libellous of Captain Broome and not caring whether those passages were true or false and on the footing that it was worth their while to run the risk of an action being brought by him and of his obtaining damages in order to make a profit on the book.

On 5th March 1968 Captain Broome issued a writ for libel. On 29th April 1968 his statement of claim was delivered. The appellants then knew, if they were in any doubt before, of what passages he was complaining. On 14th June 1968 they delivered their defence. They pleaded that the words complained of were true in substance and in fact in their natural and ordinary meaning. They did not seek to justify the meaning which the statement of claim alleged the words complained of bore, *inter alia*, that Captain Broome had been disobedient, careless, incompetent, indifferent to the fate of the merchant ships and had been largely responsible for or contributed extensively to the loss of two-thirds of the ships of the convoy. Despite the issue of this writ, the appellants went on and published a hardback edition of the book. That led to another writ being issued by Captain Broome. Again in their defence to this statement of claim the appellants pleaded that the words complained of were in their natural and ordinary meaning true in substance and in fact but did not seek to justify the meanings which in the statement of claim it was alleged they bore. The jury by their verdict rejected the plea of justification and must have accepted that the passages complained of bore the meanings alleged by Captain Broome.

I do not propose to set out what those passages were. Suffice it to say that they

a clearly alleged that Captain Broome had been disobedient, careless, incompetent, indifferent to the fate of the merchant ships, that he had wrongly withdrawn his destroyer force from the convoy, that he had taken it closer to the German airfields than he had been ordered to do and that he had been responsible for the loss of two-thirds of the ships in the convoy. He was in fact accused of cowardice. That the appellants did not appreciate that the passages complained of could be understood to have these meanings, is hard to accept. Yet after publication of the proof copies, after receipt of the writ and the statement of claim in respect of that publication, and when they knew the meanings which it was alleged the passages bore, they went on and published the hardback edition, and at the trial persisted in their plea of justification. In these circumstances if Lawton J had ruled at the end of the plaintiff's case, as he was asked to do, that there was no evidence from which the jury could infer that the case came within the second category, he would in my opinion have erred. I therefore reject this contention of the appellants.

After specifying the three categories of cases in which in his view exemplary damages might be awarded, Lord Devlin in *Rookes v Barnard*¹⁵ said that there were three considerations which must always be borne in mind and then went on to say:

d 'In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may of course be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then they can award some larger sum.'

e Complaint is made that Lawton J gave no such direction to the jury. With the agreement of counsel, he asked them to answer seven questions. The first was whether, in respect of the hardback edition the words complained of were defamatory of the plaintiff; the second, were they true in substance and in fact. Their answer to the first question was, Yes and to the second, No. The third question was, 'What compensatory damages do you award the Plaintiff?' Their answer was £14,000.

f Then in answer to the fourth and fifth questions they said that he was entitled to exemplary damages against both defendants. The sixth question was 'What additional sum should be awarded him by way of exemplary damages?' Their answer was £25,000.

After the questions had been handed to the jury in the course of the summing-up, Lawton J told them that, after considering what were the compensatory damages if they found for the plaintiff, they should go on to consider whether he was entitled to exemplary damages. As to that, he told them to consider the case against each defendant separately, saying:

h 'In respect of each of them you will ask yourselves this question: "Has the plaintiff proved his entitlement against that defendant?". If the answer is Yes, then you will have to go on and assess how much punitive damages should be awarded.'

In the next paragraph of his summing-up, he repeated this, saying:

'You will have to ask yourselves: "Has he proved that he is entitled to punitive damages against [the appellants]?" If the answer is No, that is that. If the answer is Yes, you will have to assess the damages.'

i Then he asked the jury to underline the word 'additional' in the sixth question as he and learned counsel wanted to know:

'... if you do decide to award punitive damages, how much more do you award over and above the compensatory damage.'

¹⁵ [1964] 1 All ER at 411, [1964] AC at 1228

The jury were thus clearly told that if they found that the plaintiff was entitled to punitive damages, they must then assess what punitive damages should be awarded. They were never told that in considering whether any sum should be so awarded, they must have regard to the sum they awarded for compensatory damages, and if, and only if, that sum was inadequate to punish the defendants, should they add to it by awarding a sum for exemplary damages.

The failure to give such a direction, I regret that I cannot but regard as a most serious omission. It is one of the most important features of Lord Devlin's speech that a direction on the lines he stated should be given. It was not, and instead the jury were told twice that, if they held that Captain Broome was entitled to exemplary damages, they must assess them. The jury's verdict shows that they thought that £15,000 compensatory damages was insufficient, but if they had been told that they must, in assessing exemplary damages, take into account the sum awarded in compensation, it is possible that they would have awarded not £25,000, but only £10,000 as exemplary damages, that is to say, that they would have deducted from the £25,000 the £15,000 compensatory damages.

I regret having to come to this conclusion but I see no escape from it. After a trial lasting 17 days and lengthy hearings in the Court of Appeal¹⁶ and in this House, one feels some reluctance to say that the jury's verdict should not stand. If all the counsel engaged in the case had told the jury that a sum should only be awarded for exemplary damages if the amount of the compensatory damages was insufficient punishment, then it might be possible to say that despite the omission in the summing-up, the jury can have been in no doubt as to what they were required to do. Unfortunately all counsel did not tell them that. One counsel told the jury in his final address that they must consider exemplary damages quite separately from compensatory damages. He told them, 'they are completely unconnected with each other and in no sense does the one head fall to be balanced against the other' and, 'the two sums are so different that there is no propriety in any sense in balancing them up'. He thus indicated that account should not be taken of the amount of compensatory damages when deciding what, if any, sum should be awarded for exemplary damages. Counsel for the present appellants did not refer to the matter but counsel for Mr Irving in his final address read to the jury the 'if, but only if' passage of Lord Devlin's speech.

As the case was presented to the jury, I can see no ground for the conclusion that they must, despite the omission in the summing-up, have been aware that they had to take into account the compensatory damages when deciding, if they held that there was entitlement to exemplary damages, what sum, if any, should be awarded on that account. On the contrary, the passages I have cited from the summing-up show that they were told that, if they found entitlement, they must then assess an amount for exemplary damages. I have regretfully come to the conclusion that in consequence of this omission, the verdict should not be upheld.

Another criticism made of the summing-up was that the jury were not told on what basis they should assess the exemplary damages if they found that the plaintiff was entitled to them from both defendants and if, in their opinion, the degree of guilt of the defendants differed. In the Court of Appeal¹⁶ there was considerable divergence of view as to the proper direction to be given on this. While there is ample authority for the proposition that against joint tortfeasors there can only be one verdict and one judgment for a joint tort, there is not a great deal of authority on this question. Such as there is points to the conclusion that the plaintiff can only recover the amount which all the defendants should pay and that the amount to be awarded should not be increased to a sum thought adequate to punish the most guilty defendant (see *Dawson v McClelland*, per Andrews J¹⁷, per Boyd J¹⁸ and

¹⁶ [1971] 2 All ER 187, [1964] 2 WLR 853

¹⁷ [1899] 2 IR 486 at 490

¹⁸ [1899] 2 IR at 493

a per FitzGibbon LJ¹⁹; *Smith v Streatfeild*²⁰ per Bankes J, and Gatley on Libel and Slander¹). If that were not the case an innocent party or a less guilty party might have to pay a sum far in excess of that which he ought to pay. The result of this conclusion appears to be that if three defendants are sued for writing, printing and publishing a libel, if the publisher and author are held liable to pay exemplary damages and the printer is not, the plaintiff will not be awarded exemplary damages and the publisher and author will avoid liability for such damages.

b The summing-up contained this passage:

c ‘ . . . say, for example, you took the view that Mr. Irving was more to blame than [the appellants], or to be fair, you took the view that [the appellants], being an experienced firm of publishers were more to blame than this young man, Mr. Irving, should you make [the appellants] pay a larger sum by way of punitive damages than Mr. Irving? The answer to that is No. Whatever damages, if any, you decide should be awarded by way of punitive damages must be the same sum in respect of both Mr. Irving and [the appellants], if you find them both liable to pay punitive damages.’

d Later in response to an intervention by counsel, he made it clear that this did not mean awarding one sum against each defendant but one sum against both.

While it can be said that the direction on this might have been more clearly expressed, I think it suffices for this passage did indicate to the jury that they should award a sum which was appropriate to the less guilty of the two. It may, of course, be the case that the jury did not find that one was more guilty than the other.

e I now turn to the question whether the damages awarded were so excessive that the verdict cannot be allowed to stand. In *Rookes v Barnard*² Lord Devlin recognised that where there was entitlement to exemplary damages, that did not necessarily mean that there must be two awards though he expressed the view that where there was doubt about entitlement to such damages, to avoid the risk of a new trial, it might be convenient to have separate awards. One consequence of there being two awards, one for compensatory damages and one for exemplary, is that the jury’s verdict is more open to attack. If £15,000 was sufficient to compensate the plaintiff f for the injury inflicted on him, what justification can there be for an award of a further £25,000 as exemplary damages?

Lawton J very clearly told the jury that they were being asked to fine the appellants and Mr Irving for what they had done. He told them that they were ‘really in the position of a judge or magistrate trying a criminal case’ and that punitive damages g ‘must be reasonable in all the circumstances’.

An appellate court should only interfere with a jury’s verdict as to damages if it is such as to show that the jury has failed to perform its duty (*Mechanical and General h Inventions Co Ltd v Austin and the Austin Motor Co Ltd*³ per Lord Wright, *Bocock v Enfield Rolling Mills Ltd*⁴, *Scott v Musial*⁵ and *Lewis v Daily Telegraph Ltd*⁶). To be set aside, the verdict must be out of all proportion to the facts. The award of £25,000 for exemplary damages, as a fine and despite the direction given by Lawton J to which I have referred, in addition to the award of £15,000 compensatory damages is, in my opinion, out of all proportion to the facts and suffices to show that they failed to perform their duty. Their award was, in my view, far in excess of the most that 12 reasonable men could be expected to give. If they had appreciated that they

i 19 [1899] 2 IR at 499

20 [1913] 3 KB 764 at 769, [1911-13] All ER Rep 362 at 364

1 6th Edn, p 1389

2 [1964] 1 All ER at 411, [1964] AC at 1228

3 [1935] AC 346 at 375, [1935] All ER Rep 22 at 35

4 [1954] 3 All ER 94, [1954] 1 WLR 1303

5 [1959] 3 All ER 193, [1959] 2 QB 429

6 [1962] 2 All ER 698, [1963] 1 QB 340, *affd* [1963] 2 All ER 151, [1964] AC 234

had to take into account the compensatory damages, then as I have said perhaps they might have awarded an additional £10,000 as exemplary damages. I would myself have assessed a considerably lower figure. Perhaps, one does not know, they may have thought that the judge had power to set off one against the other. However that may be, I think that the highest figure that could have been awarded by a jury performing its duty for exemplary damages would have been £10,000 in which case judgment would have been given not for £40,000 but for £25,000. On this ground, too, in my opinion the verdict cannot stand. a

In turn now to the first question. Does *Rookes v Barnard*⁷ correctly state the law with regard to exemplary damages? The Court of Appeal⁸ held that it did not. It was said that it was a decision given per incuriam. The Court of Appeal⁸ refused to allow it and judges were told to direct juries in accordance with the law as understood before that case. b

Decisions of this House are binding on all inferior courts and must be followed by them. There are, I think, two grounds on which the Court of Appeal can justifiably refuse to follow what has been said in this House. The first is that what was said was obiter. While it might be argued that the observations made with regard to exemplary damages insofar as they related to libel actions were obiter as no question with regard to them arose in *Rookes v Barnard*⁷ where the question was, could such damages be given for intimidation? the Court of Appeal⁸ did not base their action on this ground. The second is where there are two clearly inconsistent decisions of this House, and the Court of Appeal has then to choose which to follow. In the Court of Appeal⁸ it was asserted that what was said in *Rookes v Barnard*⁷ was in conflict with two previous decisions of this House, *Hulton v Jones*⁹ and *Ley v Hamilton*¹⁰ but, as I read the judgments, the Court of Appeal⁸ did not proceed on this ground. c

To say that a decision of this House was given per incuriam is, to say the least, unusual and could be taken, although I cannot believe it was so intended, as of a somewhat offensive character. While I regret the use of this expression, I doubt if it was intended to mean more than that the questions involved deserved more consideration in relation, among other things, to libel actions. If that is what was meant, it is, I must confess, a view with which I have considerable sympathy. d

As I understand the judicial functions of this House, although they involve applying well established principles to new situations, they do not involve adjusting the common law to what are thought to be the social norms of the time. They do not include bowing to the wind of change. We have to declare what the law is, not what we think it should be. If it is clearly established that in certain circumstances there is a right to exemplary damages, this House should not, when sitting judicially, and indeed, in my view, cannot properly abolish or restrict that right. This, indeed, was recognised by Lord Devlin when he said¹¹ that it was not open to this House to 'arrive at a determination that refused altogether to recognise the exemplary principle'. If the power to award such damages is to be abolished or restricted, that is the task of the legislature. e

One criticism that can be made of Lord Devlin's speech is that while recognising that a refusal altogether to recognise the exemplary principle was not possible, he nevertheless restricted the power to award such damages so that they ceased to be obtainable in cases where prior to *Rookes v Barnard*⁷ they might have been given. f

I agree with Lord Denning MR that the pre-*Rookes v Barnard*⁷ law was well g

7 [1964] 1 All ER 367, [1964] AC 1129

8 [1971] 2 All ER 187, [1971] 2 WLR 853

9 [1910] AC 20, [1908-10] All ER Rep 29

10 (1935) 153 LT 384

11 [1964] 1 All ER at 410, [1964] AC at 1226 h

a stated in *Mayne and McGregor on Damages*¹²—where it is said that such damages can only be given—

‘where the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, as it is sometimes put, where he acts in contumelious disregard of the plaintiff’s rights.’

b A similar statement is to be found in *Mayne on Damages*¹³. I do not think that this statement of the law is to be questioned because in a later passage¹⁴ in the current edition it is stated:

c ‘... it cannot be said that English law has committed itself finally and fully to exemplary damages [a view which conflicts with the opinion of Lord Devlin to which I have referred], and many of the ... cases point to the rationale not of punishment of the defendant but of extra compensation for the plaintiff for the injury to his feelings and dignity. This is, of course, not exemplary damages at all. It is another head of non-pecuniary loss to the plaintiff.’

d This passage did not appear in the earlier editions. I am not concerned with the rationale but with what was recognised to be the law before *Rookes v Barnard*¹⁵. And I am reinforced in my view by the fact that what was said in the earlier passage¹⁶ appears to accord with Australian law. In this field there does not appear to have been any difference between Australian and English law prior to *Rookes v Barnard*¹⁵. In *Uren v John Fairfax & Sons Pty Ltd*¹⁷ the High Court of Australia refused to follow *Rookes v Barnard*¹⁵ and held that exemplary damages might be awarded if it appears that the defendant’s conduct in committing the wrong exhibited a contumelious disregard of the plaintiff’s rights, McTiernan J saying that the law of exemplary damages was ‘compendiously stated’ in the passage I have cited from *Mayne and McGregor*.

e Lord Devlin’s first category ‘oppressive, arbitrary or unconstitutional action by servants of the government’, a category which he said he would not extend to oppressive action by private corporations or individuals, was subjected to serious criticism by Taylor J in *Uren v Fairfax*¹⁷. He pointed out that in none of the three old cases on which this category was apparently based, did the decisions turn on the fact that the defendants had acted for the government. Surely it is conduct, not status, that should determine liability. Power to award exemplary damages may be an anomaly, but I doubt whether it is beneficial to the law to seek to reduce the area of that anomaly at the price of creating other anomalies and illogicalities. Surely it is anomalous if a person guilty of oppressive conduct should only be liable to exemplary damages if a servant of the government. In these days there are others than the government who can be guilty of oppressive conduct. Why should they be treated differently? I can find nothing in the three cases to indicate that if the conduct complained of had been by persons other than servants of the government, liability to exemplary damages would have been excluded.

h Just as the definition of this category might be said to have been obiter to the decision in *Rookes v Barnard*¹⁵, so might consideration of it be regarded in this case. Nevertheless as *Rookes v Barnard*¹⁵ has to be considered in this appeal in consequence of the action taken by the Court of Appeal¹⁸, I feel I should express my opinion

j ¹² 12th Edn (1961), para 207

¹³ 11th Edn (1946), p 41

¹⁴ 12th Edn, para 212

¹⁵ [1964] 1 All ER 367, [1964] AC 1129

¹⁶ 12th Edn, para 207

¹⁷ (1967) 117 CLR 118

¹⁸ [1971] 2 All ER 187, [1971] 2 WLR 853

which is that this narrow definition does not appear to me to be justified by the authorities on which it was based. a

It may also be contended that Lord Devlin's second category is also too narrowly drawn for why should conduct lead to exemplary damages if inspired by the profit motive or some material interest, and similar conduct due to other motives not do so. But the substantial criticism that can be made is that by his categorisation, the previously existing and recognised power to award exemplary damages is restricted. Lord Devlin indeed appreciated the novelty of what he was doing when he said¹⁹ that acceptance of his views 'would impose limits not hitherto expressed on such awards'. I do not think that this should have or could properly be done. It should have been left to the legislature. b

This conclusion does not, however, mean that the jury's verdict as to liability must be interfered with. It was urged that the appellants' decision to call no evidence was based on the assumption that *Rookes v Barnard*²⁰ applied—and that the issue was, did the case come within the second category. While it may be that Captain Broome would have presented his case differently but for what was said in *Rookes v Barnard*²⁰ the defendants had to meet the case presented whether or not *Rookes v Barnard*²⁰ applied, and it was in relation to that case that they decided to call no evidence. As the case presented would prior to *Rookes v Barnard*²⁰, if established, have justified the award of exemplary damages, I cannot accept that the defendants might have reached a different decision about calling evidence on the case as presented if *Rookes v Barnard*²⁰ had not been followed. c

I now turn to the passage in Lord Devlin's speech dealing with the assessment of damages, a passage which, save in the respect to which I have referred, was closely followed by Lawton J in his summing-up. I think that Salmon LJ correctly summarised the pre-*Rookes v Barnard*²⁰ practice when he said¹: d

'Judges used to direct juries in libel actions that, if they found in favour of the plaintiff, they should award him a sum which would make it plain to the world that there was no truth in the libel and which, as far as money could do so, would compensate him for the distress, humiliation and annoyance which the libel had caused him. They were also told in appropriate cases that they could take the whole of the defendant's conduct into account down to the moment they returned their verdict, and that if they came to the conclusion that he had behaved outrageously they might, as a deterrent, reflect their disapproval of the defendant's conduct in the amount of the damages which they awarded. At the same time they were always warned to be fair and reasonable and not to allow themselves to be inflamed against the defendant but to decide dispassionately what in all the circumstances would be a reasonable sum to award.'

The summing-up in *Loudon v Ryder*² which was approved by the Court of Appeal³, also recognised that outrageous conduct was a ground for exemplary damages. That appears to be the first case in which a jury was asked to award separate sums for exemplary and for compensatory damages and in which it was suggested that the amount awarded for exemplary damages was to be regarded as the imposition of a fine. f

In *Ley v Hamilton*⁴ the Court of Appeal by a majority (Greer and Maugham LJJ, Scrutton LJ dissenting) allowed an appeal from a jury's verdict awarding £5,000 damages for libel, one ground for the decision being that the damages awarded were excessive, Maugham LJ saying that the sum could not be described 'as a fair g

¹⁹ [1964] 1 All ER at 410, [1964] AC at 1226

²⁰ [1964] 1 All ER 367, [1964] AC 1129

¹ [1971] 2 All ER at 205, [1971] 2 WLR at 876, 877

² [1953] 1 All ER 741, [1953] 2 QB 202

³ [1971] 2 All ER 187, [1971] 2 WLR 853

⁴ (1934) 151 LT 360 h

a and reasonable compensation for the damages which the plaintiff' had suffered, that the verdict could only be justified on the view that the jury were exercising the right to give vindictive or punitive damages, and that—

'when the damages in question are really not compensation for an injury sustained by the plaintiff but in the nature of a fine inflicted on the defendant'

b the Court of Appeal would be compelled to interfere. In this House⁵ Maugham LJ's approach was rejected by Lord Atkin in a speech with which Lords Tomlin, Thankerton, Macmillan and Wright agreed. Part of the relevant passages of Lord Atkin's speech were cited by Lord Devlin⁶ but two sentences which I italicise and which I regard as important were omitted. The full passage is as follows':

c *'The fact is that the criticism [Maugham LJ's] with great respect seems based upon an incorrect view of the assessment of damages for defamation. They are not arrived at as the Lord Justice seems to assume by determining the "real" damage and adding to that a sum by way of vindictive or punitive damages. It is precisely because the "real" damage cannot be ascertained and established that the damages are at large. It is impossible to track the scandal, to know what quarters the poison may reach: it is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation. No doubt in newspaper libels juries take into account the vast circulations which are justly claimed in present times. The "punitive" element is not something which is or can be added to some known factor which is non-punitive. In particular it appears to present no analogy to punishment by fine for the criminal offence of publishing a defamatory libel.'*

e Maugham LJ did not in his judgment refer to 'real' damage. I think it is clear that by 'real' damage Lord Atkin meant the damage which the plaintiff had suffered.

Yet is not the very process condemned in *Ley v Hamilton*⁵ that which it was said in *Rookes v Barnard*⁹ should be followed and that which, pursuant to *Rookes v Barnard*⁹, was followed in this case? Lord Atkin said that for the reasons he gave 'real' damage, i.e. compensatory damage, could not be ascertained and established.

f Under *Rookes v Barnard*⁹ a jury is to be directed that that which Lord Atkin said could not be done, is to be done and 'compensatory' damages assessed first. The punitive element is not something that can be added. Yet in *Rookes v Barnard*⁹ it is said that it should be added if, but only if, the compensatory damages are insufficient. Lord Atkin said that there was no analogy to punishment by a fine for a criminal libel, yet following *Rookes v Barnard*⁹, juries are to be told that punitive damages amount to a fine. I must confess my inability to reconcile the views of this House as expressed in *Ley v Hamilton*⁵ with those expressed in *Rookes v Barnard*⁹.

g Before *Rookes v Barnard*⁹ the words 'aggravated', 'punitive', 'exemplary' and 'retributory' were used indiscriminately to indicate that the damages awarded might be enhanced and might contain a punitive element. By *Rookes v Barnard*⁹ precise meanings were attached to the words 'aggravated' and 'exemplary'. Lord Devlin recognised¹⁰ that the jury could take into account the motives and conduct of the defendant where they aggravate the injury to the plaintiff.

h *'There may be [he said] malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation.'*

j So where the injury is aggravated, an addition can be made to the compensatory damages.

5 (1935) 153 LT 384

6 [1964] 1 All ER at 413, [1964] AC at 1230

7 (1935) 153 LT at 386

8 (1934) 151 LT 360

9 [1964] 1 All ER 367, [1964] AC 1129

10 [1964] 1 All ER at 407, [1964] AC at 1221

While in some cases it may be evident that malice or misconduct has added to the injury, there may be other cases where, although it is clear that there has been malice and misconduct, it cannot be said that the injury inflicted is any greater than it would have been if there had been no malice or misconduct. In such cases it would seem from *Rookes v Barnard*¹¹ that the compensatory damages should not be increased. Nor, in such cases would it seem that exemplary damages as there defined could always be awarded for they are only to be awarded if the sum given in compensation is 'inadequate to punish for outrageous conduct, to mark the jury's disapproval of such conduct, and to deter a repetition'. The existence of malice may not make the defendant's conduct outrageous, and yet it is, I think, established beyond all doubt that before *Rookes v Barnard*¹¹ a jury was always entitled to award larger damages than they otherwise would have given if satisfied that the libel was actuated by malice.

All the members of the Court of Appeal¹² thought that the *Rookes v Barnard*¹¹ approach was wrong and in conflict with the views expressed in this House in *Ley v Hamilton*¹³. I can find no escape from that conclusion and if the choice now lies between following one or the other of those decisions, I would myself choose to follow the simpler and more flexible approach in *Ley v Hamilton*¹³. The Court of Appeal¹² also thought that there was a conflict with the decision of this House in *Hulton v Jones*¹⁴. While there are some passages in the report of that case which afford some ground for that contention, I do not think that they suffice to establish that that is so with any degree of certainty.

While, if the views I have expressed prevailed, it would not be necessary to disturb the jury's verdict as to liability, I cannot regard a direction to assess damages in accordance with *Rookes v Barnard*¹¹ as a proper direction in accordance with the pre-*Rookes v Barnard*¹¹ practice and as complying with *Ley v Hamilton*¹³. So if my view were to prevail, the verdict given in this case could not be sustained and there would, if there had not been agreement by counsel that this House should in that event assess the damages, have to be a new trial limited to the assessment of damages. As my view does not prevail, it is not necessary to express an opinion on what that sum should be if this House had to assess it.

For the reasons I have stated, I would allow the appeal.

LORD WILBERFORCE. My Lords, this case must be accounted, as in many respects an unhappy one. After a trial of 17 days before a judge and jury, in which the defendants called no evidence, the plaintiff, Captain Broome, was awarded against author and publishers jointly £40,000 damages in respect of libels contained in the book 'The Destruction of Convoy PQ17'. This total sum was awarded by the jury as to £15,000 as 'compensatory' damages and as to £25,000 as 'punitive' damages. Captain Broome was awarded his costs of the trial.

An appeal was taken to the Court of Appeal¹² by both defendants. The substantial points for argument were two: (1) whether the summing-up was defective as regards the circumstances in which punitive damages may be given in addition to compensatory damages, (2) whether the damages awarded were excessive. There was also a question whether a separate award should have been made against each defendant. Since the passages in the book principally complained of reflected on the conduct of officers of the Royal Navy, in combat conditions, there was an obvious danger that the jury may have become inflamed. This made it particularly necessary that there should be a dispassionate and cool review of the sums awarded and of the summing-up in the Court of Appeal¹².

¹¹ [1964] 1 All ER 367, [1964] AC 1129

¹² [1971] 2 All ER 187, [1971] 2 WLR 853

¹³ (1935) 153 LT 384

¹⁴ [1910] AC 20, [1908-10] All ER Rep 29

a If matters had taken their proper and normal course these matters should have been disposed of within a few days—by dismissal of the appeal or by an order for a new trial, and no question of appeal to this House would have arisen. This did not happen. The trial had been conducted properly, and inevitably on the basis that the law to be applied as regards any claim for punitive damages was that stated by this House in *Rookes v Barnard*¹⁵. The learned judge considered that he was bound
b by what was said in this House, as he clearly was. But in the Court of Appeal¹⁶ argument was admitted to the effect that *Rookes v Barnard*¹⁵, on punitive damages, was wrong and should not be followed: the Court of Appeal¹⁶ so decided, and three judgments, separate exercises in forceful advocacy, were delivered giving their reasons.

c The course permitted and taken was doubly surprising. First, there was nothing new about *Rookes v Barnard*¹⁵. It was decided in 1964; it had been followed and applied in England by the Court of Appeal itself three times since then in, amongst others, libel cases without difficulty or protest by any of the Lords Justices involved. Secondly, it was, on the view of the facts which the Court of Appeal¹⁶ took,
d unnecessary for the decision of the appeal to decide whether *Rookes v Barnard*¹⁵ on punitive damages was right or wrong. The Court of Appeal¹⁶, having held that it was wrong, still dismissed the appeal, and in an alternative passage held that the same result followed if it was right.

e The consequences for the present litigants have been heavy. An appeal has been brought here and argued for 13 days. Counsel for the appellants were forced into the necessity of arguing at length that *Rookes v Barnard*¹⁵ is right, and this argument was answered on Captain Broome's side. A mountain of costs has piled up and it is as well that the size of this should be understood; it is open on the record.
f As shown by the order of the Court of Appeal, the plaintiff's costs at the trial have been taxed at £22,000. His costs as assessed in the Court of Appeal are £7,000. His costs in this House must exceed this figure. The taxed costs of the defendants are unlikely to be less; there will be further solicitor and own client costs on either side. It may not be unfair to put the aggregate bill, which an unsuccessful party
g may have to bear, at more than £60,000. It would be entirely unfair to suggest that the whole, or even half this sum, is due to the course taken in the Court of Appeal¹⁶—the greater part flows from the inherent nature of our system. But it is necessary to say that in a legal system so extravagant and punitive as to costs as ours is in civil cases, and particularly libel actions, the addition of further burdens, and here they were certainly considerable, carries the result further into an unacceptable area of injustice. England has not the equivalent of the New South Wales Suits Fund Act 1951, nor of the Victoria Appeal Costs Fund Act 1964, so when the machinery creaks it is the private litigants who pay. I have felt deep concern about this throughout the hearing.

h My Lords, observations have already been made on other constitutional aspects of the Court of Appeal's¹⁶ judgments. I concur entirely with what has been said, and the fact that for reasons of space I abstain from using my own words does not mean that my concurrence is any the less wholehearted.

i I proceed to the principal task we have, which is to decide the present appeal. Before examining the summing-up, on which the jury's verdict was based, it is necessary to establish the law. This involves some re-examination of those parts of the decision in *Rookes v Barnard*¹⁵ which relate to punitive damages. I shall consider *Rookes v Barnard*¹⁵ under three heads. First, as to the analysis it contains of damages in tort cases; secondly, as to defamation actions in relation to Lord Devlin's second category—both of these being directly relevant to the present case; thirdly, and briefly, as to the first and second categories, their inclusions and exclusions.

I deal first with that portion of the judgment which analyses damages in tort

¹⁵ [1964] 1 All ER 367, [1964] AC 1129

¹⁶ [1971] 2 All ER 187, [1971] 2 WLR 853

cases into 'compensatory' damages, a subhead of which is said to be 'aggravated' damages and punitive damages, because I think that this has been largely misunderstood—a misunderstanding which has fatally entered into the present case. The judgment points out that in the reported English authorities, over some 200 years, there is no clear terminology used; aggravated, exemplary, punitive, vindictive, retributory being adjectives which have been used, singly or in combination, without distinction or difference. Then it is suggested that in future there should be a clear and conscious distinction between compensatory/aggravated and punitive (or exemplary) damages, the former reflecting what the plaintiff has suffered materially or in wounded feelings, the latter the jury's (or judge's) views of the defendant's conduct. The statement of categories, in which alone punitive damages may be given, follows from this.

This analysis is powerful and illuminating and undoubtedly represents a valuable contribution to English judicial thought on the subject¹⁷ but it has its dangers in practical application, as the present case only too well shows. English law does not work in an analytical fashion; it has simply entrusted the fixing of damages to juries on the basis of sensible, untheoretical directions by the judge with the residual check of appeals in the case of exorbitant verdicts. That is why the terminology used is empirical and not scientific. And there is more than merely practical justification for this attitude. For particularly over the range of torts for which punitive damages may be given (trespass to person or property, false imprisonment and defamation, being the commonest) there is much to be said before one can safely assert that the true or basic principle of the law of damages in tort is compensation, or, if it is, what the compensation is for (if one says that a plaintiff is given compensation *because* he has been injured one is really denying the word its true meaning) or, if there is compensation, whether there is not in all cases, or at least in some, of which defamation may be an example, also a delictual element which contemplates some penalty for the defendant. It cannot lightly be taken for granted, even as a matter of theory, that the purpose of the law of tort is compensation, still less that it ought to be, an issue of large social import, or that there is something inappropriate or illogical or anomalous (a question-begging word) in including a punitive element in civil damages, or, conversely that the criminal law, rather than the civil law is in these cases the better instrument for conveying social disapproval, or for redressing a wrong to the social fabric, or that damages in any case can be broken down into the two separate elements. As a matter of practice English law has not committed itself to any of these theories; it may have been wiser than it knew.

This is not the place to argue out the general case for or against punitive damages in English law. The existence of the principle has its convinced opponents, particularly, I understand, in Scotland. The arguments against it—that it is an 'anomaly', that it brings a criminal element into the civil law without adequate safeguards, that it leads to excessive awards, an unmerited windfall for the plaintiff; these and others are by now well known; they, and the counter-arguments are well summed up in Professor Street's *Principles of the Law of Damages*¹⁸. Perhaps the opponents have, marginally, the best of it in logic but logic in excess has never been the vice of English law and I am impressed, as I think was Lord Devlin, with the fact that the principle has shown and *continues to show*, its vitality not only in England but in Australia, Canada and New Zealand, as well (though there are special considerations there) as in the United States of America. This is shown not only by reported cases, of which Canadian provinces, Australian states and New Zealand provide a number of modern examples¹⁹, but in the daily unreported practice of the courts. Its place in the

¹⁷ Cf in the United States *Fay v Parker* (1873) 53 NH 342-347 per Foster J; and as to textbook discussion Mayne and McGregor on Damages, 12th Edn (1961), Street, *Principles of the Law of Damages* (1962)

¹⁸ See pp 34-36

¹⁹ See as to Canada (1970) 48 Can BR 373

a law has been endorsed by many eminent judges in terms which clearly recognise the punitive element. The principle of punitive damages has been recognised by the High Court of Australia on five occasions, by the Supreme Court of Canada and by the Supreme Court of the United States of America.

b To my mind the strongest argument against it is that English law already contains a heavy, indeed exorbitant, punitive element in its costs system; contrast the United States where it is the absence of this (advocate's costs not being normally recoverable) which is invoked as a justification for punitive damages. One or other must clearly be reformed, and it is Parliament alone that can do it.

c I take the discussion one step further, because the point is very relevant here. In Lord Devlin's opinion the distinction is made between aggravated damages and punitive damages; it is said that many of the authorities are really cases of aggravated damages although other words are used, that apart from the exceptional cases included in the three categories, aggravated damages are the appropriate and sufficient remedy. Although I doubt very much whether all the cases can be explained in this way—to do so seems to attribute a high degree of confusion of thought or inaccuracy of expression to judges of eminence—there is attraction in the distinction. It has the advantage, to some minds, of reducing the area of 'punitive' damages, and of bringing the remedy nearer to 'compensation'.

d But closer examination causes one to doubt whether the separation, otherwise than in analysis, of compensatory from punitive damages does not involve some real danger in practice. As Windeyer J said in *Uren's case*²⁰:

e 'What the House of Lords has now done is . . . to produce a more distinct terminology. Limiting the scope of terms that often were not distinguished in application makes possible an *apparently firm distinction* between aggravated compensatory damages and exemplary or punitive damages. How far the different labels denote concepts really different in effect may be debatable. I suspect that in seeking to preserve the distinction we shall sometimes find ourselves dealing more in words than ideas.'

f (Cf Salmond on Torts¹ which maintains the old 'confusion'). The distinction does not in my belief greatly correspond to what happens in reality. Take a common case: a man is assaulted, or his land is trespassed upon, with accompanying circumstances of insolence or contumely. He decides to bring an action for damages, he need not further specify the claim. Is he suing for compensation, for injury to his feelings, to teach his opponent a lesson, to vindicate his rights, or 'the strength of the law', or for a mixture of these things? Most men would not ask themselves such questions, many men could not answer them. If they could answer them, they might give different answers. The reaction to a libel may be anything from 'how outrageous' to 'he has delivered himself into my hands'. The fact is that the plaintiff sues for damages, inviting the court to take all the facts into consideration, and, if he wins, he may ascribe his victory to all or any of the ingredients.

h As, again, Windeyer J has said², the amount of the verdict is the product of a mixture of inextricable considerations. Sedgwick³ said:

j 'Where either of these elements [sc malice, oppression etc] mingle in the controversy, the law, instead of adhering to the system, or even the language of compensation adopts a wholly different rule. It permits the jury to give what it terms punitive, vindictive or exemplary damages, in other words, it blends together the interests of society and of the aggrieved individual and gives

20 (1967) 117 CLR at 152

1 (1969) 15th Edn

2 (1967) 117 CLR at 150

3 Measure of Damages, 3rd Edn (1858)

damages not only to recompense the sufferer but to punish the offender. This rule . . . seems settled in England and in general jurisprudence of [U.S.A.].'

Lord Atkin said just this in *Ley v Hamilton*⁴ in a passage (cited in other opinions, vide that of Viscount Dilhorne) which, if any in modern times, is clear and authoritative. Dixon J endorsed the principle—see citation below⁵—as did the key passage in Halsbury's Laws of England⁶ cited by Lord Hailsham LC. To segregate the punitive element is to split the indivisible and to invite the stock criticism (vide *Street*⁷) that civil courts have no business to impose fines.

This is of critical importance in practice. If the separation of damages into compensatory/aggravated and punitive is carried through into the instruction to the jury, there is the greatest possible risk of excessive awards, through counting twice what is but a different facet of the same bad conduct. Lord Devlin himself clearly understood this; the careful passage⁸ containing the 'if but only if' prescription, provided his antidote—an effective one if judges can administer it in a timely and effective way.

My Lords, I think there was much merit in what I understand was the older system, before *Rookes v Barnard*⁹. I agree with the Court of Appeal¹⁰ that in substance, although not perhaps philosophically or linguistically, this was clear and as explained above I doubt if there was any confusion as to what the jury should do. It was to direct the jury in general terms to give a single sum taking the various elements, or such of them as might exist in the case, into account including the wounded feelings of the plaintiff and the conduct of the defendant, but warning them not to double count and to be moderate. A formula on these lines commended itself to Dixon J in 1932. What amount of damages, he asked⁵—

'is enough to serve at once as a solatium, vindication and compensation to him and a requital to the wrongdoer . . .'.

An earlier example is the direction of Abbott J in *Sears v Lyons*¹¹: as evidence that modern practice corresponds I could not desire more than the passage, based on considerable experience, in the judgment of Salmon LJ in this case¹² cited in full by Viscount Dilhorne and which I need not repeat. If judges were to act in this way, and direct substantially as Salmon LJ describes, I would see no basis for ascribing to them any error in law. If, on the other hand, use were to be made of the aggravated-punitive distinction, I would think that it is even more necessary that the jury should be directed to give a single sum (Lord Devlin's exception to avoid a new trial is entirely laudable, but, I respectfully think, risky). The direction to give a single sum should mean (the necessity to say this illustrates again the dangers of the terminology) not merely producing a single figure by way of verdict, but arriving in their discussion at a single sum. It would be wrong, and a novelty in the law, that they should, in the jury room, find separately the various elements—pure compensation, aggravated compensation and penalty and add them up to a total. In no previous cited case, except in *Loudon v Ryder*¹³ (overruled by Lord Devlin himself), was this done; it was directly discountenanced by Lord Atkin in *Ley v Hamilton*¹⁴.

4 (1935) 153 LT 384

5 *Smith's Newspapers Ltd v Becker* (1932) 47 CLR 279 at 300

6 11 Halsbury's Laws (3rd Edn) 223, para 391

7 Principles of the Law of Damages (1962), pp 34, 35

8 [1964] 1 All ER at 414, [1964] AC at 1232

9 [1964] 1 All ER 367, [1964] AC 1129

10 [1971] 2 All ER 187, [1971] 2 WLR 853

11 (1818) 2 Stark 317

12 [1971] 2 All ER at 205, [1971] 2 WLR at 876, 877

13 [1953] 1 All ER 741, [1953] 2 QB 202

14 (1935) 153 LT 384 at 386

I regret that this rather lengthy analysis has been necessary before I deal with the present appeal, but in my view it is fundamental to a consideration of the summing-up.

The full account of the trial which has been given in previous opinions enables me to summarise. The critical stages were these: (1) the jury were told that there were two aspects of damages, compensatory and punitive. They were asked first to consider compensatory damages. They had read to them a passage from the judgment of Pearson LJ in *McCarey v Associated Newspapers Ltd*¹⁵ in which it was said in clear terms that if there had been any high-handed, oppressive or contumelious behaviour which increased the mental pain and suffering caused by the defamation, this might be taken into account. (2) The judge then pointed out that Captain Broome had suffered no actual pecuniary loss; that he had not been shunned by his comrades; that the trial had been conducted without exacerbation; but that what was said in the book might be very wounding to his feelings. (3) The learned judge then dealt with punitive damages by reference to the second category in *Rookes v Barnard*¹⁶, cited the words of Widgery J in *Manson v Associated Newspapers Ltd*¹⁷, and said:

‘... you are being asked here not only to give Captain Broome compensatory damages, that is, a reasonable sum for the injury to his reputation and the exacerbation of his feelings; but *in addition to fine* [the appellants] and Mr. Irving for having done what they have done . . . you are really in the position of a Judge or a Magistrate trying a criminal case; *you have got, so to speak, to fine the Defendant.*’ [Emphasis supplied.]

and he gives examples of reasonable and unreasonable fines. Later he gives lengthy directions relevant to the second category (was there a calculation of profit etc) and on the next day returns finally to damages. (4) The final direction as to damages consisted of the statement of questions for the jury and explanation of them. The first question (no 3) is ‘What compensatory damages to you award the plaintiff?’ The summing-up continues:

‘Then having decided what are the proper additional [sic] compensatory damages you will go on and consider the fourth question, namely, “Has the plaintiff proved that he is entitled to exemplary damages?” [and directs the jury to consider this in relation separately to each defendant. Lastly there is this passage:] Then you see the last question under this heading, “What additional sum should be awarded him by way of exemplary damages?”. Would you be good enough to underline the word “additional”, because I want to know, and learned counsel want to know, if you do decide to award punitive damages, how much more do you award over and above the compensatory damage.’

The result of this was an award of £15,000 compensatory damages and £25,000 as an additional sum for exemplary damages.

My Lords, I regret to have reached the conclusion that this verdict ought not to stand. Apart from the reasons given by my noble and learned friend, Lord Diplock, with which I respectfully agree, I think for myself that the separation of the element of compensatory damages from that of punitive damages, brought about through the interpretation placed on the second category and the application of it, involving, as it did, the need to fix compensation (plus aggravation) first, see if the case came within the category, and then fix a separate punitive sum, is fundamentally wrong. It has brought about precisely the result which was to be feared from breaking down the indivisible whole, namely, of fixing a compensation figure swollen by aggravation and then adding a fine on top—a fine in this case exceeding greatly the

¹⁵ [1964] 3 All ER 947 at 957, 958, [1965] 2 QB 86 at 104, 105

¹⁶ [1964] 1 All ER 367, [1964] AC 1129

¹⁷ [1965] 2 All ER 954 at 958, [1965] 1 WLR 1038 at 1043

aggravated compensation. If the matter rested on the figures alone, I should find the greatest difficulty in supporting, even with all the inhibitions properly felt against substituting a judicial opinion for that of the jury, so large a punitive element, particularly in a case such as this where the libel was considered to be (I say nothing as to my own opinion) of a most wounding character, so that the 'compensatory' damages must necessarily include a large 'punitive' element. But when it is seen how the jury were directed to calculate, and the direction was certainly clear and certainly and visibly acted on, their figures become impossible to accept.

In argument the issue was put in the form whether the judge's direction complied with Lord Devlin's 'if, but only if' advice¹⁸. I think that it certainly did not. The dangers of separating the compartments (compensatory damages and punitive damages) in so watertight a way are so great, as I have tried to explain, indeed, in my opinion, so wrong in principle that I doubt very much whether any instructions, in a difficult case, could avoid them. That is why I think that any interpretation placed on *Rookes v Barnard*¹⁹ which requires this separation, or authorises it, and the introduction of the profit gateway which almost compels it, ought to be discarded. But however that may be, the directions given fall far short of what was necessary—I say this without any criticism of the learned judge who was merely following *Rookes v Barnard*¹⁹ as previously applied by the Court of Appeal. When all is said the warning to the jury against the danger was contained in the word 'additional' in question 4. I think this was not enough, for they had been told that they could inflict a fine.

For these reasons, without committing myself to any particular figure if we were called on to substitute one, I agree with the conclusion of my noble and learned friend, Lord Diplock, as to the necessity for a new trial on the question of punitive damages.

I must add one other point. This is the question of a joint award of damages against two wrongdoers, publisher and author. There is no doubt that the existing law is ill adapted to deal fairly with a case where 'guilt' of joint defendants is unequal. But it is clear enough what the law is; it is stated by Lord Hailsham LC in terms which I need not repeat. In the Court of Appeal²⁰ Lord Denning MR said that the jury were free to decide whether to fix punitive damages at the highest figure, the lowest figure, or at a figure between the two and I fear that the jury may well have proceeded on this somewhat libertarian view of the law. One may escape from the conclusion that this vitiates the verdict by assuming that the two defendants were equally 'guilty', but I am not prepared to make this assumption or to ascribe a view to that effect to the jury. I think that the jury must have been, at best, confused, at worst misled by the direction, and I cannot accept that acquiescence by counsel validates the defect.

I must now deal as briefly as I can with other aspects of the judgment in *Rookes v Barnard*¹⁹. I deal first with its effect on the law of damages for defamation.

I am far from convinced that Lord Devlin ever intended to alter the law as to damages for defamation or intended to limit punitive damages in defamation actions to cases where a 'profit motive' is shown. (I use this compendiously for the formula in his second category.) I summarise the reasons: (a) Defamation is normally thought of as par excellence the tort when punitive damages may be claimed. It was so presented in argument by counsel for Captain Broome (arguing against punitive damages) and he was an acknowledged expert in the subject. Every practitioner and every judge would take this view. (b) Lord Devlin's passage where he sets up his second category does not refer to any defamation case, but to three other miscellaneous cases which he illuminatingly bases on the profit motive. He makes merely an incidental reference to libel where he says the profit motive is always a *factor*, not, it should be observed, a *condition*. (c) It is difficult to believe that Lord Devlin was

¹⁸ [1964] 1 All ER at 411, [1964] AC at 1228

¹⁹ [1964] 1 All ER 367, [1964] AC 1129

²⁰ [1971] 2 All ER 187, [1971] 2 WLR 853

a intending to limit the scope of punitive damages in defamation actions so as to exclude highly malicious or irresponsible libels. At least if he intended to do so at a time when the media of communication are more powerful than they have ever been and certainly not motivated only by a desire to make money, and since elsewhere the judgment shows him conscious of the need to sanction the irresponsible, malicious or oppressive use of power, I would have expected some reasons to be given.

b If we cannot interpret his judgment as leaving libel outside category 2 as a separate case, well known to everyone, in which punitive damages may be given in familiar circumstances and as stating category 2 as a qualification for other cases, hitherto not explained or rationalised, then since the disposal of defamation actions was there dealt with briefly, I would say incidentally, and obiter, I consider that in this case where we are directly concerned with such an action we should disagree with it.

c This would leave the law as I understand it to be in Australia and Canada, countries where, in this respect, there is not known to me to be any such difference in 'social conditions' as to call for the recognition, by this House, judicially, of a divergent law. If changes are to be made, they should be made, after proper investigation, by Parliament.

d I would add, with reference to this point, that the present case well illustrates the irrationality of the supposed new principle. For if the profit motive is essential for the recovery of punitive damages, one would expect the damages given to bear some relation to the supposed profit and/or to the means of the offender; the idea (if there is any logic in the requirement) must be to take the profit out of wrongdoing. Yet there was not, and in many such cases cannot be, any real consideration of the likely profit or of the offender's means. There was no evidence what these might be and the jury were given no guidance. How, then, could the punitive £25,000 be other than an arbitrary guess? If one replies that it represents the jury's view of the defendants' conduct (as it probably did) what purpose is served by introducing the profit motive gateway?

e Finally, as to other torts as to which, before *Rookes v Barnard*¹, punitive damages could be given but on which some restriction is evidently intended to be placed by the judgment. That this House, as a matter of law, or of legal policy, was entitled to restrict the scope of punitive damages I have, with all respect to the Court of Appeal², no doubt and, whatever my own reservations as to the wisdom of the policy, I should feel myself obliged to accept a new statement of principle if it were clear, consistent and workable and intelligibly related to the main stream of authority. That it was not entirely clear, appears well enough from the opinions in the present case; and I cannot entirely blame the Court of Appeal² for attempting to escape from it, just as one may sympathise with a customer when he finds his new suit almost at once requiring alteration, or patching, for putting it aside and reaching for his old tweeds. There is not perhaps much difficulty about category 1; it is well based on the cases and on a principle stated in 1703—'if public officers will infringe men's rights, they ought to pay greater damages than other men to deter and hinder others from the like offences' (*Ashby v White*³ per Holt CJ). Excessive and insolent use of power is certainly something against which citizens require as much protection today; a wide interpretation of 'government' which I understand your Lordships to endorse would correspond with Holt CJ's 'public officers' and would partly correspond with modern needs. There would remain, even on the most liberal interpretation, a number of difficulties and inconsistencies as pointed out by Taylor J in *Uren's case*⁴.

j I have more difficulty with the commonplace types of trespass or assault accompanied by insult or contumely, which, even more than 'first category' cases touch

1 [1964] 1 All ER 367, [1964] AC 1129

2 [1971] 2 All ER 187, [1971] 2 WLR 853

3 (1703) 2 Ld Raym 938 at 956

4 (1967) 117 CLR 118

the life of ordinary men and occupy the county courts. Although Lord Devlin studiously refrains from overruling earlier cases (other than *Loudon v Ryder*⁵) which undoubtedly proceeded on, or contained, a punitive element, his opinion has been understood as laying down that in future such cases cannot, unless the 'profit motive' is present, be treated as cases for punitive damages but only as cases for aggravated damages. The phrase used has been 'aggravated damages can do the work of punitive damages'.

I understand that a majority of your Lordships, for possibly differing reasons, are satisfied with this so it will remain the law in this country. But, if only in fairness to the Court of Appeal⁶ with whose approach to this matter I agree, I must state very briefly why I feel some difficulty.

I am far from clear how juries, or judges, are intended to act in the future. Are they to take it that the law has been changed, so that (absent a profit motive) only 'compensatory' damages can be given, plus an element for 'aggravation' if that is proved? I fear that there will be difficulty in seeing how far earlier cases, or Commonwealth cases, are now authority and that there will be much argument whether a particular case was one of 'aggravated' or 'punitive' damages or of both. Alternatively, if 'aggravated damages' are 'to do the work of punitive damages' and if it is to be supposed that juries, or judges, will continue giving damages much as before, then nothing has been gained by changing the label and we are indulging in make belief and encouraging fictional pleading. The whole point is well brought out by Pearson LJ in *McCarey v Associated Newspapers Ltd*⁷: 'if the compensatory principles is accepted, punitive damages must not be allowed to creep back into the assessment in some other guise'. I must confess to sympathy with the Court of Appeal's⁶ preference for the older system and with the objections to the new stated by Taylor J in *Uren's case*⁸, the weight of which clearly impressed the Privy Council. Their validity has been endorsed by cases post-*Rookes v Barnard*⁹ in Australia, Canada and New Zealand. I share their doubt whether we have yet arrived at a viable substitute. But I note with satisfaction and agreement the opinion expressed by the noble and learned Lord on the Woolsack that the relevant passage in Lord Devlin's judgment, which he cites, should be read sensibly as a whole together with the authorities on which it is based. This may provide a sound basis for redevelopment of the law.

My Lords, on all other points not expressly dealt with in this opinion I wish to express my concurrence with that of Lord Hailsham LC. I regret to differ from him in thinking that the appeal should be allowed on the grounds which I have stated.

LORD DIPLOCK. My Lords, the trial of this action proceeded, correctly, on the basis that as respects the measure of the damages which the jury might award, the judge was bound to direct them in accordance with the law as laid down by this House in Lord Devlin's speech in *Rookes v Barnard*⁹.

I agree with all your Lordships that there was material on which the jury were entitled to find that the conduct of each of the defendants brought the case within Lord Devlin's second category of cases in which exemplary or, as I would have preferred to call them, punitive damages may be awarded. The jury did so find by special verdicts. That part of the judge's summing-up in which he directed them as to the matters for their consideration in arriving at their findings on this issue as respects each of the defendants cannot be faulted.

It was, however, also incumbent on the judge to instruct the jury as to the measure of the damages which they might award if they reached the conclusion that the case as against each of the defendants was one in which they were not precluded from

5 [1953] 1 All ER 741, [1953] 2 QB 202

6 [1971] 2 All ER 187, [1971] 2 WLR 853

7 [1965] 2 QB at 105, cf [1964] 3 All ER at 957

8 (1967) 117 CLR 118

9 [1964] 1 All ER 367, [1964] AC 1129

a awarding punitive damages. On this aspect of the case there were two principles of law which should have been stated clearly to the jury. Neither was self-evident. The first was that, even if the jury found that the case came within Lord Devlin's second category and that the defendants' conduct merited punishment, it did not necessarily follow that they must award as damages to Captain Broome a greater sum than was sufficient to compensate him for all the harm and humiliation that he had suffered as a consequence of the defendants' tortious acts. They should take into account as part of the punishment inflicted on the defendants any sum (in the result b £15,000) which they were minded to award to Captain Broome as compensatory damages; and only if they thought that sum to be inadequate in itself to constitute sufficient punishment were they to award such additional sum as would, when added to the compensatory damages, amount to an appropriate penalty for the defendants' improper conduct. The second was that if the jury thought that the conduct of one c of the joint defendants deserved to be penalised by a lesser sum than the conduct of the other, the most that the jury were entitled to award against the defendants was that lesser sum, if it were to exceed the amount which they were minded to award as compensatory damages.

d I have the misfortune to differ from the majority of your Lordships in that I find it impossible to discover in the language of the summing-up any clear statement of either of these principles. At best I think that when the jury retired they must have been confused as to how the punitive damages, if any, were to be assessed. At worst I think that they may well have thought that they were to arrive at a sum which they thought was an appropriate penalty for the defendants' conduct and to add it to any sum awarded as compensatory damages.

e My Lords, I do not think that on this vital question of the assessment of exemplary damages the jury were adequately directed. I am fortified in this view by my conviction that, if properly directed, no reasonable jury could possibly have reached the conclusion that the appropriate penalty to inflict on the less culpable of the defendants was £40,000 for publishing a libel of which the victim was in their view adequately recompensed at £15,000 for all the harm and humiliation that it had caused to him.

f A penalty of £40,000 is, I believe, very much larger than any of your Lordships would have thought it appropriate to inflict on the defendants. I doubt if any of your Lordships would have hesitated to interfere with it if it had been awarded by a judge sitting alone. He would have been vulnerable because he would have given his reasons. Shibboleths apart, there survive today two valid reasons why an appellate court should be more reluctant to disturb an assessment of damages by a jury than an assessment by a judge. The first is applicable to all kinds of actions. It is that a g judge articulates his findings on the evidence and his reasoning, whereas a jury state the result of their findings and their reasoning but otherwise are dumb. In considering whether an award of damages by a jury is excessive an appellate court cannot do other than assume that the jury made every finding of fact and drew every inference that was open to it on the evidence as favourably as possible to the plaintiff and as adversely as possible to the defendant. In the instant case, however, this handicap h to an appellate's court ability to do justice is palliated by the facts; that there was no conflict of evidence for them to resolve—for the defendants called none, and that the jury were given a partial gift of speech. By their special verdict this House has been told that they considered that the plaintiff would be fully compensated by £15,000. The second reason for reluctance to interfere with a jury's award of damages applies particularly to actions for defamation. It is that, unless the parties otherwise agree, j the consequence of setting aside the jury's verdict must be a new trial before another jury. This involves the parties, through no fault of their own, in greatly increased costs which, particularly in libel actions, are, to the discredit of our legal system, out of all proportion even to the large compensatory damages awarded in the instant case. For my part, I should not be deflected from setting aside a jury's verdict as unreasonable by the fear, sometimes expressed by appellate judges, that another

unreasonable jury might make a similar unreasonable award of damages on the new trial. So far as I know this has never happened yet. But the consideration of the costs involved is one which it would be unrealistic and unjust to ignore. In the instant case, however, the parties agreed that this House should assess the damages in the event of the jury's verdict being set aside. No more costs would be incurred if the appeal were allowed than if it were dismissed—although the incidence of them on the parties might be different.

It may be said, and not implausibly, that there is nothing in the training or experience of a judge which makes him fitter than a jury to determine the pecuniary compensation which a plaintiff should receive for a reputation that is damaged or feelings that are hurt. And there may be safety in numbers. But it runs counter to the basis of our criminal law, in which the jury determine guilt and the judge determines the appropriate punishment, to treat the jury as better qualified than a judge to assess the pecuniary penalty which a defendant ought to pay for conduct which merits punishment. On an appeal from the jury's award of £40,000 which I know to be compensatory to the extent of £15,000 only, I should approach it in the same way as I should approach a fine of £40,000 imposed by a judge in a criminal prosecution. Even if I thought the jury had been given an adequate direction by the judge, I would have set the award aside and substituted an award of £20,000.

I have thought it right to express my own minority opinion as to what the result of this appeal should be. It is that with which the parties are primarily concerned—and it is they who are paying for it. It is, however, inherent in our legal system that owing to the manner in which the Court of Appeal¹⁰ dealt with the instant case, the unsuccessful party is also paying for the ruling of this House on two questions of law of much more general importance. The first is as to the effect of the decision in *Rookes v Barnard*¹¹ on the assessment of damages for defamation and whether that decision ought to be followed. The second is as to the propriety of the manner in which the Court of Appeal¹⁰, as an intermediate appellate court, dealt with the decision of this House in *Rookes v Barnard*¹¹. To these two topics I now turn.

In *Rookes v Barnard*¹¹ the plaintiff's claim was for damages for the tort of intimidation. At the trial the judge had summed up to the jury in terms which left it open to them to award exemplary damages. There was a cross-appeal against the amount of damages, on which this House heard separate and lengthy argument. It was necessary as a matter of decision of the cross-appeal for this House to determine whether the facts in *Rookes v Barnard*¹¹ brought it within a category of cases in which exemplary damages were recoverable at common law. This House determined that they did not and ordered a new trial. There were two different processes of reasoning by which it would have been possible to reach this conclusion of law. One, which was not adopted by this House, was to hold that the particular tort of intimidation was one in which the common law did not permit of exemplary damages. The other, which was adopted by this House, was to state the categories of cases in which alone exemplary damages might be awarded at common law and to determine whether the facts in *Rookes v Barnard*¹¹ brought it within one of these categories.

Lord Devlin's speech on the cross-appeal in *Rookes v Barnard*¹¹, in which all the five members who heard the appeal explicitly concurred, was a deliberate attempt by this House to do two things: (a) as a matter of legal exposition, to formulate the rationale of the assessment of damages for torts in which damages are 'at large'; (b) as a matter of legal policy, to restrict the categories of cases in which damages can be awarded against a defendant in order to punish him, to those in which this method of inflicting punishment still serves some rational social purpose today. Lord Devlin's speech, however, does not follow the simple arrangement of exposition followed by choice of policy. He starts by formulating three heads of damages. The purpose of two of them is to compensate the plaintiff; that of the third is to

¹⁰ [1971] 2 All ER 187, [1971] 2 WLR 853

¹¹ [1964] 1 All ER 367, [1964] AC 1129

a punish the defendant. This formulation is followed by an analysis of the previous authorities. These authorities lead to the policy decision to accept two categories of cases in which exemplary damages may be recovered and, proleptically, to reject other categories of cases in which it had previously been thought that damages might be awarded in order to punish the defendant. He then reverts to exposition of some considerations which follow from the purpose served by exemplary damages and
b which should be borne in mind when awards of exemplary damages are made. Finally he reverts to an analysis of the previous authorities for the purpose of completing the policy decision by overruling those which were authority for the award of exemplary damages where the injury to the plaintiff had been aggravated by malice or by the manner of doing the injury, that is, the insolence or arrogance by which it was accompanied. It is, however, convenient for the purposes of the instant
c appeal to deal with exposition and with policy separately.

The three heads under which damages are recoverable for those torts for which damages are 'at large' are classified under the following heads. (1) Compensation for the harm caused to the plaintiff by the wrongful physical act of the defendant in respect of which the action is brought. In addition to any pecuniary loss specifically proved the assessment of this compensation may itself involve putting a money value
d on physical hurt, as in assault; on curtailment of liberty, as in false imprisonment or malicious prosecution; on injury to reputation, as in defamation, false imprisonment and malicious prosecution; on inconvenience or disturbance of the even tenor of life, as in many torts, including intimidation. (2) Additional compensation for the injured feelings of the plaintiff where his sense of injury resulting from the wrongful physical act is justifiably heightened by the manner in which or motive for which the defendant did it. This Lord Devlin calls 'aggravated damages'. (3) Punishment of the
e defendant for his anti-social behaviour to the plaintiff. This Lord Devlin calls 'exemplary damages'. I should have preferred the alternative expression 'punitive damages' to emphasise the fact that their object is not to compensate the plaintiff but to punish the defendant and to deter him, and perhaps others, from committing similar torts. To avoid confusion I have, however, accepted the lead of Lord
f Hailsham LC in adhering to Lord Devlin's adjective 'exemplary'.

It may seem remarkable that there had not previously been any judicial analysis, even as elementary as this, of the constituent elements of the compound 'damages at large'. But it has to be remembered that at common law the assessment of damages was the exclusive function of a jury, and, despite growing exceptions from the mid-nineteenth century onwards, nearly all actions for torts in which damages were at
g large were tried by jury until after 1933. The assessment of damages was an arcanum of the jury box into which judges hesitated to peer; and it does not appear to have been their practice to give any direction to the jury as to how they should arrive at the amount of damages they should award, beyond some general exhortation to do their best in a matter which was peculiarly within their sphere.

What is disclosed by an examination of previous judgments since the 18th
h century, given on applications for a new trial on the grounds that the award of a jury was too large or too small, is a confusion of language and consequently of thought as to what were the constituent elements in an award of damages at large. In particular there is a complete failure to distinguish between aggravated and exemplary damages in cases where the malice of the defendant or the manner in which he did the wrongful act had both increased the injury to the plaintiff's feelings and aroused the
i indignation of the jury themselves.

In addition to the cases specifically referred to by Lord Devlin in *Rookes v Barnard*¹² your Lordships have been referred to many others in the course of the argument in the instant appeal. They serve but to confirm the confused state of the law on this subject before 1964.

The tort of defamation, to which Lord Devlin made only a passing reference in

*Rookes v Barnard*¹³, has special characteristics which may make it difficult to allocate compensatory damages between head (1) and head (2). The harm caused to the plaintiff by the publication of a libel on him often lies more in his own feelings, what he thinks other people are thinking of him, than in any actual change made manifest in their attitude towards him. A solatium for injured feelings, however innocent the publication by the defendant may have been, forms a large element in the damages under head (1) itself even in cases in which there are no grounds for 'aggravated damages' under head (2). Again the harm done by the publication, for which damages are recoverable under head (1) does not come to an end when the publication is made. As Lord Atkin said in *Ley v Hamilton*¹⁴, 'It is impossible to track the scandal, to know what quarters the poison may reach'. So long as its withdrawal is not communicated to all those whom it has reached it may continue to spread. I venture to think that this is the rationale of the undoubted rule that persistence by the defendant in a plea of justification or a repetition of the original libel by him at the trial can increase the damages. By doing so he prolongs the period in which the damage from the original publication continues to spread and by giving to it further publicity at the trial, as in *Ley v Hamilton*¹⁵, extends the quarters that the poison reaches. The defendant's conduct between the date of publication and the conclusion of the trial may thus increase the damages under head (1). In this sense it may be said to 'aggravate' the damages recoverable as, conversely, the publication of an apology may 'mitigate' them. But this is not 'aggravated damages' in the sense that that expression was used by Lord Devlin in head (2). On the other hand, the defendant's conduct after the publication may also afford cogent evidence of his malice in the original publication of the libel and thus evidence on which 'aggravated damages' may be awarded under head (2) in addition to damages under head (1). But although considerations such as these may blur the edges of the boundary between compensatory damages under head (1) and compensatory damages under head (2) in the case of defamation, they do not affect the clear distinction between the concept of compensatory damages and the concept of exemplary damages under head (3).

My Lords, the major clarification of legal reasoning to be found in the expository part of Lord Devlin's speech in *Rookes v Barnard*¹³ was the recognition, first, that the award of a single sum of money as damages for tort, while it must always perform the function of giving to the plaintiff what he deserves to receive to compensate him fully for the harm done to him by the defendant, may in appropriate cases also perform the quite different function of fining the defendant what he deserves to pay by way of punishment; and, secondly, that even in those appropriate cases, it is only if what the defendant deserves to pay as punishment exceeds what the plaintiff deserves to receive as compensation, that the plaintiff can be also awarded the amount of the excess. This is a windfall which he receives because the case happens to be one in which exemplary damages may be awarded.

It is not necessary to dwell on the three considerations which Lord Devlin referred to as arising from the nature and function of punitive damages. The first consideration qualifies the categories of cases in which exemplary damages may be awarded. The plaintiff must himself have been the victim of the conduct of the defendant which merits punishment; he can only profit from the windfall if the wind was blowing his way. The second consideration is relevant to the attitude of an appellate court to a jury's assessment of exemplary damages. I have already taken it into account in forming my conclusion that the jury's award of £40,000 ought to be set aside. The third conclusion relates to the relevance of the defendant's means to any assessment of punitive damages in excess of the amount required to compensate

¹³ [1964] 1 All ER 367, [1964] AC 1129

¹⁴ (1935) 153 LT 384 at 386

¹⁵ (1935) 153 LT 384

a the plaintiff. These three considerations are followed by the crucial exposition of the way in which a jury should be directed in a case in which it is open to them to award punitive damages. I have already dealt with this in the first criticism which I have made of the summing-up at the trial in the instant case.

b It should perhaps be pointed out that Lord Devlin did not suggest that in a case which clearly came within a category which justified an award of exemplary damages the jury should be invited to make separate awards in respect of the compensatory and the punitive element, although no doubt a judge sitting alone should do so. It was only in cases where it might be doubtful whether exemplary damages were permissible that he suggested that special verdicts splitting the total award might serve a useful purpose in avoiding the necessity of a new trial in the event of appeal.

c It has not been contended that those parts of Lord Devlin's speech which expounded the rationale of the award and the assessment of exemplary damages in those cases in which they could be recovered did not serve a useful purpose which lay well within the functions of this House in its judicial capacity. It brought some order out of chaos, some light and reason into what was previously a dark and emotive branch of the common law. What has been criticised is the decision of legal policy to restrict the categories of cases in which exemplary damages may be awarded.

d If the common law stood still while mankind moved on, your Lordships might still be awarding bot and wer to litigants whose kinsmen thought the feud to be outmoded—though you could not have done so to the plaintiff in the instant appeal, because defamation would never have become a cause of action. The common law would not have survived in any of those countries which have adopted it, if it did not reflect the changing norms of the particular society of which it is the basic legal system. It has survived because the common law subsumes a power in judges to adapt its rules to the changing needs of contemporary society—to discard those which have outlived their usefulness, to develop new rules to meet new situations. As the supreme appellate tribunal of England, your Lordships have the duty, when occasion offers, to supervise the exercise of this power by English courts. Other supreme appellate tribunals exercise a similar function in other countries which have inherited the English common law at various times in the past. Despite the unifying effect of that inheritance on the concept of man's legal duty to his neighbour, it does not follow that the development of the social norms in each of the inheritor countries has been identical or will become so. I do not think that your Lordships should be deflected from your function of developing the common law of England and discarding judge-made rules which have outlived their purpose and are contrary to contemporary concepts of penal justice in England, by the consideration that other courts in other countries do not yet regard an identical development as appropriate to the particular society in which they perform a corresponding function. The fact that the courts of Australia, of New Zealand and of several of the common law provinces of Canada have failed to adopt the same policy decision on exemplary damages as this House did for England in *Rookes v Barnard*¹⁶ affords a cogent reason for re-examining it; but not for rejecting it if, as I think to be the case, re-examination confirms that the decision was a step in the right direction—although it may not have gone as far as could be justified.

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i The award of damages as the remedy for all civil wrongs was in England the creature of the common law. It is a field of law in which there has been but little intervention by Parliament. It is judge-made law par excellence. Its original purpose in cases of trespass was to discourage private revenge in a primitive society inadequately policed, at least as much as it was to compensate the victim for the material harm occasioned to him. Even as late as 1814 Heath J felt able to say¹⁷:

'It goes to prevent the practice of duelling if juries are permitted to punish insult by exemplary damages.'

16 [1964] 1 All ER 367, [1964] AC 1129

17 *Merest v Harvey* (1814) 5 Taunt 442 at 444, [1814-23] All ER Rep 454 at 455

No one would today suggest this as a justification for rewarding the victim of a tort for refraining from unlawful vengeance on the wrongdoer. Conversely, the punishment of wrongdoers today is regarded as the function of the state to be exercised subject to safeguards for the accused assured to him by the procedure of the criminal law and with the appropriate punishment assessed by a dispassionate judge and not by a jury roused to indignation by partisan advocacy. One of the most significant and humane developments in English law over the past century and a half has been the increasing protection accorded to the accused under our system of criminal justice. As my noble and learned friend Lord Reid has pointed out no similar protection is available to a defendant as a party to a civil action.

So the survival into the latter half of the 20th century of the power of a jury in a civil trial to impose a penalty on a defendant simply to punish him had become an anomaly which it lay within the power of this House in its judicial capacity to restrict or to remove; though it would have been anticipating by two years the recent change in the practice of this House if to have done so would have involved overruling one of its own previous decisions.

Lord Devlin's analysis of previous decisions disclosed three kinds of cases in which the courts had recognised the right of a jury to award damages by way of punishment of the defendant in excess of what was sufficient to compensate the plaintiff for all the harm occasioned to him. The categorisation was new. Its purpose has, I think, been misunderstood. No one suggests that judges, when approving awards of exemplary damages in particular cases in the past consciously differentiated between one kind of case in which exemplary damages could be awarded and another. They dealt with them all as falling within a single nebulous class of cases in which the defendant's conduct was such as to merit punishment. The purpose of Lord Devlin's division of them into three categories was in order to distinguish between factual situations in which there was some special reason still relevant in modern social conditions for retaining the power to award exemplary damages, and factual situations in which no such special reason still survived.

With this end in view Lord Devlin extracted from the single nebulous class which appeared to be all that had been consciously recognised as justifying an award of exemplary damages at common law, two categories of cases in which this House decided that there were special reasons why the power to award exemplary damages should be retained. These two (apart from cases where exemplary damages are authorised by statute) are generally referred to as 'the categories'. But there is also to be found in the previous cases a third category, consisting of the remainder of the single nebulous class in which this House decided that the anomalous practice of awarding exemplary damages in civil proceedings ought to be discontinued.

The first category comprised cases of abuse of an official position of authority. This would seem to be analogous to the civil law concept of *détournement de pouvoir*, with the limitation that it must involve the commission of an act which would be tortious if done by a private individual. The cases cited are 200 years old. It would not appear that the actual conduct of the defendant himself need justify an award of aggravated damages. In *Huckle v Money*¹⁷ the defendant appears to have treated the plaintiff with courtesy and consideration. The servant was the whipping-boy for the political head of the government. Nor need he have known that his act was wrongful. Mr Money, a mere subordinate official, can hardly have been expected to know that general warrants issued by the Secretary of State were illegal. In *Wilkes v Wood*¹⁸, however, it was said that a belief that the act impugned was lawful could be pleaded in mitigation of damages.

The second category was of cases where an act known to be tortious was committed in the belief that the material advantages to be gained by doing so would outweigh any compensatory damages which the defendant would be likely to have to pay to the plaintiff. This would seem to be analogous to the civil law concept of *enriches-*

a ment induce subject to a similar limitation that the act resulting in enrichment must be tortious. The cases cited by Lord Devlin do not include underground trespass to minerals, which provide the classic examples in the 19th century of this category of tort. There is high authority both in this House (*Livingstone v Rawyards Coal Co*¹⁹) and in the Privy Council (*Bulli Coal Mining Co v Osborne*²⁰) that in the case of wilful clandestine trespass to minerals the damages may be assessed at the market value of the minerals without deduction for the cost of working—an award which would exceed both the loss to the plaintiff and the profit to the defendant from his wrongful act. The excess is punishment.

b The third—and rejected—category is numerically by far the largest. It consists of cases in which the manner in which the tort has been committed has attracted a whole gamut of dyslogistic judicial epithets such as wilful, wanton, high-handed, oppressive, malicious, outrageous; particularly those where the defendant's manner of doing the tortious act has been characterised by arrogance or insolence or, in the preferred Australian phrase, a contumelious disregard of the plaintiff's rights. These are nearly all cases in which 'aggravated damages' by way of compensation apart from punishment can be awarded and much of the previous confusion about exemplary damages stems from this.

c Apart from this confusion or perhaps because of it, I do not doubt that it was the general understanding of English judges and of those who practised in the English courts that exemplary damages by way of punishment of the defendant as well as aggravated damages by way of compensation of the plaintiff could be awarded in cases which fall within the third category. Lord Devlin's speech in *Rookes v Barnard*¹ explicitly acknowledges this. It was an understanding which he himself had shared. He had given effect to it in his own summing-up in *Loudon v Ryder*².

d The decision of legal policy which this House made in *Rookes v Barnard*¹ was to retain the first two categories and to discard the third as obsolete.

e In describing the two categories retained I have deliberately departed from the ipsissima verba of Lord Devlin's description of them. His statement of the categories was not intended as a definition to be construed as if it were enacted law. They were retained because this House considered that there were circumstances in which a power to award exemplary damages still served a useful social purpose and the descriptive words must be understood in the light of the social purpose which they were designed to serve.

f My Lords, had I been party to the decision in *Rookes v Barnard*¹ I doubt if I should have considered it still necessary to retain the first category. The common law weapons to curb abuse of power by the executive had not been forged by the mid-eighteenth century. In view of the developments, particularly in the last 20 years, in adapting the old remedies by prerogative writ and declaratory action to check unlawful abuse of power by the executive, the award of exemplary damages in civil actions for tort against individual government servants seems a blunt instrument to use for this purpose today. But if it to be retained—a question which cannot arise in the instant appeal—the reasoning which supports its retention would not confine it to torts committed by servants of central government alone. It would embrace all persons purporting to exercise powers of government, central or local, conferred on them by statute or at common law by virtue of the official status or employment which they held.

g I have no similar doubts about the retention of the second category. It too may be a blunt instrument to prevent unjust enrichment by unlawful acts. But to restrict the damages recoverable to the actual gain made by the defendant if it exceeded the loss caused to the plaintiff, would leave a defendant contemplating an unlawful act with the certainty that he had nothing to lose to balance against the chance that the plaintiff might never sue him or, if he did, might fail in the hazards of litigation. It

19 (1880) 5 App Cas 25

1 [1964] 1 All ER 367, [1964] AC 1129

20 [1899] AC 351, [1895-99] All ER Rep 506

2 [1953] 1 All ER 741, [1953] 2 QB 202

is only if there is a prospect that the damages may exceed the defendant's gain that the social purpose of this category is achieved—to teach a wrongdoer that tort does not pay. a

To bring a case within this category it must be proved that the defendant, at the time that he committed the tortious act, knew that it was unlawful or suspecting it to be unlawful deliberately refrained from taking obvious steps which, if taken, would have turned suspicion into certainty. While, of course, it is not necessary to prove that the defendant made an arithmetical calculation of the pecuniary profit he would make from the tortious act and of the compensatory damages and costs to which he would render himself liable, with appropriate discount for the chances that he might get away with it without being sued or might settle the action for some lower figure, it must be a reasonable inference from the evidence that he did direct his mind to the material advantages to be gained by committing the tort and came to the conclusion that they were worth the risk of having to compensate the plaintiff if he should bring an action. b

I see no reason for restoring to English law the anomaly of awarding exemplary damages in the third category of cases. If malice with which a wrongful act is done or insolence or arrogance with which it is accompanied renders it more distressing to the plaintiff, his injured feelings can still be soothed by aggravated damages which are compensatory. I share the scepticism expressed by Windeyer J in *Uren v John Fairfax & Sons Pty Ltd*³ whether what was in the defendant's mind at the time he committed the tort really increases the injury to the plaintiff's feelings. I think too that an evanescent sense of grievance at the defendant's conduct is often grossly overvalued in comparison with a lifelong deprivation due to physical injuries caused by negligence. But my own equable temperament may be idiosyncratic and the law of 'aggravated damages' does not call for closer examination in the instant appeal. c

Finally on this aspect of the case I would express my agreement with the view that *Rookes v Barnard*⁴ was not intended to extend the power to award exemplary or aggravated damages to particular torts for which they had not previously been awarded, such as negligence and deceit. Its express purpose was to restrict, not to expand, the anomaly of exemplary damages. d

My Lords, there is little that I should wish to add to what Lord Hailsham LC and Lord Reid have already said about the way the instant case was treated in the Court of Appeal⁵. It is inevitable in a hierarchical system of courts that there are decisions of the supreme appellate tribunal which do not attract the unanimous approval of all members of the judiciary. When I sat in the Court of Appeal I sometimes thought the House of Lords was wrong in overruling me. Even since that time there have been occasions, of which the instant appeal itself is one, when, alone or in company, I have dissented from a decision of the majority of this House. But the judicial system only works if someone is allowed to have the last word and if that last word, once spoken, is loyally accepted. e

The Court of Appeal⁵ found themselves able to disregard the decision of this House in *Rookes v Barnard*⁴ by applying to it the label *per incuriam*. That label is relevant only to the right of an appellate court to decline to follow one of its own previous decisions, not to its right to disregard a decision of a higher appellate court or to the right of a judge of the High Court to disregard a decision of the Court of Appeal. Even if the jurisdiction of the Court of Appeal had been co-ordinate with the jurisdiction of this House and not inferior to it the label *per incuriam* would have been misused. The reasons for applying it were said to be: first, that Lord Devlin had overlooked two previous decisions of this House in *Hulton v Jones*⁶ and *Ley v Hamilton*⁷; secondly, that the 'two categories' selected as those in which the power to award exemplary damages should be retained had not been previously suggested by counsel in the course of their arguments. f

3 [1967] 117 CLR 118 at 151, 152. g
 4 [1964] 1 All ER 367, [1964] AC 1129. h
 5 [1971] 2 All ER 187, [1971] 2 WLR 853. i
 6 [1910] AC 20, [1908-10] All ER Rep 29.
 7 (1935) 153 LT 384.

a I find the suggestion that *Hulton v Jones*⁸, the leading case on innocent defamation, is to be regarded as an authority for an award of exemplary damages, quite unacceptable. *Ley v Hamilton*⁹ was discussed at some length in Lord Devlin's speech. I myself agree with his interpretation of Lord Atkin's speech. The Court of Appeal¹⁰ did not and in this they now have the powerful support of my noble and learned friend, Viscount Dilhorne. But however wrong they may have thought Lord Devlin was, they cannot have thought that he had overlooked *Ley v Hamilton*⁹.

b The second reason I find equally unconvincing. On matters of law no court is restricted in its decision to following the submissions made to it by counsel for one or other of the parties. After listening to a lengthy argument which embraced a full examination of a large and representative selection of the relevant previous authorities this House was fully entitled to come to a conclusion of law and legal policy different from that which any individual counsel had propounded.

c With regard to the amount of exemplary (and also aggravated) damages which may be awarded where the plaintiff elects to sue defendants jointly for a single tort, I agree with Lord Hailsham LC that the Court of Appeal¹⁰ got it wrong. Where I differ from him is in thinking that the trial judge got it right. I am fortified in this view by the fact that Lord Denning MR understood the summing-up as leaving to the jury a choice whether to award a sum appropriate as a punishment of the more blameworthy of the defendants or the less blameworthy or something in between the two sums. Salmon LJ appears to have taken the same view. Both thought that this was a correct statement of the law. In this I think that they were mistaken as to the law, but right as to what the jury would have understood the summing-up to mean.

e On the wider aspects of the course adopted by the Court of Appeal¹⁰ it is best that I should content myself with expressing my concurrence with all that Lord Hailsham LC has said.

LORD KILBRANDON. My Lords, there are several reasons which induce me to be as brief as I can. First, the case in its important general aspects is concerned with doctrines, and to some extent with procedures, with which I am not familiar. f Secondly, those general aspects have been examined in great detail and in an authoritative manner by your Lordships who have preceded me. Thirdly, since it is unlikely that any contribution of mine would be regarded as of value in clarifying the law of England, I may at least wind up the consideration of a disastrous case with economy, the lack of which, especially in this class of litigation, is, as others of your Lordships have observed, a notoriously discreditable feature of our jurisprudence. g In short, having had the advantage of reading the speeches prepared by my noble and learned friends, Lord Hailsham LC, Lord Reid and Lord Morris of Borth-y-Gest, I agree with them.

h It is conceded by the appellants that they libelled Captain Broome and they do not attack as excessive the sum awarded by the jury as compensation for the damage they did to his feelings and his reputation. It is also conceded that, if there was evidence on which a properly directed jury could find that the appellants had calculated that they might make a profit from publication which might exceed the compensation payable to the plaintiff, then, since 'one man should not be allowed to sell another man's reputation for profit', and since it may 'be necessary to teach a wrongdoer that tort does not pay', the jury were entitled to award punitive damages, on the authority of *Rookes v Barnard*¹¹. i The first question, and one which from first to last occupied a very great deal of time in your Lordships' House, was whether there was such evidence.

I have no doubt on this point at all, and I do not rehearse the evidence. The jury had before them the state of the appellants' knowledge before publication—that

8 [1910] AC 20, [1908-10] All ER Rep 29
9 (1935) 153 LT 384

10 [1971] 2 All ER 187, [1971] 2 WLR 853
11 [1964] 1 All ER 367, [1964] AC 1129

Captain Broome had warned them that he regarded certain passages as libellous, that professional naval opinion was to the same effect, and, above all, that another reputable publisher had refused to handle the book because of its defamatory character. The appellants' attitude is demonstrated by their written references to libel actions as affording 'first class publicity', and to 'tightening up the indemnity clause'. No doubt there was an element of the jocular in these remarks, but they do show that the appellants were going ahead with their eyes open as to consequences, and they must have thought it would be worth their while. a

Counsel for the appellants pointed out, and I for one agree, that since all commercial publication is undertaken for profit, one must be watchful against holding the profit motive to be sufficient to justify punitive damages: to do so would be seriously to hamper what must be regarded, at least since the European Convention was ratified, as a constitutional right to free speech. I can see that it could be in the public interest that publication should not be stopped merely because the publisher knows that his material is defamatory; it may well be in the public interest that matter injurious to others be disseminated. But if it were suggested that this freedom should also be enjoyed when the publisher either knows that, or does not care whether, his material is libellous—which means not only defamatory but also untrue—it would seem that the scale is being weighted too heavily against the protection of individuals from attacks by media of communication. b

The conduct of the appellants, accordingly, is in my view brought within the principle of the rule laid down in *Rookes v Barnard*¹² to which I have just referred. If a publisher knows, or has reason to believe, that the act of publication will subject him to compensatory damages, it must be that, since he is actuated by the profit-motive, he is confident that by that publication he will not be the loser. Some deterrent, over and above compensatory damages, may in these circumstances be called for. c

This leads me to the little I have to say on the doctrine of punitive damages. I do not propose to discuss its merits or demerits, because I agree with Lord Devlin, not only that it forms part of the law of England, but also that its abolition would not be within the judicial functions of this House. I will, however, add that I am not convinced that any statutory example of the recognition of the doctrine is to be found. By the Law Reform (Miscellaneous Provisions) Act 1934, s 1 (2) (a), it is provided that where a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of that estate shall not include any exemplary damages. In the previous subsection provision has also been made, per contra, for causes of action subsisting against the estates of deceased persons. Since punitive damages are punitive or deterrent against the author of them, it would have been understandable if the statute had refused to allow them against a dead man. But, instead, they have been disallowed when they are claimed in respect of an injury to a dead man. This leads me to suppose that by the phrase 'exemplary damages' Parliament was here referring to what are usually called 'aggravated' damages; the estate of a dead man must pay them in order to indemnify the living, but the estate of a dead man, whose feelings post mortem have become irrelevant, does not receive them. d

In the same sense I would interpret s 13 (2) of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951, which provides for the award, in certain circumstances, of 'exemplary damages'. Section 13 (2) applies, by virtue of s 13 (6), to Scotland, and since I can hardly believe that this Act introduced for the first time, as it were by a side-wind, the doctrine of punitive damages into the law of Scotland, I conclude again that 'exemplary' really means 'aggravated'. Aggravated damages, in the English sense, are available to pursuers in defamation cases in Scotland, subject to this qualification, that the conduct of counsel (cf *Greenlands Ltd v Wilmshurst*¹³) is not accepted as an aggravation unless that conduct has been on the express e

¹² [1964] 1 All ER 367, [1964] AC 1129

¹³ [1913] 3 KB 507

a instructions, or with the privity, of counsel's client—see *James v Baird*¹⁴. Finally, Lord Devlin¹⁵ doubted whether s 17 (3) of the Copyright Act 1956, authorised an award of exemplary damages; in my opinion it did not.

b I do not suppose that anyone now sitting down to draft a civil code would include an article providing for punitive damages. But the doctrine exists, and in my respectful opinion the rationale of it is explained, by illustrations as apt as one could find, in the speech of Lord Devlin. The doctrine proceeds on the footing, whether sound or not, that in some torts, and in some circumstances, there is an element of public interest to be protected. The only way in which that can be done may be by awarding to a plaintiff a sum of damages which he does not deserve, being in excess of any loss or injury he has suffered; that sum includes an element calculated to deter the defendant, and other like-minded persons, from committing similar offences. One example, which is Lord Devlin's second category, I have already noticed—the publisher who does not mind paying compensatory, even aggravated damages for libel, because he will still have a profit after paying them. It is not in the public interest, especially as the publishing agencies become more and more monolithic, that such conduct should go unchecked, and no remedial measures other than punitive damages seem to be open. A second example—Lord Devlin's first category—is in the sphere of public authority. While, as some of your Lordships d have pointed out, the illustration may have been too narrowly drawn, the rationale is clear, and is the same. An example might be, an outrageous excess of official authority without any aggravating circumstances (cf *Huckle v Money*¹⁶) resulting in the wrongful imprisonment of a person of bad character. False imprisonment is primarily actionable as an injury to reputation. If the plaintiff has none to lose, the amount of his compensatory damages may be inadequate to deter, in the public interest, e flagrant injustices of this character.

The exclusion of the 'common bully' category, and the consequent overruling of *Loudon v Ryder*¹⁷ are entirely consistent with this principle. Very large compensatory damages, which should be an adequate deterrent, are proper in such cases, and in most of them the criminal law can also take care of the public interest.

f I accordingly accept that *Rookes v Barnard*¹⁸, as it has now been expounded by my noble and learned friend, Lord Reid, correctly states the law of England. It cannot be said, and it does not purport, to state the law of Scotland; it may be that in other parts of the Commonwealth also it is not, for what may be very different reasons, acceptable. Nevertheless it appears to me to give content to the doctrine of punitive damages, and to set proper limits on it.

g The trial having been correctly and inevitably conducted on the basis of *Rookes v Barnard*¹⁸ as then understood, the question now arises whether the learned judge gave the jury adequate and accurate directions in law on that basis. First, did he fail to make it clear to the jury that, if they had made an award of compensatory damages, any additional award by way of punitive damages could be made 'if, but only if' the amount of the compensatory damages did not itself constitute a sufficient deterrent? The second objection was that the learned judge gave an inadequate direction h as to the course to be followed by the jury should they find punitive damages due, but a different degree of culpability in the two defendants. I think it is sufficient for me to say that I agree with those of your Lordships who are of opinion that the directions, in both matters, were adequate.

j The aspect of the case which has given me the greatest difficulty is the question whether the total amount of the damages awarded is so excessive that the verdict cannot stand. That it is excessive I do not doubt, but that is not a sufficient reason for the award to be set aside. The assessment of damages in such cases as this is not, in our law, a judicial function. Insofar as compensatory damages are concerned, it

14 1916 SC 510

15 [1964] 1 All ER at 410, [1964] AC at 1225

16 (1763) 2 Wils 205

17 [1953] 1 All ER 741, [1953] 2 QB 202

18 [1964] 1 All ER 367, [1964] AC 1129

may well be right that that should be so. If he were called on to estimate the sum appropriate to repair the injured feelings and damaged reputation of a citizen who had been defamed, a judge would be making not a legal, but something more like a social, assessment; there is no reason to suppose that his estimate would more probably be correct than would that made collectively by any 12 sensible men and women. So when one looks at a jury's award in such a case one has to ask, whether it could have been made by sensible people acting reasonably, or whether it must have been arrived at capriciously, unconscionably, or irrationally. On that test, I think the present award must stand. Moreover, it is not unprecedented. For example, in a case in which the libel was in some ways less wounding than the present—*Youssouppoff v Metro-Goldwyn-Meyer*¹⁹—an award, adjusted for the change in money values, of well over twice as large as this was upheld by experienced judges.

The same test, as the law now stands, must be applied to a jury's award of punitive damages. Whether this should be so is another matter; it is arguable that the assessment of punishment is not properly a jury's function, and ought more readily to be challengeable on appeal to a judicial authority. It is obvious that, as counsel for the appellants forcibly pointed out, a defendant against whom punitive damages is sought stands to a great extent stripped of the constitutional safeguards which would be his right were he arraigned before a criminal court. One of those safeguards is a calm judicial determination of the penalty appropriate to his offence. Perhaps, if the doctrine of punitive damages is to be retained, it ought to be made a condition precedent of their being asked for that the plaintiff forego his right to have the case tried by a jury; it is not likely that a defendant would wish to stand on his own right in that respect.

So, although I would myself have assessed the damages at a much smaller sum, I cannot say that the award, on the principles under which we now operate, ought not to stand, or that, were a new trial to be ordered, the result would, in my confident opinion, be substantially different.

Finally, I do not consider it necessary for me to say anything on the issue of the relations between this House and the Court of Appeal, except that I entirely agree with what has fallen from Lord Hailsham LC on this topic.

I would, accordingly, dismiss this appeal.

Appeal dismissed.

Solicitors: *Herbert Smith & Co* (for the appellants); *Theodore Goddard & Co* (for Captain Broome).

S A Hatteea Esq Barrister.

Dingle v Turner and others

HOUSE OF LORDS

VISCOUNT DILHORNE, LORD MACDERMOTT, LORD HODSON, LORD SIMON OF GLAISDALE AND LORD CROSS OF CHELSEA

17th, 18th, 19th, 22nd, 23rd NOVEMBER 1971, 16th FEBRUARY 1972

Charity – Relief of poverty – Poor employees – Trust to provide pensions to poor employees of a company – Whether valid charitable trust.

Charity – Public benefit – Requirement of public benefit – Section of the public – Determination whether potential beneficiaries constitute a section of the public – Relevance.

The testator died on 10th January 1950. By cl 8 (e) of his will he directed his trustees to invest a specified sum on trust 'to apply the income thereof in paying pensions to poor employees of [D Ltd] ...' At the testator's death D Ltd employed over 600

a persons and there was a substantial number of ex-employees. Since then the business had expanded and D Ltd had 705 full-time and 189 part-time employees and was paying pensions to 89 ex-employees. In proceedings to determine whether the trust declared by cl 8 (e) was valid it was contended by those interested on intestacy if the trust failed, that a trust ought not to be regarded as charitable if the benefits were confined to the employees of a given individual or company, the validity of trusts for 'poor relations' constituting an anomalous exception to the general rule.

Held – The trust constituted a valid charitable trust. It was a natural development of the 'poor relations' decisions to hold as charitable trusts for 'poor employees' of an individual or company or 'poor members' of a club or society; to draw a distinction between different kinds of 'poverty' trusts would be illogical. In the field of trusts for relief of poverty the dividing line between a charitable and a private trust depended on whether, as a matter of construction, the gift was for the relief of poverty amongst a particular description of poor people or was merely a gift to particular poor persons, the relief of poverty amongst them being the motive of the gift (see p 880 h and j, p 881 b d and e, p 883 e and p 888 f to h, post).

Re Gosling (1900) 48 WR 300, *Gibson v South American Stores (Gath & Chaves) Ltd* [1949] 2 All ER 985, and *Re Scarisbrick* [1951] 1 All ER 822 applied.

Re Compton [1945] 1 All ER 198, *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] 1 All ER 31 and *Davies v Perpetual Trustee Co (Ltd)* [1959] 2 All ER 128 distinguished.

Per Lord MacDermott, Lord Simon of Glaisdale and Lord Cross of Chelsea. In determining for the purposes of the law of charity whether a trust other than for the relief of poverty is for the public benefit, the question whether or not the potential beneficiaries of the trust can fairly be said to constitute a section of the public is a question of degree and cannot be by itself decisive of the question whether the trust is a charity. Much must depend on the purpose of the trust (see p 881 b and e and p 889 f and g, post).

Per Viscount Dilhorne, Lord MacDermott and Lord Hodson. The fiscal privileges of a legal charity are not directly relevant to the determination whether a given trust or purpose is charitable (see p 880 j and p 881 c and d, post).

Notes

For the relief of the poor being a charitable purpose, see 4 Halsbury's Laws (3rd Edn) 213-218, paras 492-495, and for cases on the subject, see 8 Digest (Repl) 316-319, 13-48.

Cases referred to in opinions

A-G v Northumberland (Duke) (1877) 7 Ch D 745, 47 LJCh 569, *varied* (1878) 38 LT 245, 8 Digest (Repl) 410, 1020.

A-G v Price (1810) 17 Ves 371, [1803-13] All ER Rep 467, 34 ER 143, 8 Digest (Repl) 316, 19.

Buck, Re, Bruty v Mackey [1896] 2 Ch 727, [1895-99] All ER Rep 366, 65 LJCh 881, 75 LT 312, 60 JP 775, 8 Digest (Repl) 356, 348.

Compton, Re, Powell v Compton [1945] 1 All ER 198, [1945] Ch 123, 114 LJCh 99, 172 LT 158, 8 Digest (Repl) 330, 123.

Cox (decd), Re, Baker v National Trust Co Ltd, Public Trustee for Ontario (Province) v National Trust Co Ltd [1955] 2 All ER 550, [1955] AC 627, [1955] 3 WLR 42, *affg* [1951] OR 205, Digest (Cont Vol A) 91, 3a.

Davies v Perpetual Trustee Co (Ltd) [1959] 2 All ER 128, [1959] AC 439, [1959] 2 WLR 673, Digest (Cont Vol A) 88, 6a.

Drummond, Re, Ashworth v Drummond [1914] 2 Ch 90, [1914-15] All ER Rep 223, 83 LJCh 817, 111 LT 156, 8 Digest (Repl) 320, 52.

Gibson v South American Stores (Gath & Chaves) Ltd [1949] 2 All ER 985, [1950] Ch 177, 8 Digest (Repl) 320, 51.

Gosling, Re, Gosling v Smith (1900) 48 WR 300, 16 TLR 152, 8 Digest (Repl) 320, 49.

- Hobourn Aero Components Ltd's Air Raid Distress Fund, Re, Ryan v Forrest* [1946] 1 All ER 501, [1946] Ch 194, 115 LJCh 158, 174 LT 428, 8 Digest (Repl) 321, 56. a
- Income Tax Special Purposes Comrs v Pemsel* [1891] AC 531, [1891-94] All ER Rep 28, 61 LJQB 265, 65 LT 621, 55 JP 805, 3 Tax Cas 53, 8 Digest (Repl) 312.
- Inland Revenue Comrs v Educational Grants Association Ltd* [1967] 2 All ER 893, [1967] Ch 993, [1967] 3 WLR 41, 44 Tax Cas 111, Digest (Cont Vol C) 529, 1400a.
- Laidlaw, Re, Sir Robert Laidlaw's Will Trusts* (11th January 1935) unreported. b
- Oppenheim v Tobacco Securities Trust Co Ltd* [1951] 1 All ER 31, [1951] AC 297, 8 Digest (Repl) 321, 55.
- Pease v Pattinson* (1886) 32 Ch D 154, [1886-90] All ER Rep 507, 55 LJCh 617, 54 LT 209, 8 Digest (Repl) 355, 356.
- Scarisbrick, Re, Cockshott v Public Trustee* [1951] 1 All ER 822, [1951] Ch 622, *rvsg* [1950] 1 All ER 143, [1950] Ch 226, 8 Digest (Repl) 316, 18. c
- Spiller v Maude* (1881) 32 Ch D 158n, 8 Digest (Repl) 463, 1641.
- Young's Will Trusts, Re, Westminster Bank Ltd v Sterling* [1955] 3 All ER 689, [1955] 1 WLR 1269, Digest (Cont Vol A) 89, 31a.

Appeal

By an originating summons dated 30th July 1970 the first respondent, Henry Elliott Turner, trustee of the estate of Frank Hanscomb Dingle deceased ('the testator'), sought inter alia the determination of the question whether the trust declared in cl 8 (e), (g), of the testator's will dated 10th January 1950 to apply the income of a legacy of £10,000 and of the residue of his estate in paying pensions to poor employees of E Dingle & Co Ltd was valid as a charitable trust, or was otherwise valid, or was void for perpetuity, uncertainty or some other reason. On 2nd April 1971 Megarry J declared that the trust was a valid charitable trust and, on the application of Betty Mary Dingle, one of the persons interested under an intestacy, granted a certificate under s 12 of the Administration of Justice Act 1969 enabling her to apply for leave to appeal to the House of Lords. On 17th May 1971 the House gave leave to appeal under s 13 of the 1969 Act. The second to tenth respondents were representatives of the various classes of employees or ex-employees of E Dingle & Co Ltd, the eleventh respondent was Lloyds Bank Ltd, an executor of the testator's will, and the twelfth respondent was the Attorney-General. d

C A Settle QC and *M W Cockle* for the appellant. e

W S Wigglesworth QC and *Spencer G Maurice* for the second to tenth respondents.

N C H Browne-Wilkinson for the Attorney-General.

The first and eleventh respondents did not appear and were not represented. f

Their Lordships took time for consideration. g

16th February. The following opinions were delivered.

VISCOUNT DILHORNE. My Lords, I have had the advantage of reading the opinions of my noble and learned friends, Lord Cross of Chelsea and Lord MacDermott. I agree with Lord Cross that this appeal should be dismissed and with the reasons he gives for that conclusion. h

With Lord MacDermott, I too do not wish to extend my concurrence to what my noble and learned friend Lord Cross has said with regard to the fiscal privileges of a legal charity. Those privileges may be altered from time to time by Parliament and I doubt whether their existence should be a determining factor in deciding whether a gift or trust is charitable. j

I agree that the costs of all the parties should be paid out of the fund.

LORD MACDERMOTT. My Lords, the conclusion I have reached on the facts of this case is that the gift in question constitutes a public trust for the relief of poverty which is charitable in law. I would therefore dismiss the appeal.

a I do not find it necessary to state my reasons for this conclusion in detail. In the first place, the views which I have expressed at some length in relation to an educational trust in *Oppenheim v Tobacco Securities Trust Co Ltd*¹ seem to me to apply to this appeal and to mean that it fails. It would, of course, be otherwise if the case just cited purported to rule the point now in issue. But that is not so, for it clearly left that point undecided and open for further consideration. And, secondly, I have had the advantage of reading the opinion prepared by my noble and learned friend, Lord Cross of Chelsea, and find myself in agreement with his conclusion for the reasons he has given. In particular, I welcome his commentary on the difficulties of the phrase 'a section of the public'. But I would prefer not to extend my concurrence to what my noble and learned friend goes on to say respecting the fiscal privileges of a legal charity. This subject may be material on the question whether what is alleged to be a charity is sufficiently altruistic in nature to qualify as such, but beyond that, and without wishing to express any final view on the matter, I doubt if these consequential privileges have much relevance to the primary question whether a given trust or purpose should be held charitable in law.

b I agree with the order as to costs proposed by my noble and learned friend.

d **LORD HODSON.** My Lords, I agree with my noble and learned friend, Lord Cross of Chelsea, that this appeal should be dismissed and with his reasons for that conclusion. With this reservation: that I share the doubts expressed by my noble and learned friends, Lord MacDermott and Viscount Dilhorne, as to the relevance of fiscal considerations in deciding whether a gift or trust is charitable.

e **LORD SIMON OF GLAISDALE.** My Lords, I have had the advantage of reading the opinion of my noble and learned friend, Lord Cross of Chelsea, with which I agree. I too would dismiss this appeal, and make the same recommendation as to costs.

f **LORD CROSS OF CHELSEA.** My Lords, by his will dated 10th January 1950 Frank Hanscomb Dingle (whom I will call 'the testator') after appointing Lloyds Bank Ltd, his wife Annie Dingle and his solicitor Henry Elliot Turner to be his executors and trustees made the following—among other—dispositions. By cl 5 he gave to his trustees his ordinary and preference shares in E Dingle & Co Ltd on trust to pay the income arising therefrom to his wife for her life and after her death to hold the same in trust for such person or persons as she should by will or codicil appoint but without any trust in default of appointment. By cl 8 (a) he directed his trustees to pay the income of his residuary estate after payment thereof of his debts, funeral and testamentary expenses to his wife for her life. By cl 8 (b), (c), (d), (e) and (f) he directed his trustees to raise various sums out of his residuary estate after the death of his wife. Clause 8 (e) was in the following terms:

h '(e) To invest the sum of Ten thousand pounds in any of the investments for the time being authorised by law for the investment of trust funds in the names of three persons (hereinafter referred to as "the Pension Fund Trustees") to be nominated for the purpose by the persons who at the time at which my Executors assent to this bequest are directors of E. Dingle & Company Limited and the Pension Fund Trustees shall hold the said sum and the investments for the time being representing the same (hereinafter referred to as "the Pensions Fund")

j UPON TRUST to apply the income thereof in paying pensions to poor employees of E. Dingle & Company Limited or of any other company to which upon any reconstruction or amalgamation the goodwill and the assets of E. Dingle & Company Limited may be transferred who are of the age of Sixty years at least or who being of the age of Forty five years at least are incapacitated from earning

their living by reason of some physical or mental infirmity PROVIDED ALWAYS that if at any time the Pension Fund Trustees shall for any reason be unable to apply the income of the Pensions Fund in paying such pensions to such employees as aforesaid the Pension Fund Trustees shall hold the pensions Fund and the income thereof UPON TRUST for the aged poor in the Parish of St Andrew, Plymouth.'

Finally by cl 8 (g) the testator directed his trustees to hold the ultimate residue of his estate on the trusts set out in cl 8 (e).

The testator died on 10th January 1950. His widow died on 8th October 1966, having previously released her testamentary power of appointment over her husband's shares in E Dingle & Co Ltd, which accordingly fell into the residuary estate. When these proceedings started in July 1970, the value of the fund held on the trusts declared by cl 8 (e) was about £320,000 producing a gross income of about £17,800 per annum.

E Dingle and Co Ltd was incorporated as a private company on 20th January 1935. Its capital was owned by the testator and one John Russell Baker and it carried on the business of a departmental store. At the time of the testator's death the company employed over 600 persons and there was a substantial number of ex-employees. On 23rd October 1950 the company became a public company. Since the testator's death its business has expanded and when these proceedings started it had 705 full-time and 189 part-time employees and was paying pensions to 89 ex-employees.

The trustees took out an originating summons in the Chancery Division on 30th July 1970 asking the court to determine whether the trusts declared by cl 8 (e) were valid and if so to determine various subsidiary questions of construction—as, for example, whether part-time employees or employees of subsidiary companies were eligible to receive benefits under the trust. To this summons they made defendants (1) representatives of the various classes of employees or ex-employees, (2) those who would be interested on an intestacy if the trusts failed, and (3) Her Majesty's Attorney-General. It has been common ground throughout that the trust at the end of cl 8 (e) for the aged poor in the Parish of St Andrew Plymouth is dependent on the preceding trust for poor employees of the company so that although it will catch any surplus income which the trustees do not apply for the benefit of poor employees it can have no application if the preceding trust is itself void.

By his judgment given on 2nd April 1971 Megarry J held, inter alia, following the decision of the Court of Appeal in *Gibson v South American Stores (Gath & Chaves) Ltd*², that the trust declared by cl 8 (e) was a valid charitable trust but, on the application of the appellant, Betty Mary Dingle, one of the persons interested under an intestacy, he granted a certificate under s 12 of the Administration of Justice Act 1969 enabling her to apply to this House directly for leave to appeal against that part of his judgment, and on 17th May 1971 the House gave her leave to appeal.

Your Lordships, therefore, are now called on to give to the old 'poor relations' cases and the more modern 'poor employees' cases that careful consideration which, in his speech in the *Oppenheim* case³ Lord Morton of Henryton said that they might one day require.

The contentions of the appellant and the respondents may be stated broadly as follows. The appellant says that in the *Oppenheim* case⁴ this House decided that in principle a trust ought not to be regarded as charitable if the benefits under it are confined either to the descendants of a named individual or individuals or the employees of a given individual or company and that although the 'poor relations' cases may have to be left standing as an anomalous exception to the general rule because their validity has been recognised for so long, the exception ought not to be

2 [1949] 2 All ER 985, [1950] Ch 177

3 [1951] 1 All ER at 38, [1951] AC at 313

4 [1951] 1 All ER 31, [1951] AC 297

a extended to 'poor employees' trusts which had not been recognised for long before their status as charitable trusts began to be called in question. The respondents, on the other hand, say, first, that the rule laid down in the *Oppenheim* case⁵ with regard to educational trusts ought not to be regarded as a rule applicable in principle to all kinds of charitable trust and, secondly, that in any case it is impossible to draw any logical distinction between 'poor relations' trusts and 'poor employees' trusts, and, that as the former cannot be held invalid today after having been recognised as valid b for so long, the latter must be regarded as valid also.

By a curious coincidence within a few months of the decision of this House in the *Oppenheim* case⁵ the cases on gifts to 'poor relations' had to be considered by the Court of Appeal in *Re Scarisbrick, Cockshott v Public Trustee*⁶. Most of the cases on this subject were decided in the 18th or early 19th centuries and are very inadequately reported but two things at least were clear. First, that it never occurred to the judges c who decided them that in the field of 'poverty' a trust could not be a charitable trust if the class of beneficiaries was defined by reference to descent from a common ancestor. Secondly, that the courts did not treat a gift or trust as necessarily charitable because the objects of it had to be poor in order to qualify, for in some of the cases the trust was treated as a private trust and not a charity. The problem in *Re Scarisbrick*⁶ was to determine on what basis the distinction was drawn. Roxburgh J—founding d himself on some words attributed to Sir William Grant MR in *A-G v Price*⁷—had held that the distinction lay in whether the gift took the form of a trust under which capital was retained and the income only applied for the benefit of the objects, in which case the gift was charitable, or whether the gift was one under which the capital was immediately distributable among the objects, in which case the gift was not a charity. The Court of Appeal⁶ rejected this ground of distinction. They held that in e this field the distinction between a public or charitable trust and a private trust depended on whether as a matter of construction the gift was for the relief of poverty amongst a particular description of poor people or was merely a gift to particular poor persons, the relief of poverty among them being the motive of the gift. The fact that the gift took the form of a perpetual trust would no doubt indicate that the intention of the donor could not have been to confer private benefits on particular f people whose possible necessities he had in mind; but the fact that the capital of the gift was to be distributed at once did not necessarily show that the gift was a private trust. The appellant in the instant case, while of course submitting that the judges who decided the old cases were wrong in not appreciating that no gift for the relief of poverty among persons tracing descent from a common ancestor could ever have a sufficiently 'public' quality to constitute a charity, did not dispute the correctness of the analysis of those cases made by the Court of Appeal in *Re Scarisbrick*⁶. g

Later in the 19th century came the friendly society cases—*Spiller v Maude*⁸ decided in 1881, *Pease v Pattinson*⁹ and *Re Buck, Bruty v Mackey*¹⁰. In all these cases the court had to consider whether funds held on trust for the relief of poverty among members of a voluntary association were held on charitable trusts—such funds being derived h in each case in part from subscriptions made by the members and in part from donations or bequests by well-wishers. In each case the court held that the funds were held on a charitable trust but it does not appear to have been argued in any of them that the fact that the benefits were confined to persons who were linked by the common tie of membership of an association prevented the trusts from being charitable. The arguments against 'charity' were either that the association in question was really no more than a private mutual insurance society or that at all i

5 [1951] 1 All ER 31, [1951] AC 297

6 [1951] 1 All ER 822, [1951] Ch 622

7 (1810) 17 Ves 371, [1803-13] All ER Rep 467

8 (1881) 32 Ch D 158n

9 (1886) 32 Ch D 154, [1886-90] All ER Rep 507

10 [1896] 2 Ch 727, [1895-99] All ER Rep 366

events on a winding-up so much of the funds as were derived from donations or bequests should be returned to the donors or the estates of the testators and not applied 'cy-près'.

The first of the 'poor employees' cases was *Re Gosling, Gosling v Smith*¹¹. There the testator sought to establish a fund for 'pensioning off' the old and worn out clerks of a banking firm of which he had been a member. It was argued by those interested in contending that the gift was not charitable, that there was no public element in it, and that a distinction should be drawn between the relief of poverty among employees of a firm and the relief of poverty among inhabitants of a geographical area. In rejecting that argument Byrne J said, inter alia, that it was inconsistent with *A-G v The Duke of Northumberland*¹², which was one of the 'poor relations' cases. His judgment continued as follows¹³:

'The fact that the section of the public is limited to persons born or residing in a particular parish, district, or county, or belonging to or connected with any special sect, denomination, guild, institution, firm, name, or family, does not of itself render that which would be otherwise charitable void for lack of a sufficient or satisfactory description or take it out of the category of charitable gifts. I therefore hold it to be a good charitable gift.'

It is to be observed that he does not confine what he says there to trusts for the relief of poverty as opposed to other forms of charitable trust.

In *Re Drummond, Ashworth v Drummond*¹⁴, the testator bequeathed some shares in a company of which he had been a director to trustees on trust to pay the income to the directors of the company—

'for the purposes of contribution to the holiday expenses of the workpeople employed in the spinning department of the said company in such manner as a majority of the directors should in their absolute discretion think fit . . .'

There were some 500 employees in the department. It was first submitted that this was a trust for the relief of poverty. Eve J rejected that submission but, in doing so, he did not suggest that if he could have held that the workpeople in question were 'poor persons' within the meaning of the Statute of Elizabeth the gift would nevertheless have failed on the ground that it was confined to employees of a particular company. Next it was submitted that the gift fell under the last of the four heads of charity set out by Lord Macnaghten in *Income Tax Special Purposes Comrs v Pemsell*¹⁵. It was a trust to secure a holiday for a substantial number of the inhabitants of Ilkley who, although not poor, might in many cases not otherwise be able to get a holiday. Such a trust—it was said—promoted the general well-being of the community; and the beneficiaries could well be considered as constituting a 'section of the community' for the purpose of the law of charity. Eve J—with some regret—rejected that contention saying¹⁶:

'This is not a trust for general public purposes; it is a trust for private individuals, a fluctuating body of private individuals it is true, but still private individuals . . .'

So Eve J, while not disagreeing with the decision in *Re Gosling*¹¹, plainly thought that the words of Byrne J¹⁷ which I have quoted, although true of poverty cases, were not of general application in the law of charity.

¹¹ (1900) 48 WR 300

¹² (1877) 7 Ch D 745

¹³ (1900) 48 WR at 301

¹⁴ [1914] 2 Ch 90, [1914-15] All ER Rep 223

¹⁵ [1891] AC 531 at 583, [1891-94] All ER Rep 28 at 55, 56

¹⁶ [1914] 2 Ch at 97, [1914-15] All ER Rep at 227

¹⁷ (1900) 48 WR at 301

a Next comes *Re Laidlaw*, *Sir Robert Laidlaw's Will Trusts*¹⁸, a decision of the Court of Appeal given in 1935 but not then reported and only brought to light in 1949¹⁹. There the testator had bequeathed a legacy of £2,000 on certain trusts for the relief of poor members or former members of the staff of Whiteway Laidlaw & Co Ltd. The judge of first instance having held that the gift failed as not being charitable the Court of Appeal reversed his decision and declared that it was a valid charitable legacy. Unfortunately neither the reasons given by the judge for holding that the gift failed nor those given by the Court of Appeal for holding that it was charitable have been recorded; but the decision of the Court of Appeal was plainly in line with *Re Gosling*²⁰.

b In *Re Compton*, *Powell v Compton*²¹, the Court of Appeal had to decide whether a trust for the education of the descendants of three named persons was a charitable trust. In a reserved judgment in which Finlay and Morton LJJs concurred Lord Greene MR began by stating that no trust could be charitable unless it is directed to the benefit of the community or a section of the community as opposed to the benefit of private individuals or a fluctuating class of private individuals. He went on to say that in his opinion no trust under the terms of which a claimant in order to establish his title as a potential beneficiary has to show that he is related to some individual or that he is or was employed by some person or company can ever be a charitable trust since in such cases a personal relationship to individuals or an individual which is in its essence non-public enters into the qualification. In this connection he expressly approved the decision of Eve J in *Re Drummond*¹ that in the law of charity a class of employees—unlike the inhabitants of a geographical area—must be regarded as a fluctuating class of private individuals and not a section of the public. Next Lord Greene MR said that even if his view that the necessity of founding a claim on the fact of kinship to an individual precluded the possibility of regarding a gift as charitable was too widely stated yet the sort of educational trust which this testator had created must be regarded as a private family trust and not as one for the benefit of a section of the community on any fair view of what that phrase might mean. Finally he said of the 'poor relations' cases that the decisions were given at a time when the public character of charitable gifts had not yet been clearly laid down, that if the validity of such gifts had first come before the courts in modern days they would very likely have been held to be invalid and that, although as they had been accepted as valid for so long it was not possible now to overrule them, they should be regarded as anomalous and not be extended by analogy to cover such a trust as that with which the court was concerned.

g Next year in *Re Hobourn Aero Components Ltd's Air Raid Distress Fund*, *Ryan v Forrest*², the Court of Appeal, consisting of Lord Greene MR and Morton and Somervell LJJs, had to consider the character of a fund built up by agreed deductions from the wages of the employees of a company with factories at Coventry, Market Harborough and Kettering, the purpose of the fund being at the relevant time to relieve employees who had suffered damage and distress from air raids. It could not be suggested that the purpose of the trust was the relief of poverty but the Attorney-General argued that it was a charitable trust falling within Lord Macnaghten's fourth category³. In rejecting that submission Lord Greene MR relied largely on the fact that the fund was a mutual insurance fund. In that connection he pointed out that the decisions in the friendly society cases to which I have already referred could only be justified—if at all—because 'poverty' was a necessary qualification for the receipt

j 18 (11th January 1935) unreported

19 See *Gibson v South American Stores (Gath & Chaves), Ltd* [1949] 2 All ER 985, [1950] Ch 177

20 [1900] 48 WR 300

21 [1945] 1 All ER 198, [1945] Ch 123

1 [1914] 2 Ch 90, [1914-15] All ER Rep 223

2 [1946] 1 All ER 501, [1946] Ch 194

3 See *Income Tax Special Purposes Comrs v Pemsel* [1891] AC at 583, [1891-94] All ER Rep at

of benefits. But both Lord Greene MR and Morton LJ were also clearly of opinion that even if this fund had been provided by the employers or an outside donor it would not have been held on charitable trusts since, as Eve J had held in *Re Drummond*⁴, and they had held in *Re Compton*⁵, the employees of a company were not a section of the public for the purpose of the law of charity.

The facts in *Gibson v South American Stores (Gath & Chaves) Ltd*⁶—the case followed by Megarry J in this case—were that a company had vested in trustees a fund derived solely from its profits to be applied at the discretion of the directors in granting gratuities, pensions or allowances to persons—

‘who . . . are or shall be necessitous and deserving and who for the time being are or have been in the company’s employ . . . and the wives widows husbands widowers children parents and other dependants of any person who for the time being is or would if living have been himself or herself a member of the class of beneficiaries.’

The Court of Appeal held that this trust was a valid charitable trust but it did so without expressing a view of its own on the question of principle involved, because the case of *Re Laidlaw*⁷ which was unearthed in the course of the hearing showed that the Court of Appeal had already accepted the decision in *Re Gosling*⁸ as correct.

In *Oppenheim v Tobacco Securities Trust Co Ltd*⁹ this House had to consider the principle laid down by the Court of Appeal in *Re Compton*⁵. There the trustees of a fund worth over £125,000 were directed to apply its income and also if they thought fit all or any part of the capital—

‘in providing for or assisting in providing for the education of children of employees or former employees of British-American Tobacco Co., Ltd. . . . or any of its subsidiary or allied companies . . .’

There were over 110,000 such employees. The majority of your Lordships—namely Lord Simonds (in whose judgment Lord Oaksey concurred), Lord Normand and Lord Morton of Henryton—in holding that the trust was not a valid charitable trust gave unqualified approval to the *Compton*⁵ principle. They held, that is to say, that although the ‘poverty’ cases might afford an anomalous exception to the rule, it was otherwise a general rule applicable to all charitable trusts that no class of beneficiaries can constitute a ‘section of the public’ for the purpose of the law of charity if the distinguishing quality which links them together is relationship to a particular individual either through common descent or common employment. My noble and learned friend, Lord MacDermott, on the other hand, in his dissenting speech, while not challenging the correctness of the decisions in *Re Compton*⁵ or in the *Hobourn Aero* case¹⁰ said that he could not regard the principle stated by Lord Greene MR as a criterion of general applicability and conclusiveness. He said¹¹:

‘. . . I see much difficulty in dividing the qualities or attributes which may serve to bind human beings into classes into two mutually exclusive groups, the one involving individual status and purely personal, the other disregarding such status and quite impersonal. As a task this seems to me no less baffling and elusive than the problem to which it is directed, namely, the determination of

4 [1914] 2 Ch 90, [1914-15] All ER Rep 223

5 [1945] 1 All ER 198, [1945] Ch 123

6 [1949] 2 All ER 985, [1950] Ch 177

7 (11th January 1935) unreported

8 (1900) 48 WR 300

9 [1951] 1 All ER 31, [1951] AC 297

10 [1946] 1 All ER 501, [1946] Ch 194

11 [1951] 1 All ER at 41, [1951] AC at 317

what is and what is not a section of the public for the purposes of this branch of the law.'

He thought that the question whether any given trust was a public or a private trust was a question of degree to be decided in the light of the facts of the particular case and that viewed in that light the trust in the *Oppenheim* case¹² was a valid charitable trust.

In *Re Cox (decd)*, *Baker v National Trust Co Ltd*, *Public Trustee for Ontario (Province) v National Trust Co Ltd*¹³, a Canadian testator directed his trustees to hold the balance of his residuary estate on trust to pay its income in perpetuity for charitable purposes only, the persons to benefit directly in pursuance of such charitable purposes being such as were or had been employees of a certain company and/or the dependants of such employees. This disposition raised, of course, a question of construction—namely whether 'charitable purposes' was simply a compendious mode of referring to any purposes a trust to promote which would be charitable providing that the beneficiaries were the public or a section of the public or whether the words meant such purposes only as having regard to the class of beneficiaries named could be the subject of a valid charitable trust. It was only on the latter construction that the question whether *Gibson v South American Stores*¹⁴ was rightly decided would arise and in fact both the courts below and the Privy Council held that the former construction was the right one. It is, however, to be observed that the Court of Appeal in Ontario unanimously held that even if the second construction was right the trust would still fail for want of any possible purposes since the 'poor relations' cases formed a class apart and the 'poor employees' cases could not stand with the decision in the *Oppenheim* case¹². The Privy Council expressly refrained from expressing any opinion on this point.

In *Re Young's Will Trusts*, *Westminster Bank Ltd v Sterling*¹⁵, Danckwerts J held that a gift by a testator of his residuary estate to the trustees of the benevolent fund of the Savage Club to be used by them as they should think fit for the assistance of any of his fellow members as might fall on evil days created a valid charitable trust. In so deciding he referred to *Gibson's* case¹⁴ and said that he could see no distinction in principle between the employees of a limited company and the members of a club.

Finally, we were referred to the Privy Council case of *Davies v Perpetual Trustee Co (Ltd)*¹⁶. There a testator who died on 21st January 1897, after giving successive life interests in certain property in Sydney to several life tenants, the last of whom died in 1957, gave the property—

'to the Presbyterians the descendants of those settled in the colony hailing from or born in the north of Ireland to be held in trust for the purpose of establishing a college for the education and tuition of their youth in the standards of the Westminster Divines as taught in the Holy Scriptures.'

On an originating summons issued in 1918 by the then sole trustee for the determination of certain questions it was held, *inter alia*, by the trial judge and on appeal by the Supreme Court of New South Wales that this devise created a valid charitable trust; but after the death of the last life tenant special leave was given to a representative of the next-of-kin to appeal to the Privy Council which held the trust to be invalid. The Board held as a matter of construction that a child would only be eligible to be educated at the college if (i) he was descended from a Presbyterian living on 21st January 1897; (ii) that Presbyterian was himself descended from a Presbyterian who had settled in the colony and (iii) that settler either hailed from or was

¹² [1951] 1 All ER 31, [1951] AC 297

¹³ [1955] 2 All ER 550, [1955] AC 627

¹⁴ [1949] 2 All ER 985, [1950] Ch 177

¹⁵ [1955] 3 All ER 689, [1955] 1 WLR 1269

¹⁶ [1959] 2 All ER 128, [1959] AC 439

born in Northern Ireland. After quoting passages from the judgments of Lord Simonds and Lord Normand in the *Oppenheim* case¹⁷ the Board held that this class of beneficiaries, the nexus between whom was simply their personal relationship to several *propositi*, was not a section of the public but merely a fluctuating class of private individuals and that though the purposes of the trust—being for the advancement of religion and education—were *prima facie* charitable the trust did not possess the necessary public quality and was invalid.

After this long—but I hope not unduly long—recital of the decided cases I turn to consider the arguments advanced by the appellant in support of the appeal. For this purpose I will assume that the appellant is right in saying that the *Compton*¹⁸ rule ought in principle to apply to all charitable trusts and that the ‘poor relations’ cases, the ‘poor members’ cases and the ‘poor employees’ cases are all anomalous—in the sense that if such cases had come before the courts for the first time after the decision in *Re Compton*¹⁸ the trusts in question would have been held invalid as ‘private’ trusts.

Even on that assumption—as it seems to me—the appeal must fail. The status of some of the ‘poor relations’ trusts as valid charitable trusts was recognised more than 200 years ago and a few of those then recognised are still being administered as charities today. In *Re Compton*¹⁹ Lord Greene MR said that it was ‘quite impossible’ for the Court of Appeal to overrule such old decisions and in the *Oppenheim* case²⁰ Lord Simonds in speaking of them remarked on the unwisdom of—

‘[casting] doubt on decisions of respectable antiquity in order to introduce a greater harmony into the law of charity as a whole.’

Indeed counsel for the appellant hardly ventured to suggest that we should overrule the ‘poor relations’ cases. His submission was that which was accepted by the Court of Appeal in Ontario in *Re Cox (dec’d)*¹—namely that while the ‘poor relations’ cases might have to be left as long standing anomalies there was no good reason for sparing the ‘poor employees’ cases which only date from *Re Gosling*² decided in 1900 and which have been under suspicion ever since the decision in *Re Compton*¹⁸ in 1945. But the ‘poor members’ and the ‘poor employees’ decisions were a natural development of the ‘poor relations’ decisions and to draw a distinction between different sorts of ‘poverty’ trusts would be quite illogical and could certainly not be said to be introducing ‘greater harmony’ into the law of charity. Moreover, although not as old as the ‘poor relations’ trusts, ‘poor employees’ trusts have been recognised as charities for many years; there are now a large number of such trusts in existence; and assuming, as one must, that they are properly administered in the sense that benefits under them are only given to people who can fairly be said to be, according to current standards, ‘poor persons’ to treat such trusts as charities is not open to any practical objection. So as it seems to me it must be accepted that wherever else it may hold sway the *Compton*¹⁸ rule has no application in the field of trusts for the relief of poverty and that there the dividing line between a charitable trust and a private trust lies where the Court of Appeal drew it in *Re Scarisbrick*³.

The *Oppenheim* case¹⁷ was a case of an educational trust and although the majority evidently agreed with the view expressed by the Court of Appeal in the *Hobourn Aero* case⁴, that the *Compton*¹⁸ rule was of universal application outside the field of poverty, it would no doubt be open to this House without overruling *Oppenheim*¹⁷ to hold that the scope of the rule was more limited. If ever I should be called on to pronounce on this question—which does not arise in this appeal—I would as at present advised be inclined to draw a distinction between the practical merits of the *Compton*¹⁸ rule and the reasoning by which Lord Greene MR sought to justify it.

17 [1951] 1 All ER 31, [1951] AC 297

18 [1945] 1 All ER 198, [1945] Ch 123

19 [1945] 1 All ER at 206, [1945] Ch at 139

20 [1951] 1 All ER at 35, [1951] AC at 309

1 [1951] OR 205

2 (1900) 48 WR 300

3 [1951] 1 All ER 822, [1951] Ch 622

4 [1946] 1 All ER 501, [1946] Ch 194

a That reasoning—based on the distinction between personal and impersonal relationships—has never seemed to me very satisfactory and I have always—if I may say so—felt the force of the criticism to which my noble and learned friend Lord MacDermott subjected it in his dissenting speech in the *Oppenheim* case⁵. For my part I would prefer to approach the problem on far broader lines. The phrase a 'section of the public' is in truth a vague phrase which may mean different things to different people. In the law of charity judges have sought to elucidate its meaning by contrasting it with another phrase 'a fluctuating body of private individuals'. But I get little help from the supposed contrast for as I see it one and the same aggregate of persons may well be describable both as a section of the public and as a fluctuating body of private individuals. The ratepayers in the Royal Borough of Kensington and Chelsea, for example, certainly constitute a section of the public; but would it be a misuse of language to describe them as a 'fluctuating body of private individuals'? After all, every part of the public is composed of individuals and being susceptible of increase or decrease is fluctuating. So at the end of the day one is left where one started with the bare contrast between 'public' and 'private'. No doubt some classes are more naturally describable as sections of the public than as private classes while other classes are more naturally describable as private classes than as sections of the public. The blind, for example, can naturally be described as a section of the public; but what they have in common—their blindness—does not join them together in such a way that they could be called a private class. On the other hand, the descendants of Mr Gladstone might more reasonably be described as a 'private class' than as a section of the public, and in the field of common employment the same might well be said of the employees in some fairly small firm. But if one turns to large companies employing many thousands of men and women most of whom are quite unknown to one another and to the directors the answer is by no means so clear. One might say that in such a case the distinction between a section of the public and a private class is not applicable at all or even that the employees in such concerns as ICI or GEC are just as much 'sections of the public' as the residents in some geographical area. In truth the question whether or not the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree and cannot be by itself decisive of the question whether the trust is a charity. Much must depend on the purpose of the trust. It may well be that, on the one hand, a trust to promote some purpose, *prima facie* charitable, will constitute a charity even though the class of potential beneficiaries might fairly be called a private class and that, on the other hand, a trust to promote another purpose, also *prima facie* charitable, will not constitute a charity even though the class of potential beneficiaries might seem to some people fairly describable as a section of the public.

In answering the question whether any given trust is a charitable trust the courts—as I see it—cannot avoid having regard to the fiscal privileges accorded to charities. As counsel for the Attorney-General remarked in the course of the argument the law of charity is bedevilled by the fact that charitable trusts enjoy two quite different sorts of privilege. On the one hand, they enjoy immunity from the rules against perpetuity and uncertainty and although individual potential beneficiaries cannot sue to enforce them the public interest arising under them is protected by the Attorney-General. If this was all there would be no reason for the courts not to look favourably on the claim of any 'purpose' trust to be considered as a charity if it seemed calculated to confer some real benefit on those intended to benefit by it whoever they might be and if it would fail if not held to be a charity. But that is not all. Charities automatically enjoy fiscal privileges which with the increased burden of taxation have become more and more important and in deciding that such and such a trust is a charitable trust the court is endowing it with a substantial annual subsidy at the expense of the taxpayer. Indeed, claims of trusts to rank as charities are just as often challenged by the Revenue as by those who would take the fund if the trust was

5 [1951] 1 All ER 31, [1951] AC 297

invalid. It is, of course, unfortunate that the recognition of any trust as a valid charitable trust should automatically attract fiscal privileges, for the question whether a trust to further some purpose is so little likely to benefit the public that it ought to be declared invalid and the question whether it is likely to confer such great benefits on the public that it should enjoy fiscal immunity are really two quite different questions. The logical solution would be to separate them and to say—as the Radcliffe Commission proposed—that only some charities should enjoy fiscal privileges. But as things are, validity and fiscal immunity march hand in hand and the decisions in the *Compton*⁶ and *Oppenheim*⁷ cases were pretty obviously influenced by the consideration that if such trusts as were there in question were held valid they would enjoy an undeserved fiscal immunity. To establish a trust for the education of the children of employees in a company in which you are interested is no doubt a meritorious act; but however numerous the employees may be the purpose which you are seeking to achieve is not a public purpose. It is a company purpose and there is no reason why your fellow taxpayers should contribute to a scheme which by providing 'fringe benefits' for your employees will benefit the company by making their conditions of employment more attractive. The temptation to enlist the assistance of the law of charity in private endeavours of this sort is considerable—witness the recent case of the Metal Box scholarships—*Inland Revenue Comrs v Educational Grants Association Ltd*⁸—and the courts must do what they can to discourage such attempts. In the field of poverty the danger is not so great as in the field of education—for while people are keenly alive to the need to give their children a good education and to the expense of doing so, they are generally optimistic enough not to entertain serious fears of falling on evil days much before they fall on them. Consequently the existence of company 'benevolent funds', the income of which is free of tax does not constitute a very attractive 'fringe benefit'. This is a practical justification—although not, of course, the historical explanation—for the special treatment accorded to poverty trusts in charity law. For the same sort of reason a trust to promote some religion among the employees of a company might perhaps safely be held to be charitable provided that it was clear that the benefits were to be purely spiritual. On the other hand, many 'purpose' trusts falling under Lord Macnaghten's fourth head⁹ if confined to a class of employees would clearly be open to the same sort of objection as educational trusts. As I see it, it is on these broad lines rather than for the reasons actually given by Lord Greene MR that the *Compton*⁶ rule can best be justified.

My Lords, for the reasons given earlier in this speech I would dismiss this appeal; but as the view was expressed in the *Oppenheim* case⁷ that the question of the validity of trusts for poor relations and poor employees ought some day to be considered by this House and as the fund in dispute in this case is substantial, your Lordships may perhaps think it proper to direct that the costs of all parties to the appeal be paid out of it.

Appeal dismissed.

Solicitors: *Hatchett Jones & Co*, agents for *Wolferstan, Snell & Turner*, Plymouth (for the appellant); *Vizard*s, agents for *Shelly & Johns*, Plymouth (for the second to tenth respondents); *Treasury Solicitor*.

S A Hatteea Esq Barrister.

⁶ [1945] 1 All ER 198, [1945] Ch 123

⁷ [1951] 1 All ER 31, [1951] AC 297

⁸ [1967] 2 All ER 893, [1967] Ch 993

⁹ See *Income Tax Special Purposes Comrs v Pemsel* [1891] AC at 583, [1891-94] All ER Rep at 55, 56

a Squire v Squire and others

COURT OF APPEAL, CIVIL DIVISION

RUSSELL, BUCKLEY AND ORR LJJ

15th, 16th, 17th NOVEMBER, 8th DECEMBER 1971

b *Pleading – Amendment – Defence – Amendment after close of pleadings – Leave – Leave given to amend statement of claim – Implied leave to amend defence – Scope of power to amend defence without special leave – Whether defendant entitled to amend defence without limit – Whether right to amend defence limited to matters consequential on amendments to statement of claim.*

c The plaintiff who was a shareholder and director of a private company allegedly absconded with the company's money. During his absence abroad the management of the company asserted the company's lien on his shares in respect of the sums said to be owing and pursuant to that lien they purported to sell the plaintiff's shares in the company to his brother, a co-director, and his brother's wife and son. On his return the company issued a writ against the plaintiff claiming some £500,000 damages for fraudulent conversion. The plaintiff subsequently issued a writ against d the defendants (the company, his brother, his brother's wife and son) challenging the disposal of his shares, his claim being based on conspiracy to cheat and defraud him and asserting a sale at a gross undervalue. The two actions came on for hearing together. After the trial had started the plaintiff's advisers decided not to rely e solely on the pleaded conspiracy to cheat and defraud but to introduce by amendment allegations of breach of duty by the company in its exercise of its powers of sale, an illegal reduction of capital and an illegal financial aid to the acquisition of the f company's own shares. The plaintiff was given leave to amend the statement of claim accordingly. The defendants, without obtaining leave, amended their defences and for the first time pleaded laches, acquiescence and limitation of actions. The plaintiff contended that although the defendants were entitled to plead (as an amendment consequential on the amendment to the statement of claim) laches, f acquiescence and limitation in respect of the alleged breaches of duty and alleged irregularities, they were not entitled so to plead in respect of the fraudulent conspiracy unless they made a substantive application for leave to do so.

g **Held** – (i) When after the close of pleadings a plaintiff had been given leave to amend his statement of claim, it did not follow that the defendant had power without leave to make any amendment he chose to the defence; in such circumstances the defendant was only entitled to amend the defence without special leave by introducing con- h sequential amendments, i.e. amendments which did not relate only to those allegations or contentions contained in the statement of claim that were not affected by amend- ments to the latter; accordingly, although leave to amend a defence after pleadings had been closed was always necessary, it could properly be assumed that leave to amend the statement of claim involved without mention leave to amend h consequentially the defence (see p 896 f and g and p 897 c and d, post).

j (ii) The plaintiff's amended statement of claim pleaded a different and wider conspiracy than that originally pleaded and so the defendants' pleas of laches, acquiescence and limitation of actions did relate to a conspiracy that was affected by the plaintiff's amendments and their defences would be allowed to stand amended as delivered (see p 897 e and g, post).

Notes

For amendment of pleadings, see 40 Halsbury's Laws (3rd Edn) 32-36, paras 65-74, and for cases on pleading to amendment, see 50 Digest (Repl) 135, 136, 1185-1187.

Interlocutory appeals

These were appeals by the first, second, third and sixth defendants, Percy James

Aldritt Squire, Muriel Squire, Gordon Peter James Squire and Henry Squire & Sons Ltd, respectively, from so much of the judgment of Goff J, given on 20th April 1971, as declared that the leave to amend their defences implied in the leave granted to the administratrix of the estate of Harold Aldritt Squire, deceased, to serve a re-amended statement of claim in the action commenced in 1964 by the said Harold Aldritt Squire against the defendants for damages for fraudulent conspiracy, did not authorise the defendants to amend their defences by pleading limitation by way of defence to any of the matters pleaded in para 6^a of the re-amended statement of claim. There was a cross-appeal by the administratrix of the plaintiff's estate from so much of the judgment of Goff J as declared that the leave to amend the defences implied in the leave granted on 17th June 1970 to serve a re-amended statement of claim authorised the defendants to amend their defences by pleading laches and acquiescence by way of defence generally. The facts are set out in the judgment of the court.

Charles Sparrow QC and *G B Parker* for the first, second and third defendants.
Kenneth Mynett QC, *Peter Northcote* and *Julian Gibson-Watt* for the sixth defendant.
Alexander Irvine for the plaintiff.

Cur adv vult

8th December. **RUSSELL LJ** read the following judgment of the court. These interlocutory appeals from a decision of Goff J dated 20th April 1971 raise procedural questions on which there is a dearth of authority, and we thought it right to take time to consider the form of our judgment.

The background of the case relates to the management of the affairs of a private company; it contains more human interest than the matters for immediate decision, involving the alleged misappropriation many years ago by one Harold Squire, a shareholder and director of the company, of several hundreds of thousands of pounds of the company's money, and his departure with much of his alleged ill-gotten gains to Mexico and points south in the form of diamonds and money. Attempts to obtain his extradition failed. Ultimately he returned in 1962 to this country, and served six months for tax frauds in connection with the company. During his absence those concerned with the management of the company asserted the company's lien on his shares in respect of the sums said to be owing (as above indicated) by him to the company, and pursuant to that lien the company purported to sell in February 1948 his shares to his brother Percy Squire who had been his co-director and held the other half of the shares, his brother's wife and his son at 8s per share, a price offered after a valuation made at 6s per share. In July 1963 the company issued a writ against Harold claiming £500,000 odd damages for fraudulent conversion. In July 1964 Harold issued a writ challenging the disposal of his shares, the claim being based on a conspiracy to cheat and defraud him and asserting a sale at a gross undervalue. The defendants were Percy, his wife and son, and the company; some of the shares having been transferred to the trustees of a settlement those trustees were later joined, since the plaintiff sought to recapture the shares. At some date which is not material Harold died and his daughter as his legal personal representative took his place. The two actions came on for hearing together by agreement, although not formally consolidated, in June 1970. We are only concerned with the action by Harold.

At that stage the plaintiff's claim was framed as follows, so far as now material:

'6. In or about 1947 and onwards the Defendants . . . and each of them wrongfully and fraudulently conspired and agreed together to cheat and defraud the Plaintiff . . .

^a Paragraph 6 as re-amended is set out at p 894 a, post

a '7. In pursuance and execution of the said conspiracy or alternatively jointly
and severally the Defendants... did the following overt acts: (a) That the
Defendant Company did by written Notice dated 3rd January, 1948 to the
Plaintiff give him notice that unless he paid to the Defendant Company the
b amount of his alleged indebtedness namely £392,197.15.od. within 30 days after
the 1st January 1948 the Defendant Company would proceed to enforce its lien
on his shares standing solely in his name or jointly in his and the First-named
Defendant's name by the sale of such shares under Article 30 aforesaid. (b) That
on a date which the Plaintiff is unable to particularise until Discovery herein
the Second-named Defendant offered to the Defendant Company to purchase
1000 shares of the 1882 shares standing in the Plaintiff's sole name at a price of
8/- per share which said price was grossly below the true and fair value of the
c said shares. The Plaintiff is unable to give the true and fair value of the shares
until inquiries are made and accounts taken herein. (c) That on a date which
the Plaintiff is unable to particularise until Discovery herein the Third-named
Defendant offered to the Defendant Company to purchase 882 shares of the
1882 shares standing in the Plaintiff's sole name at a price of 8/- per share
which said price was again grossly below the true and fair value of the said
d shares. (d) That on the 3rd day of February 1948 at a meeting of Directors of
the Defendant Company at which the First-named Defendant who at all material
times was a director of the Defendant Company was present the Defendant
Company purported to resolve that the Defendant Company should exercise
its lien on the shares in the Company held by the Plaintiff for his alleged debt
of £392,197.15.od. that such shares should be sold and the proceeds thereof
e credited in reduction of the Plaintiff's alleged indebtedness to the Defendant
Company. At all material times the Defendant Company and the First-named
Defendant knew that the Plaintiff was not indebted to the Defendant Company
in the said or any sum. (e) That on the 3rd Day of February 1948 the First-named
Defendant offered to purchase the interest of the Plaintiff in the 2072 shares
standing in their joint names as aforesaid at the price of 8/- per share which
f said price was again grossly below the true and fair value of the said shares.
(f) That on the 3rd day of February 1948 the Defendant Company resolved that
the above 3 offers be accepted and accordingly the names of the Second and
Third Defendants were entered in the Register of Members in respect of their
shareholding and the name of the Plaintiff was struck out in respect of his
g joint-holding with the First-named Defendant. (g) That afterwards on a date
which the Plaintiff is unable to particularise the sum of £1167.4.0. representing
the proceed of sale of the Plaintiff's interest in his shares was credited to the
Defendant Company.'

As indicated Harold sought to set aside the disposal of his shares, rectification of the register, and damages and other consequential relief. Apparently, until six days before the trial opened, the defendants, while disclosing certain documents, had
h withheld them from inspection as allegedly privileged. As the trial developed those
advising the plaintiff for one reason or another decided that it was desirable not to
rely solely on the pleaded conspiracy to cheat and defraud but to introduce by
amendment allegations of breach of duty by the company in its exercise of its powers
of sale, an illegal reduction of capital, and an illegal financial aid to the acquisition
of its own shares. The projected amendments were put forward in more than one
j way, but finally on the 12th day of the trial application for leave to amend the
statement of claim was (against opposition) granted in the form the pleading now
bears and the action was adjourned. The order was not drawn up, as is frequently
the case; nor was any separate application made for leave to deliver an amended
defence, it being assumed on all hands that such delivery was open to the defendants.

The amendments to the statement of claim, for which leave was given, resulted
in it being in the following form. Paragraph 6 now reads:

'6. In or about 1947 and onwards the Defendants (other than the Fourth-named and Fifth-named Defendants—hereinafter together called "The Trustees") and each of them wrongfully and fraudulently conspired and agreed together to cheat and defraud the Plaintiff, and further or alternatively to cause and procure the Defendant Company to act in breach of duty and unlawfully to the injury of the Plaintiff as appears from paragraphs 9-16 (inclusive) hereof.'

Paragraph 7 was in the same form (including its reference to 'the said conspiracy') but there was added sub-paragraph (h) in the following terms:

'(h) Reliance will also be placed on all of the documents, facts and matters pleaded in paragraphs 10-14 (inclusive) hereof.'

Paragraph 9 was added as follows:

'9. Further or alternatively it was in law the duty of the Defendant Company in enforcing its lien over the aforesaid shares held or held jointly by the Plaintiff by the sale thereof to exercise such power of sale in good faith, with a due and prudent regard to the interest of the Plaintiff and with fair and reasonable precaution to ensure that a proper price was realised for the said shares.'

Paragraph 10 referred to certain documents. Paragraph 11 was in the following terms:

'11. As appears or is to be inferred from all the documents aforesaid the Defendant Company in exercising its power of sale of the said shares acted wrongfully and in breach of its aforesaid duty.'

It then gave particulars of facts alleged to support the contention of a sale in breach of duty. Paragraph 12 alleged that the relevant transactions involved an illegal reduction of capital and an illegal provision of financial assistance by the company for the purchase of the shares, and were, therefore, void. Paragraph 13 alleged that the transactions involved an illegal and void forfeiture of the shares. Paragraph 14 asserted that the notice given to the plaintiff in 1948 in connection with his shares was an illegal and, therefore, ineffective notice of intention to forfeit his shares. It will be recalled that paras 10 to 14 were embodied in the new para 7 (h); and paras 9 to 16 were referred to in the new para 6.

This resulted in amended defences by the first three defendants and the company which were a complete rewriting. We need not go through the details of the defences and their denials, for only one paragraph is in question. In the original defences no point was taken based on the time that had elapsed since the matters complained of; there was no pleading of laches, acquiescence, or limitation of actions. It may be that the defendants then preferred to meet an attack on their honesty head on and confidently. Be that as it may, in the amended defences, and we take that of the first three defendants as sufficient example, is a paragraph in these terms:

'14. If necessary these Defendants will rely on the laches and acquiescence of the Plaintiff and on the provisions of the Limitation Act 1939.'

We have mentioned that no order permitting amendment of the statement of claim was drawn up. However in an order dated 31st July 1970 for security for costs by the plaintiff the following provision was inserted:

'BUT IT IS ORDERED that notwithstanding the immediately foregoing provision of this Order the Defendants Percy James Aldritt Squire Muriel Squire Gordon Peter James Squire and Henry Squire and Sons Limited be at liberty on or before 10th August 1970 or subsequently within 4 days after service of this Order to serve on the Plaintiff such Defences or amended Defences to this Action as they may be advised.'

a This language in terms recognised that there was no limit to the extent to which the defendants were at liberty to introduce new allegations and contentions in the course of amending their defences following the delivery of the amended statement of claim. Goff J, however, in the order now appealed from, corrected that under the slip rule so that it should refer quite neutrally to service of defences.

b Before Goff J it was contended for the plaintiff that, while the defendants were well entitled by amendment to plead (as amendment consequential on the amendments to the statement of claim) laches, acquiescence and limitation in respect of the alleged breaches of duty and alleged illegalities, they were not entitled so to plead in respect of the fraudulent conspiracy, unless they made a substantive application for leave so to do, which might fail or might succeed only on terms. The defendants contended that when leave was obtained by the plaintiff to amend the statement of claim this resulted automatically in an unlimited ability in the
c defendants to amend their defences as they thought fit. Alternatively the defendants contended that if this was wrong, and their consequential ability to amend was limited to the introduction of matters that have been described as consequential on the changes introduced into the statement of claim in its amended form, then the plea of laches, acquiescence and limitation was consequential in that sense in respect
d also of the allegation of fraudulent conspiracy. Goff J ruled against the wider contention of the defendants, but concluded that on the narrower approach neither side was wholly correct. He held that the defendants were entitled to plead laches and acquiescence in connection with the conspiracy, but not limitation; if they wished to plead limitation in that connection they would have to make a separate and substantive application for leave to amend.

e As a consequence we have two appeals, by the first three defendants and by the company defendant, asserting (1) that their ability to amend was unlimited and, (2) that in any event if the narrower approach is correct the whole plea including limitation is available to them as consequential on the amendments touching fraudulent conspiracy. We have also a cross-appeal by the plaintiff supporting the
f judge on the narrower approach but contending that he should not have allowed the plea of laches and acquiescence in relation to the conspiracy. In the course of the appeal it emerged that neither side found themselves able to support the intermediate solution favoured by the judge. As a consequence it was made plain that success or failure of the cross-appeal would follow successful or unsuccessful resistance to the appeals. Accordingly we have only two problems to decide. The first is whether, when a plaintiff is given leave to amend his statement of claim, the defendant is at
g liberty to amend his defence without limit as he may be advised. The second is, if that broad proposition is not correct, what is the narrower proposition, and does it enable the defendants to plead laches, acquiescence and limitation of action to the allegation of fraudulent conspiracy in this case, or does it not?

We turn first to the wider submission. It extends to this; that whatever the amendment allowed by the court to the statement of claim, however slight, the
h defendant is given *carte blanche* to introduce any amendment that he chooses, even when, if the defendant had independently applied to make the amendment, he would not have been allowed it, or would only have been allowed it on perhaps stringent terms as to costs including (for example) the payment of all costs up to the date of amendment. We are not prepared to accept that submission. It is apparently the fact that, under RSC Ord 20, r 3, if a plaintiff takes advantage of sub-r (1) before
i close of pleadings to amend his statement of claim once without leave, the defendant is empowered by sub-r (2) to amend his defence without leave or limit. Although r 4 does enable the propriety of such an amendment to the statement of claim to be challenged before the court, the particular reference in r 4 to r 3 (1) does not enable amendments to the defence in such case to be so challenged. The predecessor of RSC Ord 20, r 3 (RSC Ord 28) shows that this is not accidental. The notes in the Supreme Court Practice state the situation too widely. But this situation, obtaining

necessarily at an early stage in any proceedings, does nothing in our view to suggest that at a later stage, when the statement of claim has been amended with leave, the defendant has or should have a similar *carte blanche*. a

For the defendants it was argued that when the amended statement of claim is delivered it is a new and different pleading as a whole, and that the defendant should not be supervised or dictated to by the court in deciding how to plead to this new pleading—how to defend himself. He should be at liberty to plead anew and quite generally. It is not to the amendments that he pleads but to the whole statement of claim in its new form. The defendant, when amendments to the statement of claim are allowed by the court, is not then required to table his proposed amendments for consideration by the court; in practice he simply amends in due time and delivers his amended defence. If his ability to amend is in any way restricted it must result in great inconvenience and proliferation of proceedings, as leading to applications (such as the present) requiring close analysis and decision whether the defendant has overstepped the limits, followed possibly (if he is found to have done so) by a further substantive application by the defendant for leave to amend further to the extent of the excess. An application (it was argued) such as the present one is unknown, which points to an unlimited power to amend the defence. Maybe there are some undesirable features of an unlimited right to amend; but the whole question (it was said) is one of procedure and convenience should tip the scale in its favour. In further support of these arguments we were referred to four or five cases; but we cannot derive guidance from them. b

For the plaintiff it was contended that the right of a defendant to amend in such circumstances was, without special leave, limited to making amendments consequential on the amendments made to the statement of claim. Some criticism having been directed in the course of debate to the word consequential, a definition was, we understand, found acceptable to both sides in the formula that if the right to amend is limited, the extent to which it is limited is that it does not permit amendments of the defence which relate only to those allegations or contentions contained in the statement of claim that are not affected by amendments to the latter. For the plaintiff it was argued, correctly in our view, that apart from RSC Ord 20 a defendant always requires leave to amend his defence; that the need for leave is inconsistent with an unqualified ability to amend the defence after leave is given to amend the statement of claim; although the need for leave is consistent with a universal practice of leave being assumed to be given for consequential amendments as defined above, since justice plainly requires such limited leave. Further (it was contended) it would be unjust that a defendant should, by the slightest amendment permitted to the statement of claim, be able to avoid the imposition of stringent terms on an independent application for leave to amend the defence, or even a refusal of leave. For the defendants to argue that, because the amended statement of claim can be described as a new pleading, the right to the defendant to amend is at large is (it was said) a non sequitur. The fact that, when the plaintiff is given leave to amend his statement of claim, the defendant is not then and there required to formulate the amendments to his defence is precisely because it is assumed that the amendments will be limited and consequential. The defendants' argument (it was said) would confer rights on the defendants wholly unconnected with that which was the sole cause of the ability to amend the defence, i.e. the leave to make particular amendments to the statement of claim. c

Reference was made to Bullen and Leake¹—names at which even Chancery practitioners have been known to bend the knee—where the following is found: d

'Where the Statement of Claim is amended under an order giving leave to amend, such amendment does not, in the absence of special terms in the order, give the defendant any additional time for pleading his Defence or entitle him

¹ Precedents of Pleadings, 11th Edn, p 64 e

a to amend a defence already delivered. Accordingly, when an application is made for leave to amend, care should be taken by the opposite party to have it imposed as a term of the order, if any, giving such leave that any alteration or amendment of his own pleading (if any) already delivered which may be necessitated by the amendment of the opponent's pleading may be made by him, otherwise a summons for leave to make such amendment or alterations may be necessary.'

b Atkin's Court Forms² suggests that on such an occasion leave to amend is given in terms, but without saying on the one hand that it is leave to make consequential amendments, nor on the other that it is leave to amend as the defendant may be advised. But costs are referred to as 'costs of any consequent amendment' and see Summons Form 44 which speaks of costs 'of the amendments consequential thereon'. No other textbooks (e.g. Seton's Judgments and Orders) apparently throw any light on the matter.

c In our judgment the arguments advanced by the plaintiff are to be preferred, and the leave to amend the defence in circumstances such as the present is limited to those amendments that are consequential in the sense of the formula above-mentioned. We think, however, that in practice the strict requirements referred to in Bullen and Leake are seldom followed, and that it is commonly and properly assumed that leave to amend the statement of claim involves without mention a leave to amend consequentially the defence.

d We turn now to the particular question whether the allegations of laches, acquiescence and limitation of actions relate only to a conspiracy that is not affected by the amendments to the statement of claim, and accordingly, should not be allowed. The answer to this seems to us to be reasonably plain. We have already referred to the amendments to the statement of claim. Paragraph 6 of the statement of claim as amended, and the addition of para 7 (h), in terms plead a different and wider conspiracy—namely one to cheat and defraud and to cause and procure the company to act in breach of duty and unlawfully as appears from the new paras 9 to 16. Alternatively it alleges as a new and separate conspiracy the addition to the first conspiracy. It was argued for the plaintiff that the additions to para 6 were really irrelevant and could be ignored, leaving para 7 (h) as merely an addition to the overt acts of a conspiracy to defraud the plaintiff by procuring a sale of the plaintiff's shares at a gross undervalue. But the fact remains that the amended paras 6 and 7 are there in the form summarised; they cannot be ignored; any attempt further to amend the statement of claim would be for present purposes too late. It seems to us that it is impossible to say that the pleas of laches, acquiescence and limitation of actions, if now applied to the conspiracy or conspiracies now pleaded, related only to allegations or contentions contained in the statement of claim that are not affected by the amendments to the latter.

e Consequently in our judgment the appeals should be allowed, so that the defences shall stand amended as delivered, and the cross-appeal should be dismissed.

h Appeals allowed; cross-appeal dismissed.

Solicitors: *George C Carter & Co* (for the first, second and third defendants); *Peacock & Goddard*, agents for *Rigbey, Loose & Mills*, Birmingham (for the sixth defendant); *A Kramer & Co* (for the plaintiff).

Mary Rose Plummer Barrister.

i 2 (2nd Edn) Vol 32, Form 45

Re B (M F) (an infant) Re D (an infant)

COURT OF APPEAL, CIVIL DIVISION

SALMON, EDMUND DAVIES AND STAMP LJJ

9th NOVEMBER 1971

Adoption – Welfare of infant – Severance of adopted child from natural parents – Desirability – Circumstances in which adoption order may be made even though child will continue to see natural parents.

In March 1968 two boys, then aged four and one, were removed from their parents' home as being in need of care and protection and were fostered to the appellants with whom they had subsequently lived for three years. The appellants had shown great love and affection for the boys, who had made great strides under their care and were undoubtedly happy and extremely well cared for in their new home. The home of the natural parents ('Mr and Mrs D') was much less satisfactory; they had two babies and a little girl, Pauline, who had for a time been fostered with the appellants but who had since returned home. Mr and Mrs D were in constant financial difficulties and Mr D had difficulty in finding, or keeping, a job. The appellants applied for an adoption order in respect of the two boys. Both Mr and Mrs D gave their consent. The appellants however took the view that it would be desirable that Mr and Mrs D, for whom they had a lot of sympathy, should visit the boys from time to time and particularly that the boys should be kept in touch with their sister Pauline. The application was opposed by the county council, who took the view that it was undesirable that the boys should continue to see their natural parents after an adoption order had been made and were of opinion that it would be better for the boys to remain as foster children so that the position could remain fluid.

Held – (i) Although it was, as a rule, highly undesirable that, when an adoption order had been made, there should be any contact between the child or children and their natural parents, there was no hard and fast rule that if there were an adoption it could only be on terms that there should be a complete divorce of the children from their natural parents; each case was to be considered on its own particular facts (see p 900 d e and j and p 901 a, post); dictum of Vaisey J in *Re A B (An Infant)* [1949] 1 All ER at 710 and *Re G (D M) (an infant)* [1962] 2 All ER 546 followed.

(ii) The facts of the present case were exceptional in that (a) the appellants considered that the occasional encounter between the boys and their natural parents and their sister Pauline would be for their good, (b) the natural parents were not prepared, and were not in the position, to have the boys back, and (c) it was obvious that it would be very much more in the interests of the boys that they should stay where they had been so well cared for during the previous three years; furthermore it was doubtful whether it could conceivably be in the boys' interest to keep the position fluid by allowing them to remain as foster children since, once an adoption order had been made, their legal position vis-à-vis the appellants would be assured and the relationship between the appellants and the boys made secure; accordingly an adoption order should be made (see p 899 j, p 900 a b f g and j and p 901 a, post).

Notes

For the power to make adoption orders, see 21 Halsbury's Laws (3rd Edn) 231, para 505, and for cases on the subject, see 28 (2) Digest (Reissue) 823-826, 1353-1365.

Cases referred to in judgment

A B (An Infant), *Re* [1949] 1 All ER 709, 113 JP 353, sub nom *Re D X (An Infant)* [1949] Ch 320, 28 (2) Digest (Reissue) 823, 1354.

a *G (D M) (an infant)*, Re [1962] 2 All ER 546, [1962] 1 WLR 730, 28 (2) Digest (Reissue) 839, 1413.

Appeal

b This was an appeal by the proposed adopters against the judgment of his Honour Judge Stansfield on 16th June 1971 whereby he refused to make an adoption order in their favour in respect of two boys aged 7 years and 4 years who had been fostered with the appellants by the local authority ('the county council'). The facts are set out in the judgment of Salmon LJ.

C Q Henriques for the appellants.

T L Dewhurst for the county council.

c

SALMON LJ. This is an appeal from an order of the county court judge refusing to make an adoption order in favour of the prospective adopters of two boys, Martin and Steven. Martin is seven years old and Steven is four years old. These two boys were removed from their parents' home as being in need of care in March 1968. They were removed by the county council. They were fostered to the appellants, the prospective adopters, who have had the two boys with them ever since, that is for just over three years. The appellants have indisputably showered love and affection on these children and given them the most excellent care all the time they have had them. The elder boy was in a very poor way and retarded when he went to them. The younger boy was better but not very well either. The children have made great strides under the appellants' care and are undoubtedly happy and extremely well cared for in their present home.

e The appellants have two little girls living at home who are adopted children, one nine and one eight years of age. The house in which they live has excellent accommodation, and no criticism could be made of the children's environment, nor of the way in which they are treated. In one of the reports submitted by the welfare officer of the county council, the fact is referred to that the home is 'untidy'. Perhaps that is unfortunate. No one, however, suggests that it is dirty. The kitchen could be better, and it is said that its hygienic arrangements are not ideal. I cannot think that this is a significant factor when one is considering whether adoption by the appellants is in the best interests of these two boys.

f The natural parents (I will call them 'Mr and Mrs D') have a home which is nothing like as satisfactory as the appellants' home. They have two babies, one born in October 1968 and one in 1969, and a little girl called Pauline, who for a time was taken from their care and fostered to the appellants. She has gone home, and Mr and Mrs D are in constant financial difficulties. Moreover, Mr D has unfortunately suffered from psychiatric difficulties and finds it impossible to keep a job, or at any rate to keep one for long. Both Mr and Mrs D consent to the proposed adoption. The learned judge, in the exercise of his discretion, refused to make the order. Why he did so is not at all clear to me and certainly does not appear from his judgment or from the notes that he made of the proceedings before him.

g I have assumed that he founded himself on the county council's report. Apparently the view which the county council take is that it would be better for the status quo to be preserved, that is to say for the children to remain as foster children with the appellants. It would have the advantage, so the county council think, of keeping the position fluid. There is no doubt that the position would remain fluid, but I am by no means persuaded that that fluidity could conceivably be in the interests of the children. Once an adoption order is made, then the children's position vis-à-vis the appellants is assured. The appellants would have the same legal obligation to the children as if they were their own natural children. I am not suggesting for a moment that they would not in any event continue to treat

j

the children with the same affection and take the same interest in them and accept the same responsibility for them as they do now; and, of course, I know that the county council has no present intention of taking the children away from them. But the appellants feel—and indeed they feel rightly—that just as the children would have no legal rights against them unless an adoption order is made, so they would have no legal right to keep the children should the county council, in their wisdom, decide to remove the children in the future. I would have thought the insecurity which they not unnaturally feel would be just as unsatisfactory from the point of view of their relations with the children as it would be unsatisfactory for the children to have no security and no legal rights as against their adopters. a

The only other point that I should deal with is the fact that the appellants take the view that Mr and Mrs D, for whom they have much sympathy, should from time to time visit the children, and particularly that these two boys should be kept in touch with their sister Pauline. It is quite true that in law Pauline will cease to be their sister after the adoption order is made, but Pauline will remain their natural sister and no order of any court can alter that fact. b

As a rule, it is highly undesirable that after an adoption order is made there should be any contact between the child or children and their natural parents. This is the view which has been taken, and rightly taken, by adoption societies and local authorities as it has been by the courts in dealing with questions of adoption. There is, however, no hard and fast rule that if there is an adoption it can only be on the terms that there should be a complete divorce of the children from their natural parents. I refer to the case of *Re G (D M) (an infant)*¹, which in effect followed the dictum of Vaisey J in *Re A B (An Infant)*². Although the courts will pay great attention to the general principle to which I have referred, namely, that it is desirable in normal circumstances for there to be a complete break, each case has to be considered on its own particular facts. c

The facts of this case are exceptional. Although it may be—I know not—that it would be a good plan if there were a complete break here between Mr and Mrs D and the two boys, the appellants (who I suspect know a good deal more about the situation than I do) consider that the occasional encounters between Mr and Mrs D and the boys and Pauline is for their good. d

It is suggested that in the future the fact that the two boys know the appellants as 'Mummy' and 'Daddy' and their parents as 'Daddy D' and 'Mummy D' may lead to stresses and strains. Mr and Mrs D are not prepared to have these children back. It is all they can do to cope with the three young ones they have at home now, and without any disrespect to Mr and Mrs D, through circumstances over which they have no control, it is obvious that it would be very much more in the interests of the two boys to stay where they have been so well cared for during the last three years. e

There is only one other matter that I should mention although I am certain that the county council does not regard it as a reason for opposing the adoption order. The fact is this, that unfortunately the appellants did not go through the usual procedure of asking for the consent of the county council before they made their application to the court. No doubt it would have been better had they done so, but of course it cannot have made any difference to the attitude which the county council adopt. Their opposition to the order is apparently based solely on the unusual circumstances that the relationship with the natural parents is not and will not be completely severed. I have no doubt myself that it is in the best interests of the children, giving full weight to that factor, that an adoption order should be made rather than refused, and I would allow the appeal accordingly. f

EDMUND DAVIES LJ. And so would I, and I have nothing to add. g

1 [1962] 2 All ER 546, [1962] 1 WLR 730

2 [1949] 1 All ER 709 at 710, [1949] Ch at 320 h

STAMP LJ. I too agree.

Appeal allowed.

Solicitors: *Canter & Martin*, agents for *F W Ollier, Wilner & Co*, Manchester (for the appellants); Solicitor to the *Lancashire County Council*.

Harold J Hughes Esq Barrister.

Phelan v Back

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND GRIFFITHS JJ

15th DECEMBER 1971

Criminal law – Evidence – Witness – Recall of prosecution witness after defence counsel's closing speech – Quarter sessions – Hearing of appeal by recorder – Recall of witness by recorder to refresh his memory of witness's testimony – Absence of note of witness's testimony – Whether recorder entitled to recall witness – Whether discretion to do so properly exercised.

A recorder of quarter sessions, hearing an appeal against a conviction by magistrates, at the conclusion of all the evidence and after the speech of counsel for the appellant, recalled and further questioned a prosecution witness in order to refresh his memory of that witness's testimony. There was no shorthand note available. The recorder then invited counsel for the appellant to cross-examine the witness and to address the court further. Counsel for the appellant declined both invitations. The recorder found the prosecution case proved and dismissed the appeal. If the witness in question had not been recalled the recorder would not have found the prosecution case proved.

Held – (i) A recorder or chairman of quarter sessions when hearing an appeal, and sitting alone or with magistrates and without a jury, had a discretion to allow evidence to be called after the normal point at which such evidence would be excluded provided the interests of justice required it, and if in the exercise of his discretion he thought it fit and proper to do so (see p 904 c d and h, post).

(ii) In the present case the recorder was entitled to refresh his memory on those parts of the evidence of which he had no note and that being so it was impossible to say that he had exercised his discretion wrongly in doing so (see p 904 e f and h, post).

Dictum of Lord Parker CJ in *Webb v Leadbetter* [1966] 2 All ER at 115 applied.

Dictum of Avory J in *R v Sullivan* [1922] All ER Rep at 432 considered.

Notes

For the powers of a judge to recall witnesses, see 10 Halsbury's Laws (3rd Edn) 423, para 778, and for cases on the calling of evidence after the close of the defence in criminal proceedings, see 14 Digest (Repl) 321-323, 3107-3130.

Cases referred to in judgment

R v Sullivan [1923] 1 KB 47, [1922] All ER Rep 431, 91 LJKB 927, 126 LT 643, 86 JP 167, 14 Digest (Repl) 322, 3124.

Saunders v Johns [1965] Crim LR 49.

Webb v Leadbetter [1966] 2 All ER 114, [1966] 1 WLR 245, 130 JP 277, Digest (Cont Vol B) 509, 607a.

Case stated

This was an appeal by case stated from an adjudication of the recorder of Plymouth (E S Fay Esq QC) made on 7th January 1971 whereby he dismissed the appeal of Stephen Paul Phelan, the appellant, against his conviction by the Plymouth justices

on 3rd December 1970 on a charge preferred by the respondent, Pc Victor William John Back, that the appellant on 28th August 1970 in a public place used threatening words and behaviour, contrary to the Public Order Act 1936, s 5. The facts are set out in the judgment of Lord Widgery CJ.

Robin Miller for the appellant.

John Beveridge for the respondent.

LORD WIDGERY CJ. This is an appeal by case stated from the learned recorder of Plymouth in respect of his adjudication at Plymouth quarter sessions on 7th January 1971. The history of the matter was that a charge had been preferred against the appellant alleging that he had used threatening words and behaviour on an occasion in August 1970. The matter came before the Plymouth justices in the first instance sitting as a magistrates' court. They convicted the appellant and sentenced him to be detained in a detention centre for three months. He appealed to quarter sessions and, as I have already indicated, the matter came before the recorder on appeal on 7th January 1971. The appeal was, of course, a rehearing. What happened which has given rise to the appeal to this court is set out in the case in this way. The recorder says:

'I heard the appeal on the 7th day of January, 1971. The prosecution arose out of confused disturbances outside a youth club involving a large crowd. There was a conflict of evidence between police officer witnesses for the Respondent, and the Appellant and his witnesses. At the conclusion of counsel's speech for the Appellant I found myself unable from my note or my recollection to recall what the Respondent's principal witness had said on certain material points of detail stressed by Appellant's counsel. This witness had impressed me as a fair and reliable witness. I therefore recalled him and questioned him myself. I invited Appellant's counsel to cross-examine and to address me further: both invitations were declined. Having thus ascertained what this witness's evidence was on the material details I found the Respondent to have discharged the burden of proof beyond reasonable doubt and I dismissed the appeal against conviction. If the witness had not been recalled I could not and would not have found the case proved.'

It is contended by counsel for the appellant that the learned recorder was wrong in recalling a prosecution witness in that way, and he says with force that if that point is once established, it is clear from the case that the recorder, without the assistance of that evidence, would have allowed the appeal; accordingly he says that the appeal should be allowed in this court.

There are, of course, rules of procedure governing every court. Those rules derive from law or from convention, and there is no doubt that as a general principle such rules must be observed. That means that if the rules are not observed, or if any departure from them is to take place, that departure must be justified according to the circumstances of the particular case. We must not allow the rules to be our masters, they must remain our servants, and the authorities show a wide range of circumstances in which prosecution witnesses can be called or recalled after the close of the prosecution case. The normal rule, of course, must be that they will be called before the close of the prosecution case, but there are exceptions.

The case principally relied on by counsel for the appellant is *R v Sullivan*¹. That was a trial for murder, and on two occasions the trial judge allowed certain witnesses for the prosecution to be recalled. In the first instance they were recalled to rebut evidence given by the prisoner; later on in the course of his final speech counsel for

a the accused had invited the jury to find that another person altogether had committed the murder, whereupon the judge asked that the person so accused be called in order to deny his part in it even though the time at which he was to be recalled was after counsel for the defence had made his speech. We were referred to this case principally for what was said by Avory J². He dealt with an argument which had taken place in the Court of Criminal Appeal whether these witnesses were being recalled
b to add something to what had been said before, or whether they were merely being recalled to repeat what they had said before. With regard to the law Avory J said²:

[Counsel for the appellant] contended that the two police constables were recalled for the mere purpose of stating over again the evidence which they had already given as witnesses for the prosecution. If the Court had come to the conclusion that that objection was well founded, and that these two police constables had merely been recalled for the purpose of restating that which they
c had already sworn to in their examination in chief, the Court would have been bound to hold that the recalling of the two police constables for that purpose was an irregularity, and the Court would then have had to consider whether any substantial miscarriage of justice had been occasioned thereby.'

d Counsel for the appellant contends that that which the recorder did in this case on the authority of *R v Sullivan*³ was an irregularity.

For my part I think there may be a very distinct difference in the application of these rules to a trial on indictment before a jury, and a trial before magistrates or before a recorder. Quite clearly it is most undesirable, and indeed highly irregular, in a trial before a jury to recall a witness who has already given evidence merely
e for the purpose of giving the evidence again. One would wonder what the point of such an exercise would be, and in any event with a trial on indictment there is a shorthand note of the evidence and if some serious question arises as to what a witness said when in the box, the proper way no doubt to check it is to turn up the shorthand note. I have no doubt, with respect to Avory J, that what he said in *R v Sullivan*³ in describing as an irregularity the recall of a witness, merely to repeat
f what he said before, is entirely correct.

In *Webb v Leadbetter*⁴ this court was concerned with a magistrates' case in which, when the parties assembled to begin the proceedings, one of two prosecution witnesses had not appeared, and rather than have an adjournment the prosecution elected to go on, relying only on the one witness who had appeared. The matter went right through, both cases were closed, the justices retired to consider their
g opinion, and the missing witness then appeared with a perfectly genuine story of a car breakdown which had prevented him appearing before. The justices were invited to come back to court to hear him, not as part of the prosecution case, not even before the defence had been closed, but after the justices had retired. Lord Parker CJ, giving the leading judgment, pointed out that such an exercise of discretion was one which was not open to any properly instructed bench of magistrates. He said,
h dealing with the principle of the matter⁵:

'It is, of course, quite clear, under our law that he who affirms must prove; therefore, strictly, once the prosecution have closed their case, there would be no opportunity for them to call further evidence, subject of course, to evidence in rebuttal, with which we are not concerned. Nevertheless, it does seem to me
j that there must always be some residuary discretion in the court to allow, in particular circumstances, evidence to be called, but the manner in which that

2 [1923] 1 KB at 57, [1922] All ER Rep at 432

3 [1923] 1 KB 47, [1922] All ER Rep 431

4 [1966] 2 All ER 114, [1966] 1 WLR 245

5 [1966] 2 All ER 114 at 115, [1966] 1 WLR 245 at 247

discretion is exercised must depend on the stage of the case. If one turns to indictable offences, it is perfectly clear that it has become now an established rule of law that no evidence can be called after the summing-up, and a judge who in his discretion sought to exercise his discretion by allowing evidence to be called at that stage would be acting entirely wrongly and the conviction would be quashed. The same considerations do not wholly apply in magistrates' courts, but, nevertheless, as a general rule and in the absence of some special circumstances, it would certainly be wholly wrong for the justices to purport to exercise a discretion to allow evidence to be called once they had retired, and indeed, probably, after the defence had closed their case. At an earlier stage it may well be proper to exercise the discretion in favour of allowing a witness to be called, and indeed that was suggested in a decision of this court in *Saunders v. Johns*⁶.

I would adopt that reasoning, not merely in regard to magistrates' courts, but also in regard to quarter sessions, and I have no doubt that there is an element of discretion in the recorder or chairman of quarter sessions when sitting alone, or with magistrates, when hearing an appeal and when not sitting with a jury, to allow evidence to be called after the normal point at which such evidence would be excluded, if the interests of justice require it, and if in the exercise of his discretion he thinks it is proper so to do. We have been referred to other cases in which on a trial by jury attempts have been made to introduce fresh evidence after the close of the prosecution case, and I do not propose to refer to those cases, because I think they deal with a significantly different situation from that which prevails here.

The short point here, once it is established that the recorder had an element of discretion, is whether he exercised his discretion in a way which this court ought to reject and set aside. In my judgment he was perfectly entitled to refresh his memory on those parts of the evidence of which he had no note. He could not refer to a short-hand note because none existed, and although it might perhaps have been wiser if he had asked counsel in the first instance to see whether they agreed as to the evidence in question, I find it quite impossible to say that he exercised his discretion wrongly in doing what he did in these circumstances.

I am not unimpressed by the fact that when the prosecution witnesses had been recalled and counsel for the appellant was given an opportunity to cross-examine and address the recorder further, that opportunity was not accepted. I feel that if in fact some significant difference in the evidence given at the end of the trial to that given by the witness when first called had appeared, it would have reflected itself in cross-examination and address from counsel for the appellant. In my judgment the contention that there is here an error of law is not made out and I would dismiss the appeal.

ASHWORTH J. I agree.

GRIFFITHS J. I also agree.

Appeal dismissed.

Solicitors: *Bower, Cotton & Bower*, agents for *Bond, Pearce & Co*, Plymouth (for the appellant); *Gregory, Rowcliffe & Co*, agents for *J A Pearce & Major*, Plymouth (for the respondent).

Gordon H Scott Esq Barrister.

Birch v Thomas

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, MEGAW AND STEPHENSON LJ

10th DECEMBER 1971

a Negligence – Defence – *Volenti non fit injuria* – Consent to risk to injury – Agreement to exclude liability – Passenger in vehicle – Notice on windscreen that passengers riding at own risk and on condition no claim made against driver – Driver informing passenger that he is ‘not insured for passenger liability’ – Driver pointing to notice and telling passenger it is to do with the insurance – Passenger injured in collision caused by driver’s negligence in overtaking car when dangerous – Driver exempt from liability – Driver doing all that is *c* reasonably necessary to draw limitation of liability to passenger’s attention – No misrepresentation as to disclaimer of responsibility for driver’s negligence – Driver’s conduct within protection of notice.

The defendant who was only 19 was not insured for passenger liability; his insurance company had declined to give him this cover because of his age. On the insurance *d* agent’s advice the defendant had stuck a notice in his car, on the inside of the windscreen on the passenger’s side of the car, which read: ‘Passengers ride at their own risk and on the condition that no claims shall be made against the driver or owner.’ The notice was three inches long and one inch wide, and was printed in red letters less than one-sixteenth of an inch high. One evening the defendant and three other young *e* men including the plaintiff wanted to visit a social club. They discussed whose car to take. The defendant said to the three that he was not insured for passenger liability but the plaintiff decided to travel in the defendant’s car rather than in another vehicle. When they got into the car the defendant pointed to the notice and informed the plaintiff that it was the sticker ‘to do with the insurance’. At the time it was *f* daylight so there was no difficulty about reading the notice. Later that evening, when the plaintiff was travelling as a passenger in the defendant’s car, there was a collision in which the plaintiff sustained severe head and brain injuries causing amnesia. He brought an action against the defendant for damages for negligence in overtaking another car when it was dangerous to do so. At the hearing of the action the defendant admitted negligence but contended that he was not liable because the plaintiff was being carried at his own risk. Because of his amnesia the plaintiff could give no *g* evidence about reading the notice. The judge held that the defendant was not liable for the negligence. He found that the fact that the defendant was not insured for passengers had been brought to the plaintiff’s attention; that the defendant had pointed out to the plaintiff the notice in the car when they set off; that the form of notice was distinct and the inference to be drawn was that the plaintiff must have read it. The plaintiff appealed.

h **Held** – The defendant was exempt from liability for his negligence, and the appeal would be dismissed, for the following reasons—

i (i) even assuming that the judge was not entitled to infer that the plaintiff had read the notice, the defendant had done all that was reasonable in the circumstances to bring to the plaintiff’s attention the condition in the notice; he had not relied on the mere presence on the windscreen of the sticker, which by itself would not have been sufficient to exclude liability; he had informed the plaintiff that he was not insured against passenger liability and on getting into the car had pointed out the notice and said that it was to do with insurance so that if the plaintiff had read the notice he would have seen that the defendant was not insured against passenger liability (see p 907 *f* to *j* and p 909 *f* and *h*, post);

(ii) there was no misrepresentation by the defendant, for when he said to the plaintiff that he was not insured against passenger liability that meant that if the passenger

was injured, even by the negligence of the defendant, the passenger could have no claim against the defendant (see p 907 j to p 908 a and p 909 g and h, post).

(iii) the defendant's conduct in overtaking when it was dangerous to do so was not conduct outside the protection of the notice; it was the very sort of situation in which the exemption was intended to apply, and was not conduct outside the contemplation of the parties in respect of which, under the doctrine of fundamental breach of contract, the defendant could not have relied on the exemption (see p 908 b to d and p 909 c and h, post).

Notes

For agreements to exclude or limit liability for negligence, see 28 Halsbury's Laws (3rd Edn) 86, 87, para 91, and for cases on the application of the defence of *volenti non fit injuria*, see 36 Digest (Repl) 150-155, 781-818.

Cases referred to in judgments

Bennett v Tugwell (an infant) [1971] 2 All ER 248, [1971] 2 QB 267, [1971] 2 WLR 847.

Curtis v Chemical Cleaning and Dyeing Co Ltd [1951] 1 All ER 631, [1951] 1 KB 805, 3 Digest (Repl) 103, 289.

Kenyon, Son & Craven Ltd v Baxter Hoare & Co Ltd and another [1971] 2 All ER 708, [1971] 1 WLR 519.

McCawley v Furness Railway Co (1872) LR 8 QB 57, 42 LJQB 4, 27 LT 485, 37 JP 358, 8 Digest (Repl) 111, 718.

Appeal

This was an appeal by the plaintiff, Clive Roosevelt Birch, from the judgment of Talbot J, given on 31st March 1971, whereby the plaintiff's action against the defendant, Roger David Thomas (an infant, through his next friend and guardian ad litem, Mervyn John Thomas), for damages for personal injuries sustained by the plaintiff in a road accident in which he was a passenger in the defendant's car, was dismissed. The facts are set out in the judgment of Lord Denning MR.

Conrad Dehn QC and *Hywel Moseley* for the plaintiff.

J O Roch for the defendant.

LORD DENNING MR. On 5th May 1967 there was a bad motor accident in the county of Glamorgan. There were a couple of young men in an Austin Mini motor car. The driver, Mr Roger Thomas, was about 19 years of age. He had as his passenger with him Mr Clive Birch, who was about the same age, a young marine engineer. Just before midnight, this car attempted to overtake another car. It came head on into collision with an approaching vehicle. The passenger, Mr Birch, was very seriously injured, especially in his head and brain. He suffered a personality change. If he is entitled to damages, it would be five figures at least.

Now Mr Birch, the passenger, brings an action against the driver, Mr Thomas. There is no doubt that Mr Thomas was negligent. He pleaded guilty in the magistrates' court to a charge of careless driving. At the hearing of this action negligence was admitted on his behalf. But Mr Thomas says that he is not liable because Mr Birch was being carried at his own risk. The judge has held that Mr Thomas is not liable. Mr Birch appeals to this court.

It appears that Mr Thomas, who was only 19 years of age, had previously been covered by an insurance company, but that company had gone into liquidation. So he went to another insurance company. This new company covered him for ordinary liability to third persons but they declined to cover him for passenger liability because of his age. On this account the insurance agent advised him 'to put a sticker in the car'. Mr Thomas heeded that advice. He got a sticker from the father of a friend of his who had a fleet of lorries. He stuck it on the windscreen inside on the passenger side so that it could be seen by the passenger. It was three inches long and

a one inch wide. The print was in red letters less than one-sixteenth of an inch high. It said:

'PASSENGERS RIDE AT THEIR OWN RISK AND ON THE CONDITION THAT NO CLAIMS SHALL BE MADE AGAINST THE DRIVER OR OWNER.'

Mr Thomas says that his practice was, if he had a passenger, to bring the sticker to the passenger's attention and to tell him that he was not insured for passenger liability.

b On this particular evening Mr Thomas and Mr Birch and two other young men decided to go to a social club. They discussed whose car to take. At the outset Mr Thomas said to the others, 'I cannot take mine because mine has got a defective tyre and I am not insured for passenger liability'. But the alternative was to ride in a van which was uncomfortable. In the result Mr Thomas decided to take his own car. He said to Mr Birch, 'You can travel with me or travel in the back of the van. It's entirely up to you.' Mr Birch decided to travel with Mr Thomas. Mr Thomas said: 'I pointed to the sticker informing [Mr Birch] that that was the sticker to do with the insurance.' They drove off. Later on that evening there was this accident.

The judge made these findings of fact. He said that he was satisfied—

d 'that the fact that [Mr Thomas] was not insured for passengers was brought to [Mr Birch's] attention. I am also satisfied that [Mr Thomas] pointed out to [Mr Birch] the notice in the car at the time they set off in the car. Furthermore the notice was there to be seen, its form was distinct, and the inference I draw is that [Mr Birch] must have read it.'

e Counsel for Mr Birch challenged that finding insofar as the judge inferred that the plaintiff must have read the notice. Mr Birch himself could give no evidence on it. He was so badly injured that he had a retrograde amnesia going back for two months. It should not be found against him that he had in fact read it. I think there is much force in that criticism. I would not myself be prepared to infer that Mr Birch read the notice. Then what is the position? It is clear law that a driver giving a lift to a passenger is entitled to limit his liability by conditions, so long as he does all that

f is reasonable to bring them to the attention of the passenger. So the question becomes this: did Mr Thomas do all that was reasonable to bring the condition to the notice of Mr Birch? I am not at all satisfied that the mere sticking of this notice on the wind-screen would by itself be sufficient. It was not very prominent. Many a passenger would not notice it; or, if he did, he might not read it. But the sticker does not stand alone. The important thing here is that Mr Thomas said to Mr Birch: 'I am not

g insured against passenger liability.' Counsel for Mr Birch submitted that those words were not sufficient to exclude the liability of Mr Thomas personally. Counsel emphasised the word 'insured'. He suggested that the words meant: 'If I am negligent you will not be able to claim against the insurance company', leaving it to be inferred that he could claim against the driver personally. That is a lawyer's construction of the words. It is not the meaning which an ordinary man would put on them.

h If any driver tells a passenger 'I am not insured against passenger liability', it is as good as telling him: 'Mark you, you ride at your own risk.' Everyone knows nowadays that, if you are injured in a motor accident, you will recover if the defendant is insured, but you will not recover if he is not insured. At all events you will not recover when the driver is a young man of 19 with no visible assets.

j The other thing was that Mr Thomas, when they got into the car, pointed to this sticker and said: 'That is to do with the insurance.' That means the same thing. It means that: 'If you read that sticker you will see, as I told you, I am not insured against passenger liability.'

Counsel for Mr Birch rather suggested there was some misrepresentation by Mr Thomas. He referred to *Curtis v Chemical Cleaning and Dyeing Co Ltd*¹. But I do not

think Mr Thomas made any misrepresentation at all. He simply told Mr Birch the truth, that he was not insured against passenger liability. That means the same as the sticker, 'Passengers ride at their own risk.' It meant that, if the passenger was injured, even by the negligence of the driver, he would have no claim against the driver: see *McCawley v Furness Railway Co*², which was quoted by Ackner J in *Bennett v Tugwell (an infant)*³.

Counsel for Mr Birch made one remaining point. He said this was no ordinary negligence by Mr Thomas. It was conduct so reckless that it was outside the protection of this clause altogether. He reminded us of the cases about fundamental breach and the like (the latest of which is *Kenyon, Son & Craven Ltd v Baxter Hoare & Co Ltd*⁴), where it has been held that a person cannot rely on an exemption clause if his conduct, or the way in which he performs the contract, is such as to be totally different from that which was contemplated in the contract. There seems to me to be a short answer to that point. It was not pleaded, nor was it taken below. In the court below the claim was put against Mr Thomas as a case of ordinary negligence. So in truth it was. He was overtaking when it was dangerous to do so. That is the very sort of situation in which this exemption was intended to apply. In order to come within the doctrine of fundamental breach, the conduct would have to be something quite outside the contemplation of the parties, such as the instance I put in the course of the argument of a man who drove off the road across a field, or who drove up the wrong carriageway, and met with disaster. If a driver was guilty of that sort of conduct, he could not rely on the exception clause.

So that it seems to me that none of the arguments of counsel for Mr Birch prevail. This is just one of those cases where it is reasonable for a party to stipulate for exemption from liability, and it is just for the court to give effect to the stipulation. If a young man like Mr Thomas is not insured against passenger liability, he should give notice to any passenger that he travels at his own risk. Otherwise he might well be ruined by the liability which would be incurred. Especially when damages are assessed at figures which only insurance companies can afford. It will be altogether different when the Motor Vehicles (Passenger Insurance) Act 1971 comes into operation; but that does not come into operation until 1st December 1972. When that Act comes into force every driver will have to be insured against liability to passengers; but up until then a man who is not insured against passenger liability is wise to put on a sticker such as this, so as to protect himself from claims such as this.

I think the judge was right and I would dismiss the appeal.

MEGAW LJ. The part of the evidence which seems to me to be relevant for purposes of this appeal is within a very small compass. The defendant, Mr Thomas, giving his evidence-in-chief, had explained how he had told the plaintiff, amongst others, that his car was not insured. The question had then arisen whether or not the plaintiff was going to travel with the defendant in the defendant's car, because of the discomfort which they had been suffering in the van in which they had previously travelled; and at that stage the defendant had said to the plaintiff: 'It's entirely up to you', meaning that the plaintiff could make up his own mind whether he wanted to come in the defendant's car or not. Then came these questions and answers in the evidence, relating to a time when the defendant's car was outside the defendant's parents' home:

'Q Did he and you get into the car? A Yes.

'Q Before you drove off did you do anything? A I pointed to the sticker informing [the plaintiff] that that was the sticker to do with insurance.'

2 (1872) LR 8 QB 57

3 [1971] 2 All ER 248, [1971] 2 WLR 847

4 [1971] 2 All ER 708, [1971] 1 WLR 519

a And then the judge asked a question to make sure he had got down the answer correctly, to which the defendant replied: 'Words to that effect, yes, sir.' There was uncontradicted evidence that it was daylight, with no difficulty whatever about reading the notice on the windscreen, the notice being on a part of the windscreen where it would be directly under the eye of the plaintiff sitting in the passenger seat in the car. The defendant was accepted by the judge, who had the opportunity of seeing and hearing him, as being a witness of truth.

b On the basis of that evidence the judge's conclusion was as follows:

c 'I am also satisfied that the Defendant pointed out to the Plaintiff the notice in the car at the time they set off in the car. [That finding of fact is plainly justified by the passage in the evidence which I have read, if, as was the case, the judge accepted the defendant as a witness of truth.] Furthermore the notice was there to be seen [a finding of fact at which the judge was entitled to arrive on the evidence], its form was distinct [again it is clear from the evidence that the judge was entitled so to find], and the inference I draw is that the Plaintiff must have read it.'

d Counsel for the plaintiff in this case has suggested not merely that that is not a probable inference, but that it is an inference which is really quite unreasonable or impossible to draw. With great respect, I think that the inference which the judge drew was entirely right, and from the evidence I should have had no hesitation myself in drawing precisely the same inference. The plaintiff's attention was called to this sticker or notice; it was on the windscreen of the car directly in front of him, and I for myself should have thought that the fair, proper and almost inevitable inference from that was that the plaintiff read it. If that is so, that is, as I see it, an end of this appeal.

e Let it be assumed, however, that the judge was not entitled to draw the inference. If on the balance of probability the proper inference was that the plaintiff did not read the notice, I should agree with what Lord Denning MR has said in reaching his conclusion, namely, that the defendant did all that was reasonably necessary in the circumstances, including the particular exemption which was inherent in this notice, to bring to the plaintiff's attention that he, the defendant, was making that stipulation in respect of the plaintiff's intended purpose of using the car as the defendant's guest or passenger. So far as concerns the point made about misrepresentation, I am unable to see how the words used in the answer which I have read from the evidence, informing the plaintiff that that was the sticker 'to do with the insurance', could be regarded as being a misrepresentation by the defendant, or that it was calculated to lead the plaintiff to believe that all that was being said to him was 'I am not insured', without showing a disclaimer of responsibility if the plaintiff, as the defendant's guest in the motor car, was to suffer injury due to his negligence.

g As regards the last point made by counsel for the plaintiff, there is nothing which I wish to add to what Lord Denning MR has said. I agree that this appeal fails.

h **STEPHENSON LJ.** I agree with Lord Denning MR and Megaw LJ for the reasons they have given that this appeal fails. I would myself have been willing to go as far as the judge and draw the inference which he drew that the plaintiff must have read the notice had it been necessary to do so. In his judgment the judge posed three questions and gave his answers:

i '(1) Was the notice brought to the plaintiff's attention in this case? The answer to that is "Yes". (2) Was the plaintiff bound by the notice? The plaintiff was travelling by leave and licence of the defendant in the defendant's motor car, and it was a condition of the licence that he travelled at his own risk and that no claim should be made against the defendant. He was therefore in my view bound by the notice. (3) Was the notice sufficient to exclude any liability on the part of

the defendant in the event of an accident due to his negligence causing injury to the plaintiff, and was he therefore protected? In my view the notice did protect him.' a

I think that the learned judge asked himself the right questions and gave the right answers. On the part of the defendant there was no misrepresentation either pleaded or proved and no fundamental breach of the terms of this gratuitous licence to carry him as a passenger either pleaded or proved. Sad as it is for the plaintiff to get nothing for the grave damage done to him by the defendant's negligence, in my judgment he unfortunately agreed to take the risk of just that, and therefore I agree that this appeal should be dismissed. b

Appeal dismissed.

Solicitors: *Tuck & Mann & Geffen*, agents for *John Loosemore & Co*, Cardiff (for the plaintiff); *R R Morgan, Sons & Grovers*, Cardiff (for the defendant). c

Wendy Shockett Barrister.

Smith v Hawkins

d

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND BRIDGE JJ

15th NOVEMBER 1971

National insurance – Inspector – Powers of inspector – Power to require information for the purpose of ascertaining whether contributions payable – Employed person – Failure of employer to pay contributions – Refusal of employee to furnish information to inspector – Whether inspector having power to require employee to disclose name and address of employer – National Insurance Act 1965, s 90 (3), (4). e

S, an inspector appointed under and for the purposes of the National Insurance Act 1965, interviewed H, having cause to believe that H was an insured person for the purposes of the 1965 Act. S found that H's national insurance card for 1968-69 had not been stamped for 41 weeks. H explained that the absence of contributions for those weeks was because at the material dates he had been an employed person. Then, and on subsequent occasions, S asked H to supply him with the names and addresses of his employers for the relevant weeks. H refused to give this information. H was charged with refusing to furnish information to S, contrary to s 90 (4)^a of the 1965 Act. The justices dismissed the information on the grounds that S's powers under s 90 (3)^b of the 1965 Act to require information regarding contributions did not extend to information as to the names and addresses of H's employers. On appeal, f

Held – The obligation on an insured person under s 90 (3) to furnish information for the purpose of ascertaining whether contributions were or had been payable or had been duly paid was wide enough to enable S to ask H whether he was employed or self-employed and, if employed, to ask H for the names and addresses of his employers; accordingly the appeal would be allowed and the case sent back to the justices to continue the hearing (see p 914 d, post). g

Notes

For the powers of inspectors appointed for the purposes of the National Insurance Acts, see 27 Halsbury's Laws (3rd Edn) 677, 678, paras 1224, 1225. h

^a Section 90 (4), so far as material, provides: 'If any person— . . . (b) refuses or neglects to answer any question or to furnish any information . . . when required to do so under this section, he shall be liable on summary conviction to a fine . . .'

^b Section 90 (3) is set out at p 913 h and j, post

j

a For the National Insurance Act 1965, s 90, see 23 Halsbury's Statutes (3rd Edn) 357.

Case stated

This was an appeal by way of case stated by justices for the Middlesex area of Greater London acting in and for the petty sessional division of Edmonton in respect of their adjudication as a magistrates' court sitting at the Court House, Lordship Lane, Tottenham N17, on 5th March 1971.

b 1. On 11th January 1971 an information was laid by the appellant, Malcolm Smith, against the respondent, Frank Ville Hawkins, that on or about 17th September 1970 he did refuse to furnish information to the appellant, an inspector appointed for the purposes of the National Insurance Act 1965, when so required by the appellant, contrary to s 90 (4) of the 1965 Act.

c 2. The justices found the following facts. The appellant was an inspector appointed under and for the purposes of the 1965 Act. The respondent was a professional musician. The respondent's national insurance card for 1968-69 was not stamped for 41 weeks and his card for 1969-70 showed that flat-rate contributions were paid only in respect of eight weeks. On 1st December 1969 the appellant (who at all material times had reasonable cause to believe the respondent to be and to have been an insured person) examined the respondent as to the weeks in 1968-69 in which contributions had not been paid. The respondent stated that during those weeks he was an employed person but refused to answer the appellant's question as to the name or names of his employer or employers on the ground that if he did so such employers would give him no further employment. He later offered to pay his share of Class 1 contributions, which offer was refused. On 13th December 1969 the respondent provided a list of his employments for 1968-69 but refused to identity his employers. He stated that he was an employed person and refused on principle the appellant's suggestion that he should be classified as Class 3 and pay contributions on that basis. On 10th March 1970 the appellant asked the respondent for the names and addresses of his employers during periods when he was employed, but the respondent refused to answer such questions or give such information unless he could have a written undertaking from the Department of Health and Social Security that his name would not be disclosed. Letters were sent by the respondent to the Department of Health and Social Security dated 11th January, 15th March, 17th September 1970 and one undated, and by the appellant to the respondent dated 10th March and 15th September 1970. On or about 17th September 1970, by the letter of that date, the respondent refused to furnish information to the appellant, when required to do so by the latter, as to the names and addresses of the respondent's employer or employers during the periods specified by the respondent.

g 3. At the conclusion of the appellant's case it was submitted on behalf of the respondent that there was no case to answer on the following grounds: (a) The request to furnish the required information was unreasonable since by giving it the respondent would risk his livelihood. (b) By the proviso to s 90 (4) of the 1965 Act the respondent was not liable to furnish information tending to incriminate himself, and since the employers were in default under s 8 (2) of the 1965 Act the respondent could be held liable as an aider or abettor in cases where he worked for employers whom he knew did not pay contributions which they were liable to pay. (c) The respondent had given all the information required under s 90 (3) of the 1965 Act in that he had provided all the information necessary for the purpose of ascertaining what contributions 'are or have been payable or have been duly paid' and this information was all that he was required to give.

h i 4. It was submitted on behalf of the appellant: (a) that the names and addresses of the respondent's employers were matters on which the appellant reasonably required information under the 1965 Act, and for the purpose of ascertaining whether contributions were or had been payable, or had been duly paid by or in respect of the respondent; (b) that the respondent had refused to furnish information as to the

names and addresses of such employers; (c) that the respondent's first submission set out in para 3 (a) above was mere assertion as no evidence had yet been given; and (d) that as to the respondent's second submission set out in para 3 (b) above the employee where his employer defaulted was not necessarily an aider. a

5. The justices did not accept the first two submissions made by the respondent (as set out in para 3 (a) and (b) above). There was evidence that the respondent had refused to furnish information as to the names and addresses of his employers during the relevant period. The justices were of the opinion, however, that the appellant's power to require information was limited to the furnishing of information 'for the purpose of ascertaining whether contributions are or have been payable, or have been duly paid, by or in respect of any person' under the part of s 90 (3) of the 1965 Act which was relevant to this case. They were of the opinion that the appellant's power to require information in the case did not extend to information as to the names and addresses of defaulting employers. Since the respondent had given information as to the periods when he was employed, unemployed or sick and that information had been accepted as correct and since his national insurance cards showed what contributions had been paid, he could not be required to give the further information sought by the appellant. Accordingly they upheld the respondent's submission as set out in para 3 (c) above and dismissed the information. b
c
d

Gordon Slynn for the appellant.

Henry Boyd for the respondent.

LORD WIDGERY CJ. This is an appeal by case stated by justices for the Middlesex area of Greater London acting in and for the petty sessional division of Edmonton who on 5th March 1971 ruled that the respondent had no case to answer on an information laid by the appellant in these terms. It alleged: e

' . . . that on or about 17 September 1970 he did refuse to furnish information to the Appellant, an inspector appointed for the purposes of the National Insurance Act 1965, when so required by the Appellant, contrary to Section 90 (4) of the National Insurance Act, 1965.' f

The justices find the essential facts quite briefly. They find that the appellant is an inspector duly appointed under the Act of 1965; the respondent is a professional musician; his national insurance card for 1968-69 was not stamped for 41 weeks and his card for 1969-70 was stamped in respect of 8 weeks only. On 1st December 1969 the appellant, who, the justices find, at all material times had reasonable cause to believe that the respondent was an insured person, examined the respondent, and the respondent's explanation of the absence of stamps on his card for the year 1968-69 was that he was an employed person. This, as a brief reference to the legislation will show, is a relevant consideration in that if he is an employed person, employed under a contract of service, the obligation to stamp his card lies on his employer. Having been told by the respondent that the latter was an employed person, the appellant asked for the name and address of the employer and the respondent declined to give the name and address of the employer, giving no doubt what was a highly practical reason, that if he did so, the employers in question would give him no further employment. The matter dragged on for a few months whilst further enquiries were made, but in the end, as the justices find, a point blank request for the identity of the employer was made by the appellant and that was refused. It is consequent on that refusal that the present information was laid against the respondent. g
h
i

To turn to the relevant legislation, s 1 (2) of the 1965 Act provides the three categories of insured persons:

a ' (a) employed persons, that is to say, persons gainfully occupied in employment in Great Britain, being employment under a contract of service; (b) self-employed persons, that is to say, persons gainfully occupied in employment in Great Britain who are not employed persons; (c) non-employed persons, that is to say, persons who are neither employed nor self-employed persons.'

b So far as the obligation to pay contributions is concerned, if a person is employed under a contract of service, the obligation is on his employer to pay for the stamp which represents the total contribution made by both parties to the contract, and then to obtain reimbursement of the appropriate proportion by deduction from the employee's wages. That comes under s 11 of the 1965 Act.

c On the other hand, if the insured person is a self-employed person, the obligation to pay and to affix the stamp is his, and obviously his alone, there being no other party to the contract from whom a share of the contribution is to be derived. As a matter of fact the amount paid by a self-employed person is somewhat less than the combined amount paid in respect of an employed person; on the other hand from the worker's point of view the amount which he pays as a self-employed person is greater than the share which he would pay if he were an employed person.

d Against that background one comes to consider s 90 of the 1965 Act under which the information was laid. Section 90 provides for the appointment of inspectors, and in sub-s (2) provides:

'An inspector appointed under this Act, shall for the purposes of the execution of this Act, have power to do all or any of the following things . . .'

e There are then set out a number of things which the inspector can do; he can enter premises at any reasonable time, he can make examination or enquiry as to whether the Act has been complied with in those premises, and then in para (c) he may examine—

f 'either alone or in the presence of any other person, as he thinks fit, with respect to any matters under this Act on which he may reasonably require information, every person whom he finds in any such premises or place, or whom he has reasonable cause to believe to be or to have been an insured person, and to require every such person to be so examined'.

g Further, under s 90 (2) (d) he is authorised 'to exercise such other powers as may be necessary for carrying this Act into effect'. I pause there to observe that although s 90 (2) seems to be largely concerned with the entry into premises and the examination of persons found therein, it is contended by counsel for the appellant that the concluding words of para (c) and the terms of para (d) are wide enough to authorise examination of persons other than those found on premises entered by virtue of the powers in the section. Section 90 (3) provides:

h 'The occupier of any premises or place liable to inspection under this section, and any person who is or has been employing any person, and the servants and agents of any such occupier or other person, and any insured person, shall furnish to an inspector all such information and produce for inspection all such documents as the inspector may reasonably require for the purpose of ascertaining whether contributions are or have been payable, or have been duly paid, by or in respect of any person, or whether benefit is or was payable to or in respect of any person.'

j Finally s 90 (4) creates the offence of refusing to answer or provide information authorised to be sought under those provisions. Counsel for the appellant contends that it must have been the intention of Parliament that an employee or a person claiming to be an employee whose card was not fully and properly stamped for a particular period should be obliged to give information to the inspector as to the

identity of his employer at the relevant time. Counsel for the appellant points out, as in my judgment is clearly correct, that if an employee is not obliged to disclose the name of his employer, the prospect of the inspector ever discovering the identity of the person liable to make the contribution is remote. If in truth the relationship is one of master and servant, then it is the master who is bound to buy the stamp. If it is open to an insured person simply to say, 'I am employed but I will not tell you by whom', then the lead offered from that to the inspector to ascertain who is the person liable to pay the contribution is negligible.

Further, counsel for the appellant submits that the question of whether a person is employed or self-employed will depend on the terms of his contract of service, and that in many instances that contract will not have been reduced into writing. Accordingly, he says, it is in practice impossible for an inspector to determine into which category an insured person falls unless he has access to both parties to the contract of service or services and may thus ascertain from both of them whether they agree as to the nature of the contract.

For my part I have no doubt that as a general proposition what counsel for the appellant contends for is right. I think the obligation under s 90 (3) to furnish information for the purpose of ascertaining whether contributions are or have been payable or have been duly paid by or in respect of any person is an obligation which is certainly wide enough to enable the inspector to ask the insured person whether he is employed or self-employed and the name and address of his employer if he says that he is employed.

However, the matter, on the submission of counsel for the respondent, is not really as simple as that. Counsel for the respondent in the end I think was accepting the general proposition of counsel for the appellant as being correct, but he says that in this particular case there was no obligation on the respondent to supply the information because the appellant had accepted the proposition that the respondent was an employed person and not a self-employed person. Counsel for the respondent I think concedes that if there remained a question to answer whether the insured person was employed or self-employed, then it is open to the inspector to ask for the identity of the employer, but it is contended that once that issue, employed or no, has been got out of the way by acceptance by the inspector, then there is nothing further which can legitimately be called for under s 90 (3), because all that then remains in question is whether or not the contribution has been paid, and that is ascertained simply by looking at the card.

For my part I do not find it necessary to consider what the situation would be if the inspector had in some way estopped himself from investigating the question of whether the insured person was an employed person or not. I am certainly not to be taken as accepting the proposition that the inspector can estop himself in that way, but in the present instance it seems to me perfectly clear from the form of the case that no such acceptance or estoppel arose.

This sentence appears in the last paragraph of the case, and is relied on by counsel for the respondent.

'Since the Respondent has given information as to the periods when he was employed, unemployed or sick and that information was accepted as correct and since his national insurance cards showed what contributions had been paid he could not be required to give the further information sought by the Appellant.'

As I read that, it means no more than that the appellant had accepted, as he no doubt had, over what periods the respondent had been unemployed or sick and consequently over what periods he was an employed or unemployed person. I do not read the case and the correspondence exhibited to it as showing any different attitude on the part of the appellant.

In my opinion therefore there is no departure from the general rule in this case,

a and I would accept the submission of counsel for the appellant. I would accordingly allow the appeal and send the case back to the justices to continue the hearing.

ASHWORTH J. I agree.

BRIDGE J. I also agree.

b Appeal allowed.

Solicitors: Solicitor, Department of Health and Social Security; Egerton, Sandler Summer & Co (for the respondent).

Gordon H Scott Esq Barrister.

c Moore v News of the World Ltd and another

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, MEGAW AND STEPHENSON LJJ

7th, 8th, 9th DECEMBER 1971

d Copyright – False attribution of authorship – Attribution – Newspaper article – Article about well-known professional singer – Article based on interview with singer – Article written by reporter on basis of notes taken during interview – Published article stated to be ‘by’ the singer ‘talking to’ the reporter – Article in first person singular – Normal practice for reporters of newspapers to put words into mouths of individuals – Whether constituting attribution of authorship to singer – Whether action for false attribution available to persons other than professional authors – Copyright Act 1956, s 43 (2), (8).

e Copyright – False attribution of authorship – Damages – Damages for false attribution to be taken into account in assessing damages in other proceedings arising out of same transaction – Newspaper article – Damages for libel in respect of same article – Damages for false attribution not precluded in proper case – Article concerning plaintiff’s former marriage to well-known actor – Article purporting to consist of words spoken by plaintiff – Innuendo that plaintiff ready to ‘wash her dirty linen’ in public and lend herself to such an article for money – Plaintiff awarded libel damages of £4,300 – Proper case to award additional damages of £100 for false attribution of authorship – Copyright Act 1956, s 43 (10).

f Libel – Justification – Substantial justification – Pleading – Reliance by defendant on substantial justification – Necessary to plead substantial justification if sought to rely on it – Defamation Act 1952, s 5.

h The plaintiff, a professional singer, about whose life there had been much publicity, was interviewed on behalf of the News of the World by one of their reporters, who conducted the show page, for the purpose of writing an article about her. The reporter took down notes of the interview and wrote them up into an article the same night. The plaintiff was not shown the article and knew nothing of its contents until she saw it published in the News of the World. The article was long and described her relationship with her divorced husband. The article stated that it was written ‘by’ the plaintiff followed by the words, in smaller print, ‘talking to’ the reporter. The article was written in the first person as if the plaintiff was herself talking. She had not, however, used the words in the article, and she claimed that much of the article was fiction. The plaintiff brought an action against the News of the World and the reporter in which she claimed damages for libel alleging, in effect, that the words of the article had two defamatory meanings: first that she was a woman who was ready to ‘wash her dirty linen’ in public; secondly, that she was a woman who would lend herself to such an article for money. The defendants

pleaded justification to the first meaning but did not seek to justify the second, it being clear that the plaintiff did not give the interview for money. In respect of the claim for libel the defendants also pleaded consent to publication of the article. The plaintiff further claimed damages for false attribution of authorship of the article contrary to s 43^a of the Copyright Act 1956. On the claim for damages under s 43 the judge directed the jury that they could give the plaintiff a small sum for the annoyance and irritation of having the article passed off as hers. The jury found in favour of the plaintiff and awarded her damages of £4,300 for the libel and damages of £100 for the claim under s 43. The defendants appealed. On appeal they contended, *inter alia*, that the judge ought to have drawn the jury's attention to s 5^b of the Defamation Act 1952 since the words admittedly not true, i.e. that the plaintiff had written the article for payment, did not materially injure her reputation having regard to the other allegation contained in their plea of justification, i.e. that she was an embittered and unprincipled woman.

Held – (i) The defendants were liable for false attribution of authorship contrary to s 43 (2), (8) of the 1956 Act, and £100 was a proper award of damages for that breach of statutory duty because—

(a) in most cases of false attribution of authorship under s 43 there would also be a cause of action for libel; damages for false attribution were not precluded however by the fact that damages were also given for libel in respect of the same article although s 43 (10) prohibited duplication of damages in respect of the same complaint; the present case was a proper one to award some additional damages in respect of the false attribution of authorship; accordingly, there was no error in the judge's direction to the jury, and £100 was not an excessive award (see p 920 f to h, p 921 j and p 922 a and j, post);

(b) the defendants had no defence to the claim under s 43 which applied to everybody and was not intended only to protect professional authors; it was no defence that the words 'talking to' the reporter had been added in the article, for putting the words of the article into the first person constituted attribution to the plaintiff; unless authorised by the individual, this attribution was false and it was immaterial that it was the usual practice of News of the World reporters to put words into the mouths of individuals; the defence that the plaintiff had consented to producing the article in the way in which it had been produced, even if not put to the jury, was sufficiently covered by the defence of consent to the libel; if the plaintiff did not consent to the libel she did not consent to the attribution (see p 920 b to f and p 922 f and g, post).

(ii) If the defendants wished to rely on s 5 of the 1952 Act they should have pleaded the section, even if they only relied on it in the alternative. Since the defendants had not pleaded s 5 they could not contend on the appeal that the trial judge ought to have drawn the jury's attention to it (see p 919 e and p 922 f and j, post).

(iii) Accordingly the appeal would be dismissed.

Notes

For false attribution of authorship in relation to literary, dramatic, musical or artistic works, see Supplement to 8 Halsbury's Laws (3rd Edn) paras 824-826.

For the defence of substantial justification in actions for libel or slander, see 24 Halsbury's Laws (3rd Edn) 46, 47, para 81, and for cases on the subject, see 32 Digest (Repl) 110, 1321-1326.

For the Defamation Act 1952, s 5, see 19 Halsbury's Statutes (3rd Edn) 38.

For the Copyright Act 1956, s 43, see 7 Halsbury's Statutes (3rd Edn) 197.

Appeal

This was an appeal by the defendants, News of the World Ltd and Weston Taylor, who sought an order that the verdict given and judgment entered for the plaintiff,

^a Section 43, so far as material, is set out at p 919 g to j, post

^b Section 5 is set out at p 919 b, post

a Edna May Moore (professionally known as Dorothy Squires), against the defendants on 11th May 1971, at the trial of the plaintiff's action for damages for libel and for breach of statutory duty under s 43 of the Copyright Act 1956, be set aside and a new trial ordered. The facts are set out in the judgment of Lord Denning MR.

M E I Kempster QC and *Charles Gray* for the defendants.

Lewis Hawser QC and *A T Hoolahan* for the plaintiff.

b

LORD DENNING MR. Mrs Edna May Moore, the plaintiff, is a singer who is professionally known as Dorothy Squires. In 1953 she was married to Mr Roger Moore, who has since acquired fame as a television artist known as 'The Saint'. On 20th April 1969 the News of the World came out on the front page with a headline: 'The girl who lost the Saint. When love turns sour. By Dorothy Squires'; and on an inner page a big headline: 'How my love for the Saint went sour by Dorothy Squires'; and, in smaller letters: 'talking to Weston Taylor'. There is a long article describing the relationship of Mrs Moore to her husband. Now in this action Mrs Moore—Dorothy Squires, as I will call her—claims damages for libel from the News of the World, the first defendants, and also, as a subsidiary claim, for damages for a breach of the Copyright Act 1956.

d

The action was tried in May 1971 for six days before Cantley J and a jury; and, after retiring for three hours and 20 minutes, the jury found on the libel for Dorothy Squires damages of £4,300, and on the claim under the Copyright Act 1956 damages of £100. The News of the World appeals to this court.

e

I will first deal with the claim for libel. The defences were, first, justification (that the words were true in their natural and ordinary meaning); secondly, that Dorothy Squires had assented to the publication. The facts appear to be these. Dorothy Squires and her husband were married in 1953. They lived happily together for some seven years; and then unfortunately in about 1961 they separated. The husband then lived with another woman. After some years Dorothy Squires sought a divorce. A decree absolute was made in February 1969. She is a singer, and was anxious to promote her songs. She started up a venture of her own in order to promote them. Early in April 1969 she formed her own business called Dorothy Squires Promotions Ltd. She put an advertisement in The Stage about her songs: 'Your flowers arrived too late', and so forth. About the same time other things were happening. She was tried at London Sessions on a charge of not giving a sample under the breathalyser law. She was found not guilty. Just about the same time her former husband remarried. So there was a good deal of publicity going about.

g

In the midst of it all, on Thursday, 17th April 1969, Mr Weston Taylor, the second defendant, telephoned to her. He is a reporter of long standing with the News of the World. He conducts their show page. He telephoned to Dorothy Squires. He sought an interview with a view to writing an article. She said that he could come that very afternoon. Mr Weston Taylor said he was a 'cheese man', meaning that he only wanted sandwiches with cheese and tea. That is what they had. The interview started at 1.00 p.m. and went on for three hours until 4.00 p.m. At the trial there was an acute conflict about the object of that interview. The plaintiff said that the object was to get an article in support of her new business venture. She wanted 'plugs' in the article to advertise her latest songs. Mr Weston Taylor said that the object was to write a sympathetic article on her domestic relations with her husband and all that happened to her.

j

The second defendant took down notes in shorthand. He worked on them afterwards. He wrote them up that night. On the next day, the Friday, he telephoned to her to clear up one or two points. He put the story into the hands of the sub-editors for the weekend publication. He did not write the headlines. The sub-editor did them. None of the script was shown to Dorothy Squires. She did not

sign it. She knew nothing of its contents until she saw the paper on the Sunday morning. At the bottom it said there was to be an instalment next week: 'Next week: Why I decided to give Roger his freedom'. a

When Dorothy Squires read the article, she was extremely annoyed. There is no doubt whatever about it. She telephoned Mr Weston Taylor and made her annoyance quite plain. He tried to soothe her down a bit. After the conversation she says that all her friends were ringing her up, saying 'What is this?' and telling her how awful it was. They thought she was doing it for money, and so forth. b So she rang up Mr Weston Taylor again and said: 'I am going to my lawyers'. She went to them. The lawyers wrote a letter on the Tuesday. They issued a writ for libel. They went to the court and asked for an injunction to restrain the next week's publication. They came to this court. We refused any injunction. The News of the World said that they would on the next Sunday put in a statement to the effect that she had not been paid for the article. c

On 27th April, the next Sunday, they published an article headed 'Why Dorothy Squires set the Saint free'; and then, in smaller print: 'Miss Squires gave these details to our show-business reporter Weston Taylor in an interview, for which she was not paid a fee.' Then there is an article which goes into the circumstances leading to the divorce. Dorothy Squires did not issue a new writ in respect of that article. d

At the trial Dorothy Squires did not complain of any particular words in the first article itself. Her complaint was that people thought she had written it for money; and also that she was 'washing her dirty linen' in public. These two complaints were put by the lawyers in the pleadings in the shape of what is called a 'false innuendo'. They alleged that—

'the said words . . . by reason of the context in which they were published bore the natural and ordinary and inferential meaning that the Plaintiff was an embittered and unprincipled woman who had deliberately prepared and sold for a substantial sum of money a series of articles for publication in the said newspaper in a sensational form and manner revealing private and confidential details of her private life with the said Mr. Roger Moore [the husband].' e

That allegation contains two distinct meanings. The first is that Dorothy Squires was a woman who was ready to 'wash her dirty linen in public'. The second is that she was a woman who would lend herself to articles like this for money. The News of the World said the first meaning was true. They sought to justify it. The second one they did not seek to justify. It is quite clear she did not give the interview for money. In addition to the defence of justification to the first meaning, they also pleaded that she assented. f

In the course of the discussion in this court, it was recognised that the real question was whether Dorothy Squires consented expressly or impliedly or by her conduct to the publication of these words substantially as they were in the News of the World. If she did, then the first meaning was true; and also she assented to the publication. That issue depended on who was to be believed. Mr Weston Taylor said that she told him her story, he took it all down in his notes, and the article was written from it. She said: g

'That is all wrong: that is nearly all fiction: 90% of it is not what I told him. He must have gathered it from somewhere else.' h

The judge put the issue fairly and properly to the jury. Counsel for the defendants, in his careful argument before us, said that, in fairness to Mr Weston Taylor, the judge ought to have stressed the gravity of the charge made by Dorothy Squires against him. She charged him with writing up things which were never said to him. It seems to me the gravity of the matter must have been apparent, and I do not think there is any room for saying the judge misdirected them in any way. j

Next counsel for the defendants raised a point of law. He said that the defendants

a did not seek to justify the innuendo about payment; but they did seek to justify the innuendo about 'washing dirty linen in public'. In those circumstances he submits that the judge ought to have drawn the jury's attention to s 5 of the Defamation Act 1952, which provides:

b 'In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.'

c That is a very complicated section, but it means that a defendant is not to fail simply because he cannot prove every single thing in the libel to be true. If he proves the greater part of it to be true, then even though there is a smaller part not proved, nevertheless the defendant will win as long as the part not proved does not do the plaintiff much more harm. Counsel for the defendants submits that this is a case for s 5, because, if the defendants proved that Dorothy Squires was an embittered and unprincipled woman, it did not do her much more harm to say that she wrote the article for payment. He quoted passages from the evidence of Dorothy Squires in which she said, in effect, that the imputation of payment did not matter d so much as the imputation that she was an embittered and unprincipled woman.

e Now s 5 was not pleaded. It was not raised by counsel in the court below. Naturally enough the judge did not refer to it. Not having been raised below, I am of opinion that it cannot be made any ground of complaint here. It seems to me that if a defendant seeks to rely on s 5, he ought to plead it. Even if he only relies on it in the alternative, he ought to plead it. I realise that in the course of the case, as the evidence proceeds, the defendant may realise that he cannot prove every jot or tittle of the libel. If the defendant then wishes to rely on s 5, no doubt the judge will usually allow him to amend. At any rate it is for the defendant to raise the point. He did not do so here.

f Now the copyright point. It is a claim for damages for false attribution of authorship. This is the first time it has come before the courts. Section 43 of the Copyright Act 1956 provides:

'(1) The restrictions imposed by this section shall have effect in relation to literary, dramatic, musical or artistic works . . .

g '(2) A person . . . contravenes those restrictions as respects another person if, without the licence of that other person, he does any of the following acts in the United Kingdom, that is to say, he—(a) inserts or affixes that other person's name in or on a work of which that person is not the author, or in or on a reproduction of such a work, in such a way as to imply that the other person is the author of the work . . .

h '(8) The restrictions imposed by this section shall not be enforceable by any criminal proceedings; but any contravention of those restrictions, in relation to a person, shall be actionable at his suit . . . as a breach of statutory duty . . .

i '(10) Nothing in this section shall derogate from any right of action or other remedy (whether civil or criminal) in proceedings instituted otherwise than by virtue of this section: Provided that this subsection shall not be construed as requiring any damages recovered by virtue of this section to be disregarded in assessing damages in any proceedings instituted otherwise than by virtue of this section and arising out of the same transaction.'

That section makes it a civil wrong for any person falsely to attribute the authorship of a work to a person when it is not his. Up till now a false attribution of that kind has only been caught by the law of libel (if the work is of lower standard than the plaintiff would himself write), or by the law of passing-off (leading other people to

think it is the work of the plaintiff). Under this section false attribution of authorship is a civil wrong of its own, but if a plaintiff obtains damages in libel or passing-off in regard to it, then there is to be no duplication of damages in respect of the same complaint. a

I have no doubt that the News of the World were guilty of false attribution. The article purports to be written by Dorothy Squires. It says 'By Dorothy Squires'. That was untrue. She did not write it. The News of the World seek to escape liability on this head because they added: 'By Dorothy Squires talking to Weston Taylor'. But that will not do. They put the words into the mouth of Dorothy Squires as if she was herself talking. The very first line is: b

'When I saw those newspaper placards screaming out, "Roger Moore weds", I knew it was the worst day of my life. Everywhere I looked my ex-husband's name was on newspaper bills in the streets of London.' c

By putting it into the first person, they attribute the very words to her; whereas she did not use them. They were attributed to her by Weston Taylor; and it was a false attribution.

The News of the World also seek to escape liability because, they say, it is their usual practice for reporters to put words into the mouths of individuals in this way. That may be true. But it is no defence to the claim. Unless this format is authorised by the individual, it is a false attribution and contrary to the statute. Then counsel for the defendants suggests that this section did not apply to this case. The section was only intended to protect professional authors, he said, and not other persons like Dorothy Squires who do not make a practice of writing. This suggestion is no good either. The statute protects everybody. It says 'another person', not 'another author'. Lastly on this point counsel for the defendants says that, if Dorothy Squires consented to this way of producing the article, it would be a defence. He says that this defence of consent was not put to the jury. But it seems to me that it was sufficiently covered by the defence of consent to the libel. If she did not consent to the libel, she did not consent to the false attribution. d

The only substantial point on false attribution is whether the award of £100 was excessive. Now, in most cases of false attribution of authorship, there will also be a cause of action for libel or passing-off; and the damages for those causes of action will cover false attribution as well. So there will be little extra for the false attribution. In this case the judge himself made it clear in his summing-up. He told the jury they were not to give double damages. He also told them that they could— e

'give her something for the annoyance and irritation of having somebody take the liberty of passing off this production as hers. But it will be a small sum. I do not mean a derisory sum, but a small sum. I think everybody, both parties are agreed on that. Something, some gentle, gentle amount for a rather technical cause of action.' f

I see nothing wrong in that direction. I think the jury might well give the sum of £100 on this head. Megaw LJ suggested that they might have agreed on £4,400 as the total figure; and then split it up and gave her £100 for the copyright. That would be a common sense way of doing it. g

I do not see any error in the summing-up of the judge or in the award of the jury. I would dismiss this appeal. h

MEGAW LJ. On most of the issues which arise in this appeal I agree entirely with what has been said by Lord Denning MR. i

So far as concerns the libel, the defendants, by their notice of appeal, originally included as one of the grounds that the verdict of the jury was perverse and unreasonable. That ground, not surprisingly, was not pursued on behalf of the defendants in this court. That being so, counsel for the defendants fairly and necessarily recognised that it would not avail his clients to take this court in detail through the evidence

a which had been given before the learned judge and the jury in order to try to persuade us that this court, had it been the jury, would have arrived at a different verdict. From what I have seen of the evidence, I think it would be fair to say that it is a case where quite clearly there was a very real and live issue of fact. But the jury saw and heard the witnesses and the jury came to a conclusion. Therefore if it were the case that anyone in this court took the view, by reading the evidence, that he, had
b he been a member of the jury, would have been likely to arrive at a different view from that at which the jury did arrive, it would not matter at all. It would not avail the defendants, for the jury were the tribunal of fact; the jury saw and heard the witnesses, and the jury have given their verdict. The only ground on which the new trial for which the defendants ask could be ordered on the issue of libel would be if it could be shown that there had been some material misdirection by the learned
c judge in directing the jury. In my view, without going in detail into the various points that have been raised—and they have been already dealt with by Lord Denning MR in terms with which I entirely agree—this direction by the learned judge to the jury is not capable of any criticism as erring in any material respect in relation to the issues that arose with regard to libel. That being so, so far as libel is concerned, this appeal must fail.

d There is, however, one matter on which I feel at any rate a good deal less confident. That relates to the relatively minor issue with regard to the claim under the Copyright Act 1956. That claim resulted in damages in a sum of £100 being awarded by the jury on the basis that the defendants had infringed s 43 of the Act by affixing another person's name, namely the name of the plaintiff, to a work of which that person, the plaintiff, was not the author.

e The work in question was the first of the two articles, the article which is complained of as defamatory, published in the News of the World on 20th April 1969. In that article the headline, in large type, is followed by the words, in smaller type, 'By Dorothy Squires'; and that is followed again in less dark and obvious type with the words 'talking to Weston Taylor'. When one looks at the article itself, it would not be quite correct to say that it is all set out in the first person as though it were
f directly written or spoken by Miss Squires herself. The text of the article starts with quotation marks: it contains two paragraphs in quotation marks written in the first person. It then goes on—this is simply by way of example—to contain a paragraph which is not within quotation marks, in which Dorothy Squires is referred to in the third person. It was at any rate possible to argue that, looking at that article as a whole, including the words 'talking to Weston Taylor' in the heading, and the form in which it was set out, it was not a case which fell within s 43 of the
g Act. But that matters no longer because the question whether or not it did amount to a breach of the statutory duty imposed by s 43 of the Copyright Act 1956 was properly left to the jury with a proper direction by the learned judge and was decided by the jury adversely to the defendants. No complaint is or can be made about that part of the judge's direction, and therefore it now has to be accepted that there was that breach of statutory duty by the defendants.

h The question which I find more difficult is whether in this case it is right that the plaintiff should have been awarded any more than nominal damages for that breach of statutory duty. I agree fully with Lord Denning MR that s 43, having regard to the provisions of sub-ss (1) (a), (8) and (10), and particularly the proviso to sub-s (10), enables an action such as this to be brought and damages to be given if liability is established; and damages are not precluded by the fact that damages are also given
i for libel in respect of the same article or the same words. I disagree in no respect from Lord Denning MR on that question of principle. What does concern me is whether, in this particular case, on the pleadings as they stood, there was any scope left, over and above the jury's award of damages for the libel, for more than merely nominal damages for the breach of statutory duty in respect of wrongful attribution of name. The statement of claim in para 6 contains the normal allegation in libel,

that the defendants falsely and maliciously wrote and printed and published; and then the whole of the words of the article are set out, including the hearing, including the words 'By Dorothy Squires talking to Weston Taylor'. Then in para 7 it is said: a

'In addition to their literal meaning, the said words set out in paragraphs 5 and 6 above by reason of the context in which they were published bore the natural and ordinary and inferential meaning that the Plaintiff was an embittered and unprincipled woman who had deliberately prepared and sold for a substantial sum of money a series of articles for publication in the said newspaper in a sensational form.' b

In other words, that paragraph of the pleading, as I understand it, embodies, as it were, every word of the article, including the attribution of authorship, whatever it meant. The claim then is that the plaintiff has been damaged by the defamation in that article, because it means, first, that she was an embittered and unprincipled woman; and, secondly, that she was one who had deliberately prepared and sold *this article* (including its attribution of authorship) for publication in this manner. To my mind, on that pleading the libel which is alleged, and properly alleged, already covers everything that could be covered in respect of the wrongful attribution of the article, if the jury held that it was indeed wrongly attributed. It is perfectly true, as Lord Denning MR has said, that in the course of the argument I threw out the suggestion that what may have happened here is that the jury thought the appropriate sum of damages for the wrong done to the plaintiff, taken as a whole, should be compensated by the sum of £4,400. 'Now let us, the jury, divide that up and we will divide it as to £4,300 to one head and as to £100 to the other.' It may be that was so; but on reflection I think it would be wrong as against the defendants to make such an assumption. Therefore, so far as I am concerned, I should have been minded to say that the award of damages of £100 in respect of the breach of statutory duty under the Copyright Act 1956 could not be sustained and that the damages under that head should have been nominal only. But having regard to the fact that Lord Denning MR takes a different view, and as I understand it, Stephenson LJ who has still to deliver judgment agrees with him on that matter, I am not prepared formally to dissent on that issue. On all the other issues I agree, affirmatively, that the appeal fails. c
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STEPHENSON LJ. I agree for the reasons already given that this appeal must be dismissed. The jury were entitled to believe the plaintiff and disbelieve the second defendant on the one crucial issue whether she consented to publication of the information contained in the article of 20th April 1969. Counsel for the defendants has failed to persuade me that there was any material misdirection of fact or law in a full and fair summing-up. There were left out of the summing-up, as out of every summing-up which deserves the name, some of the things which one party and probably both parties would have liked put in; but there was no omission that could have led to misunderstanding or injustice. I should add that in my view we ought not to encourage a plea of s 5 of the Defamation Act 1952 in every defence to a claim for libel or slander, still less a plea of a breach of s 43 of the Copyright Act 1956 in every statement of claim for libel. But I agree that if s 5 of the 1952 Act is likely to be relied on, it ought to be pleaded—and this was such a case—and a false attribution of authorship ought to attract some additional damages in a proper case, but only in a proper case—and this was just, but only just, such a case. g
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Appeal dismissed.

Solicitors: *J Elliott Brooks & Co* (for the defendants); *M A Jacobs & Sons* (for the plaintiff).

Wendy Shockett Barrister.

Hazell v Hazell

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, MEGAW AND STEPHENSON LJJ

15th, 16th DECEMBER 1971

Husband and wife – Property – Matrimonial home – Both parties contributing to purchase – Direct and indirect contributions – Contribution by wife to family income – House acquired in husband's name by means of loans from his parents and building society – Husband paying mortgage instalments – Husband and wife deciding that wife should go out to work following acquisition of home to help meet increased expenditure – Husband at same time cutting housekeeping allowance to wife – Wife's earnings used for her own and children's clothing and to supplement housekeeping allowance – Wife claiming share in matrimonial home – Whether wife's contributions referable to acquisition of home – Whether relevant that husband could have paid mortgage instalments without wife's contribution.

The parties married in 1942, and had three children born in 1942, 1945 and 1954 respectively. In 1951 the matrimonial home was purchased in the husband's name for £1,850. The purchase price was provided by the husband in part by a loan from his parents amounting to £370 and in part by a loan from a building society of £1,480. Before moving into the house the husband had paid the wife £5 a week housekeeping money out of which she had to pay £1 2s rent a week leaving £3 18s spending money. Following the purchase of the house the parties discussed how the increased expenditure should be met. It was agreed that the wife should go out to work to help and the husband reduced her housekeeping money to £3 10s a week, a figure at which it remained for the rest of their married life. The wife started work at £5 per week out of which she had to pay £1 10s a week for someone to look after one of the children. The balance was used, together with the housekeeping money provided by the husband, for clothing for herself and the children. In 1954, when the youngest child was born, the wife gave up work and stayed at home for four or five years, after which she went out to work again. At about this time the upper flat of the matrimonial home became free from a rent controlled tenancy. It was furnished and let at a rent of £3 10s a week, later £5, which was always paid to the husband. From 1957 until 1966 the wife was at work and earned from £7 to £11 a week. Out of this she provided for her own and her daughter's clothing and paid for housekeeping expenses to supplement the £3 10s provided by the husband. In 1966 the wife left the house and in 1970 the marriage was dissolved on the ground of the wife's desertion. In proceedings under the Married Women's Property Act 1882 the wife claimed to be entitled to a share in the matrimonial home. The judge rejected the claim finding that there was no express or implied agreement to give her a share. He held that the wife's contributions to the family expenses were not referable to the acquisition of the house, since the evidence did not show that the husband could not have obtained the mortgage and paid the instalments on it without that contribution. He rejected, however, a claim by the husband that it was purely coincidental that the wife first went out to work when they moved to the matrimonial home and found that 'there must obviously have been some discussion as to how the increased expenses were to be met'. The wife appealed.

Held – (i) In order to entitle the wife to a share in the proceeds of the matrimonial home it was unnecessary to show an agreement, express or implied, that the wife should have a share; it was sufficient if the contributions made by the wife to the family expenses were such as to relieve the husband from expenditure which he would otherwise have had to bear, thereby helping him indirectly with the mortgage expenses; it was unnecessary to show that if the wife had not made her contribution

the husband would have been totally unable to carry out his payments towards the acquisition of the home (see p 925 g, p 926 g and h and p 928 f and j, post). a

(ii) It could not be argued that the wife's contributions were not referable to the acquisition of the house; there was a positive finding by the judge that the wife had gone out to work because the husband would otherwise have found his liabilities on the new house difficult to meet; (per Megaw LJ) it was unnecessary to show that on each occasion when the wife paid her contribution to the household expenses she had positively and affirmatively in mind the intention that that particular sum should help towards the acquisition of the matrimonial home; it was sufficient if, when the contribution began to be made, a reasonable husband would necessarily have realised that her intention in so doing was to make a contribution for that purpose; when that was the initial intention the contribution continued to be for the same purpose until such time as it could be reasonably shown that something had occurred to give the contribution a different purpose or effect (see p 927 c and p 928 c to e and j, post). b

(iii) Accordingly, in view of her contribution to the family expenses, the wife was, in the circumstances, entitled to a one-fifth share of the total value of the house and the appeal would be allowed (see p 927 d and e and p 928 h and j, post). c

Dicta of Lord Reid and Lord Pearson in *Gissing v Gissing* [1970] 2 All ER at 782, 788, of Lord Denning MR in *Falconer v Falconer* [1970] 3 All ER at 452 and *Hargrave v Newton* [1971] 3 All ER 866 applied. d

Notes

For property purchased partly with wife's money, see 19 Halsbury's Laws (3rd Edn) 841, 842, para 1372, and for cases on the beneficial ownership of the matrimonial home, see Digest (Cont Vol A) 692-695, 2130a-2130f. e

Cases referred to in judgments

Cracknell v Cracknell [1971] 3 All ER 552, [1971] P 356, [1971] 3 WLR 490.

Falconer v Falconer [1970] 3 All ER 449, [1970] 1 WLR 1333, Digest (Cont Vol C) 435, 2130aca. f

Gissing v Gissing [1970] 2 All ER 780, [1971] AC 886, [1970] 3 WLR 255, Digest (Cont Vol C) 436, 213ag.

Hargrave v Newton (formerly *Hargrave*) [1971] 3 All ER 866, [1971] 1 WLR 1611.

Appeal

This was an appeal by the wife, Gwendolyn Margaret Hazell, against the judgment of deputy Judge Rafferty in the Willesden County Court on 30th March 1971 whereby it was adjudged that the wife was not entitled to a beneficial interest in the net purchase of the former matrimonial home. By her notice of appeal the wife sought an order that the judgment be set aside and that the husband, Eric Reginald Hazell, be ordered to pay to the wife one-fifth, or other such fraction as might be just, of the net purchase money of the former matrimonial home. The facts are set out in the judgment of Lord Denning MR. g

W R Marshall for the wife. h

D M Hogg for the husband.

LORD DENNING MR. The parties married in 1942. There are three children aged 29, 26 and 17. The parties separated in 1966. They were divorced in 1970.

In 1951 they were in unfurnished rented accommodation. It was too small for them. They decided to buy a house if they could. The wife went round looking at houses. They found 26 Holland Road, Harlesden. The price was £1,850. The house was taken in the husband's name. He provided the purchase price, obtaining it in part by a loan from his parents of £370 and in part by a loan from a building society of £1,480. They had a discussion as to how the increased expenditure should be met. It was agreed that she should go out to work to help. For the next two i

a years the wife went out to work for the local grocers. She earned £5 a week. Out of it she paid a mother's help 30s a week and used the rest for housekeeping expenses, including clothing for herself and the children. The husband (who had previously given her £3 18s housekeeping money a week) reduced it to £3 10s a week when she went out to work. He kept it at £3 10s a week for the rest of their married life. She asked several times for more, but he replied that he could not afford it.

b There was a top floor in the house which was originally occupied on a rent controlled letting, but it became empty. The wife decided to furnish it. They let it furnished at £3 10s a week, rising later to £5 a week. The husband took these rents and used them, no doubt, to pay the mortgage instalments and so forth. But he never increased the housekeeping money of £3 10s a week to the wife.

c In 1954 they had their third child. The wife stayed at home for four or five years whilst the child was small. Then she went out to work again, at first part-time and afterwards full-time at wages which rose from about £7 to £11 a week. Out of her earnings she provided for her own clothing and the daughter's and she paid for housekeeping expenses so as to supplement the £3 10s provided by the husband. The husband never told her what his earnings were. His wages must have increased from time to time, but he never increased the housekeeping money of £3 10s. This was 'niggardly' of him, said the judge.

d In 1966 they separated. The wife left the house. The husband stayed in it, paying the outgoings. In 1970 the wife applied under the Married Women's Property Act 1882, claiming that she was entitled to a share in the house. The judge found that she was not entitled in law to any share in it, but that, if he was wrong, he would put it at one-fifth. The wife appeals to this court.

e The judge seems to have thought that, in order to entitle the wife to a share, she had to show an express or implied agreement to give her a share. He found there was no such agreement. He said:

f 'I am satisfied however that there was no express agreement that her contribution to the family income would entitle her to any beneficial interest in the house and she does not claim that there was any such agreement. Nor, in the circumstances, do I think it would be at all realistic to imply any such agreement from the conduct of the parties ...'

g I think the judge was wrong in thinking that the wife had to show some express or implied agreement to give her a share. That is a misreading of *Gissing v Gissing*¹. She may get a share by reason of her contributions, even though there is no agreement, express or implied.

h The judge found that the wife went out to work in order to help, and he found that her contribution must have been very useful. The husband said in evidence that it was a mere coincidence that she started going out to work when they got the house; but the judge did not accept this. He said:

i 'I cannot accept that it was purely coincidental that the wife first went out to work when the family moved to no 26 and there must obviously have been some discussion as to how the increased expenses were to be met.'

Nevertheless the judge found that her contributions did not entitle her to a share in the house; because they were not referable to the acquisition of the house. He quoted these two paragraphs of Lord Diplock's speech in *Gissing v Gissing*²:

'Difficult as they are to solve, however, these problems as to the amount of the share of a spouse in the beneficial interest in a matrimonial home where the legal estate is vested solely in the other spouse, only arise in cases where the court is

1 [1970] 2 All ER 780, [1971] AC 886

2 [1970] 2 All ER at 793, [1971] AC at 909

satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other. a

'Where the wife has made no initial contribution to the cash deposit and legal charges and no direct contribution to the mortgage instalments nor any adjustment to her contribution to other expenses of the household which it can be inferred was referable to the acquisition of the house, there is in the absence of evidence of an express agreement between the parties, no material to justify the court in inferring that it was the common intention of the parties that she should have any beneficial interest in a matrimonial home conveyed into the sole name of the husband, merely because she continued to contribute out of her own earnings or private income to other expenses of the household. For such conduct is no less consistent with a common intention to share the day-to-day expenses of the household, while each spouse retains a separate interest in capital assets acquired with their own moneys or obtained by inheritance or gift. There is nothing here to rebut the prima facie inference that a purchaser of land who pays the purchase price and takes a conveyance and grants a mortgage in his own name intends to acquire the sole beneficial interest as well as the legal estate; and the difficult question of the quantum of the wife's share does not arise.' b

The judge observed that the facts in *Gissing v Gissing*³ were very similar to those in this present case. He took the test as being whether the wife's contributions 'were referable to the acquisition of the house'. He thought that her contributions would only be so referable if the husband could not have bought the house without them. He said: c

'I do not think in the circumstances of this case that the contribution made by the wife to the well-being of the family can be rightly said to be referable to the acquisition of no 26 for the evidence does not satisfy me that the husband could not have obtained the mortgage and paid the instalments on it without this contribution ...' d

Counsel for the husband, in his excellent argument before us, agreed that indirect contributions could give a wife a share in the house; but he insisted that they must be referable to the acquisition of the house. Since the judge's decision, however, we have considered those words in *Hargrave v Newton*⁴; and I hope that in future we shall not hear so much of them. It is sufficient if the contributions made by the wife are such as to relieve the husband from expenditure which he would otherwise have had to bear. By so doing the wife helps him indirectly with the mortgage instalments because he has more money in his pocket with which to pay them. It may be that he does not strictly need her help—he may have enough money of his own without it—but, if he accepts it (and thus is enabled to save more of his own money), she becomes entitled to a share. In support of this I would refer not only to the speech of Lord Reid in *Gissing v Gissing*⁵ (which was quoted by Megaw LJ in *Hargrave v Newton*⁶) but also to two sentences by Lord Pearson in *Gissing v Gissing*⁷, where he said: e

'Contributions are not limited to those made directly in part payment of the price of the property or to those made at the time when the property is conveyed into the name of one of the spouses. For instance there can be a contribution if f

3 [1970] 2 All ER 780, [1971] AC 886

4 [1971] 3 All ER 866, [1971] 1 WLR 1611

5 [1970] 2 All ER at 782, [1971] AC at 896

6 [1971] 2 All ER at 869, [1971] 1 WLR at 1613

7 [1970] 2 All ER at 788, [1971] AC at 903 g

a by arrangement between the spouses one of them by payment of the household expenses enables the other to pay the mortgage instalments.'

It was because of those passages in the speeches of Lord Reid⁸ and Lord Pearson⁹ that I summarised the position in *Falconer v Falconer*¹⁰:

b 'It may be *indirect*, as where both go out to work, and one pays the house-keeping and the other the mortgage instalments. It does not matter which way round it is. It does not matter who pays what. So long as there is a substantial financial contribution to the family expenses, it raises the inference of a trust.'

I am quite aware that some of the other speeches in *Gissing v Gissing*¹¹ are to a different effect; so that we have to choose between them. I think we should follow those of Lord Reid⁸ and Lord Pearson⁹.

c In the present case there is a positive finding that the wife went out to work because otherwise the husband would have found his new liabilities on the house difficult to meet. Stephenson LJ suggested that it might be inferred that her contributions were referable to the acquisition of the house. That seems to be sufficient ground from which the court could and should impute a trust. It would be inequitable for the husband to take the whole when she has helped him so much to acquire it. So I
d would reverse the decision of the judge and hold that the wife is entitled to a share in the house. Then the question is, what share? The judge dealt with this. He said that if he were wrong in holding that the wife had no interest, he would put her share at one-fifth of the total value of the house. In reaching this figure, he thought that the husband had contributed much more than the wife, and he took into account the fact that the wife herself left the house five years before, and that the husband
e had paid all the instalments ever since, and no doubt the house had increased in value in this time. That is a good reason for saying that she should not have one-half or anything near it: see *Cracknell v Cracknell*¹². I would not, therefore, differ from the judge's assessment of one-fifth. The house has now been sold. The net proceeds are £6,968.

f I would therefore allow the appeal, set aside the judgment, and award the wife one-fifth of the net purchase moneys.

MEGAW LJ. I agree. Counsel for the husband's admirably succinct argument started with acceptance of this proposition: where there is a substantial indirect contribution referable to the acquisition of the matrimonial home, there is a pre-
g sumption of an imputed trust. It is a rebuttable presumption. Counsel for the husband then sought to defend the judgment appealed from by reference first to the proposition that in the present case there was no substantial indirect contribution by the wife. That argument I think cannot succeed because of the findings of the deputy county court judge in the last sentence of his judgment, in which he says:

h 'I do not think it would be right to say the [wife's] contribution to the family expenses was not substantial.'

When one cancels out the double negative there, the effect is a finding that the wife's contribution was substantial.

j Counsel for the husband's second and principal point was that the formula which he had accepted did not enable the wife to succeed because the indirect contribution thus made by her, although substantial, was not referable to the acquisition of

8 [1970] 2 All ER at 782, [1971] AC at 896

9 [1970] 2 All ER at 788, [1971] AC at 903

10 [1970] 3 All ER 449 at 452, [1970] 1 WLR 1333 at 1336

11 [1970] 2 All ER 780, [1971] AC 886

12 [1971] 3 All ER 552, [1971] P 356

the matrimonial home. As I understand it, the principle of the indirect contribution can be extracted from a very few words of Lord Reid's speech in *Gissing v Gissing*¹³. The contributions are sufficient to establish this imputed trust where—and here I quote the words from Lord Reid's speech—

'her contributions are only indirect by way of paying sums which the husband would otherwise have had to pay . . .'

There is a finding of fact in this case to which Lord Denning MR has referred, where the judge says:

'I cannot accept that it was purely coincidental that the wife first went out to work when the family moved to [the matrimonial home] . . .'

Again if that is turned into the positive statement which I think it necessarily connotes, the judge was finding that the conduct of the wife in going out to work was in order to bring in a contribution to the expenses which were going to be incurred because of, and in connection with, the acquisition of the matrimonial home. It would be wrong in my judgment to suggest that in order to make an indirect contribution relevant, it had to be shown that on each occasion when the wife paid her £3 towards housekeeping, or whatever it might be, she had positively and affirmatively in mind the intention that that particular sum should help towards the acquisition of the matrimonial home. It is sufficient if, when the contribution begins to be made, as here, when the wife went out for the first time to work, a reasonable, sensible husband would necessarily have realised that her intention in so doing was to make such a contribution for that purpose. When that is the intention initially, it continues thereafter to be a contribution for the same purpose so long as the contributions do continue from that source until such time as it can be shown reasonably and sensibly that something has occurred to give the contribution a different purpose or effect.

It would also in my view be wrong to say that the law requires that before an indirect contribution can be relevant, it must be shown by the wife that if that contribution had not been made the husband would have been totally unable to carry out his payments towards the acquisition of the house. That, to my mind, is an unreal and impossible burden. I do not think that any of the passages to which we have been referred, particularly in the speeches in *Gissing v Gissing*¹⁴, were spoken with any such point in mind or were intended to lay down any such rule. It would in practice, in my view, be impossible to apply. It would involve investigation of such questions, really reducing the whole proposition to an absurdity, as whether the husband, if the wife had not made this contribution to the housekeeping, could have cut down his smoking or drinking or could have sold his car so as to incur less expenses in that way in order to provide the money which the wife in fact provided by her contribution; whether he could have borrowed the money from a money-lender or relative and other such questions. In my judgment it is sufficient if as a matter of common sense the wife's contribution ought to be treated as being a contribution towards the expenses of the acquisition of the matrimonial home.

I agree that this appeal should be allowed, and I agree with the order proposed by Lord Denning MR as to the proportion to which the wife is entitled.

STEPHENSON LJ. I agree and have nothing to add.

Appeal allowed.

Solicitors: *Leggatt & Leggatt* (for the wife); *Cyril Chody & Co*, Kenton (for the husband).

L J Kovats Esq Barrister.

¹³ [1970] 2 All ER at 782, [1971] AC at 896

¹⁴ [1970] 2 All ER 780, [1971] AC 886

R v Thorpe

COURT OF APPEAL, CRIMINAL DIVISION

LORD WIDGERY CJ, PHILLIMORE LJ AND LAWSON J

14th JANUARY 1972

Road traffic – Dangerous driving – Causing death by dangerous driving – Evidence of alcohol consumed by driver – Admissibility – Evidence of blood-alcohol concentration exceeding prescribed limit under the Road Safety Act 1967 – Road Traffic Act 1960, s 1.

The appellant was charged on two counts of an indictment with (1) causing death by dangerous driving contrary to s 1^a of the Road Traffic Act 1960, and (2) driving with a blood-alcohol proportion exceeding the prescribed limit contrary to s 1 (1)^b of the Road Safety Act 1967. He pleaded guilty to count 2 and not guilty to count 1. At his trial the judge ruled that the appellant's plea of guilty on count 2 and the alleged proportion of alcohol in his blood (130 milligrammes per 100 millilitres) could be disclosed to the jury. There was evidence from which the jury could have inferred that the car was being driven at an excessive speed at the relevant time. He was convicted on count 1 and appealed on the ground that the alleged proportion of alcohol in his blood should not have been disclosed.

Held – Evidence that a driver charged with causing death by dangerous driving had, prior to the accident, been drinking was admissible provided that it went far enough to show that the quantity of alcohol consumed was such that it might adversely affect a person driving; proof that the alcohol content of the blood of a person driving exceeded 80 milligrammes per 100 millilitres (the prescribed limit) was sufficient to show that the quantity of alcohol consumed was such that it might adversely affect a person driving, and was therefore admissible, whether or not, in the case of a particular person driving, the quantity of alcohol might or might not have affected him. Accordingly the evidence had been properly admitted and the appeal would be dismissed (see p 931 c h and j, post).

R v McBride [1961] 3 All ER 6 applied.

Notes

For causing death by dangerous driving, see 33 Halsbury's Laws (3rd Edn) 622, para 1047, and for cases on the subject, see 45 Digest (Repl) 87, 293-298.

For the Road Traffic Act 1960, s 1, see 28 Halsbury's Statutes (3rd Edn) 224, and for the Road Safety Act 1967, s 1, see *ibid* 459.

Case referred to in judgment

R v McBride [1961] 3 All ER 6, [1962] 2 QB 167, [1961] 3 WLR 549, 125 JP 544, 45 Cr App Rep 262, 45 Digest (Repl) 87, 294.

Appeal

This was an appeal by Neal Thorpe against his conviction on 10th March 1971 at Newcastle Assizes before O'Connor J and a jury of causing death by dangerous driving contrary to s 1 of the Road Traffic Act 1960 (count 1). He had pleaded guilty to the charge on count 2 of the indictment of driving with a blood-alcohol

^a Section 1, so far as material, provides: '(1) A person who causes the death of another person by the driving of a motor vehicle on a road recklessly, or at a speed or in a manner dangerous to the public... shall be liable on conviction on indictment to [a penalty].'

^b Section 1 (1), so far as material, provides: 'If a person drives... a motor vehicle on a road... having consumed alcohol in such a quantity that the proportion thereof in his blood... exceeds the prescribed limit... he shall be liable... (b) on conviction on indictment, to a fine or imprisonment...'

proportion above the prescribed limit contrary to s 1 (1) of the Road Safety Act 1967. He was sentenced to a fine of £75 on each count and was disqualified for seven years. He appealed pursuant to a certificate of the trial judge under s 1 (2) of the Criminal Appeal Act 1968, on the ground that on the trial of causing death by dangerous driving on count 1, the fact that the appellant had pleaded guilty to count 2 of the indictment i.e. driving with a blood-alcohol proportion over the prescribed limit and the degree of blood-alcohol concentration there alleged should not have been disclosed to the jury. The facts are set out in the judgment of the court.

W H R Crawford for the appellant.

R A Percy for the Crown.

LORD WIDGERY CJ delivered the judgment of the court. The appellant pleaded guilty at Newcastle Assizes to driving a motor vehicle with a blood-alcohol concentration above the limit prescribed by the Road Safety Act 1967, the amount of alcohol in his blood being 130 milligrammes per 100 millilitres of blood. He was also at the same time charged with causing death by dangerous driving; to that he pleaded not guilty and he was tried and convicted. The fact of his plea of guilty and the amount of the alcohol concentration in the blood was known to the jury which tried him on the charge of causing death by dangerous driving. It was known to them because they were in court when the plea was taken and it was quite openly discussed in the course of the trial and referred to in the summing-up. In this court the appellant appeals against his conviction for causing death; he does so on a certificate of the trial judge who certified that the matter was fit for appeal, there being an issue whether the facts of the appellant's plea of guilty to the second count, that is to say the blood-alcohol concentration count and the degree of blood-alcohol concentration therein alleged, should have been disclosed to the jury.

I do not find it necessary to go into the facts of this case to any degree. It really suffices to say that on an afternoon in September at about 3.30 p.m. in a built-up area a four year old girl was knocked down and killed by a Ford Zephyr car driven by the appellant. There was evidence before the jury from which they could have inferred that the car was being driven at an excessive speed immediately prior to the accident. Such evidence consisted of the testimony of witnesses who had seen, I think, in one instance black smoke coming from the rear wheels of the car as it braked before the occurrence, and also evidence as to marks on the road indicative again of a speed of not less than 45 miles an hour. I say no more about the facts because we are here concerned simply with the question of law whether it was proper for the jury to be informed of the fact that the appellant's blood contained alcohol to a degree above the limit prescribed by the Road Safety Act 1967.

The same question arose in 1961 before laboratory specimens were a common factor in cases of this kind and before there was any standard laid down as to the quantity of alcohol in a person's blood which should or should not in itself amount to an offence. The question raised in *R v McBride*¹ was very similar to the one raised in the present case. It was again a case where a man had been charged with causing death by dangerous driving, and the question for the five judges who constituted the court on that occasion was whether it was admissible on such a charge to prove that the accused had been drinking shortly prior to the event. The principle enunciated by that strong court is given in the judgment of the court read by Ashworth J, where he said²:

'In the opinion of this court, if a driver is adversely affected by drink, this fact

¹ [1961] 3 All ER 6, [1962] 2 QB 167

² [1961] 3 All ER at 9, [1962] 2 QB at 172

a is a circumstance relevant to the issue whether he was driving dangerously. Evidence to this effect is of probative value and is admissible in law. In the application of this principle two further points should be noticed. In the first place, the mere fact that the driver had had drink is not of itself relevant: in order to render evidence as to the drink taken by the driver admissible, such evidence must tend to show that the amount of drink taken was such as would adversely affect a driver or, alternatively, that the driver was in fact adversely affected.

The principle which is enshrined in that paragraph is quite clearly this. It would be prejudicial and not probative for the prosecution to seek to show merely that the accused had been in a public house on the evening in question or had been seen with a glass of beer in his hand. If evidence of that kind were allowed to be admitted it might prejudice the mind of the jury and it would have no probative value at all. What this court was saying in *R v McBride*³ was that such evidence is not admissible unless it goes far enough to show that the quantity of alcohol taken is such that it may have some effect on the way in which the person drives. In those days without the sophisticated devices of breathalysers and laboratory tests the way to express that principle was that used in the judgment of the court. Now we can bring that principle up to date, because we now have a well-known method of testing the quantity of alcohol in the person's blood and thus of testing indirectly the quantity which he has consumed, and in applying the principle of *R v McBride*³ we must take advantage of those modern developments.

The question really resolves itself into this: if a person driving is shown to have more than 80 milligrammes of alcohol per 100 millilitres of blood, does that show a sufficient consumption of alcohol to tend to show that the amount of drink taken was such as would adversely affect a driver. I take those last few words, as will be observed, from the judgment of Ashworth J. If it is proved that the alcohol content of the blood of a person driving exceeds 80 milligrammes per 100 millilitres, is that evidence which tends to show that the amount of drink taken was such as would adversely affect a person driving?

Counsel for the appellant, who has assisted the court greatly in his argument, says 'No' to that question because he says that it is well known that the effect on a person of a given quantity of alcohol may differ between one person and another. But I observe that it is not laid down in *R v McBride*³ that it must be shown that the quantity of alcohol would necessarily affect any driver. What is required is to consider whether it is of such a volume as would affect drivers generally or, as the trial judge puts it, affect 'a driver'.

I have no doubt myself that if it is proved that the alcohol content of the blood of a person driving exceeds 80 milligrammes per 100 millilitres, the point has been reached when the consumption of alcohol is such that it can affect a person driving and I say that in full consciousness of counsel for the appellant's argument that, if one took a particular person driving, that quantity of alcohol might or might not have affected him. The point as we see it is that the proof of excess over 80 milligrammes is enough to bring the evidence within that which this court sanctioned in *R v McBride*³.

A further point is taken as to the way in which the trial judge used the evidence, having admitted it, but I find no substance in that, and I do not propose to encumber this judgment by dealing further with the facts of the case. In the judgment of the court the trial judge's ruling on this point was entirely correct, the evidence was properly admitted and the appeal must be dismissed.

3. [1961] 3 All ER 6, [1962] 2 QB 167

Appeal dismissed. Application for a certificate under s 33 (2) of the Criminal Appeal Act 1968 for leave to appeal to the House of Lords refused. a

Solicitors: Registrar of Criminal Appeals (for the appellant); A J Olson, Durham (for the Crown).

N P Metcalfe Esq Barrister.

R v Inner London Area (West Central Division) Betting Licensing Committee, ex parte Pearcy c

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND GRIFFITHS JJ

17th DECEMBER 1971

Gaming – Betting – Licensed betting office – Application for licence – Notice advertising making of application – Validity – Content of notice – Notice containing matter additional to that required by statute – Notice printed with note stating that premises already operating as a licensed betting office – Whether additional matter invalidating notice – Whether licensing committee having jurisdiction to hear application – Betting, Gaming and Lotteries Act 1963, Sch 1, para 6. d

The applicant applied to the respondent betting licensing committee for a betting office licence under the Betting, Gaming and Lotteries Act 1963. In accordance with para 6^a of Sch 1 to that Act he had inserted an advertisement in a newspaper indicating that he had made application to the respondent committee for the grant of a betting office licence in respect of a company, thus giving an opportunity for anyone reading the notice to raise an objection to the granting of the licence. However, at the end of the notice was added the sentence: 'N.B. These premises are already operating as a Licensed Betting Office.' The respondent committee declined to hear the application, considering that it had no jurisdiction to hear it in that the added sentence rendered the statutory notice defective. On an application for mandamus directing the respondent committee to hear and determine the application according to law, e

Held – Since the 1963 Act contained no prohibition on the inclusion of additional matter in the notice advertising the application, there was no reason why, provided that the positive requirements of Sch 1 to the 1963 Act were complied with, an unnecessary addition should invalidate the notice unless that addition prevented the notice having its full force and effect. As no possible reduction of the effectiveness of the notice could result from the words following 'N.B.', there was no reason for regarding the notice as being ineffective; it was immaterial that by including the additional words indicating that the premises were a licensed betting office the applicant might unwittingly have committed an offence under s 10 (5)^b of the 1963 Act. Accordingly the respondent committee had jurisdiction to consider the application, and an order of mandamus would be granted (see p 935 d g and h, post). g

R v Leicester Gaming Licensing Committee, ex parte Shine [1971] 3 All ER 1082 distinguished. h

Notes j

For the advertisement of applications for betting office licences, see Supplement to 18 Halsbury's Laws (3rd Edn) para 392D, 4.

a Paragraph 6, so far as material, is set out at p 934 a and b, post

b Section 10 (5), so far as material, is set out at p 935 f, post

a For the Betting, Gaming and Lotteries Act 1963, s 10, Sch 1, para 6, see 14 Halsbury's Statutes (3rd Edn) 553, 606.

Case referred to in judgment

R v Leicester Gaming Licensing Committee, ex parte Shine [1971] 3 All ER 1082, [1971] 1 WLR 1648.

b Motion for mandamus

This was an application by Thomas Ellis Percy for an order of mandamus directed to the respondent betting licensing committee for the Inner London Area (West Central Division) requiring the respondent committee to hear and determine according to law an application made by the applicant on behalf of a company, A Williams & Sons (London) Ltd, for the grant of a betting office licence in respect of premises at 88 Grafton Road, London NW5. The grounds of the application were that the respondent committee, at its meeting on 20th October 1971, declined to hear the application on the ground that it had no jurisdiction to hear the same because due notice of the making thereof had not been given by advertisement on the premises and in a newspaper circulating in the area, whereas the applicant contended that the advertisements placed on the premises and published in a newspaper did comply in all respects with the material statutory provisions, i.e. paras 5, 6 and 7 of Sch 1 to the Betting, Gaming and Lotteries Act 1963. The facts are set out in the judgment of Lord Widgery CJ.

Quentin Edwards for the applicant.

The respondent committee did not appear and was not represented.

e **LORD WIDGERY CJ.** In these proceedings counsel moves for an order of mandamus directed to the Betting Licensing Committee for the Inner London Area (West Central Division) requiring the respondent committee to hear and determine according to law an application made on 17th September 1971 by the applicant, Mr Percy, on behalf of a company for the grant of a betting office licence in respect of premises known as 88 Grafton Road, London NW5. The respondent committee declined to consider the application because it considered itself to be without jurisdiction in view of what it regarded as a defect in the statutory notices leading to such an application. It is contended before us that the respondent committee misdirected itself in law, that there is no such defect in the notice and accordingly that the respondent committee should have adjudicated on the application in the ordinary way.

f The application in question was under the Betting, Gaming and Lotteries Act 1963 in respect of a betting office licence. The procedure for making application for a betting office licence is to be found in Sch 1 to the Act. In particular, the sections of the schedule beginning with para 3 are headed 'Applications for grant of permit or licence'. One finds in para 3 of the schedule that the authority is to fix a day in each of specific months in which to consider applications; in para 3 there is provision for the making of application by anyone who wishes to have a betting office licence. Paragraph 5 provides:

j 'Any such application as aforesaid may be made at any time and shall be made to the clerk to the appropriate authority in such form and manner, and shall contain such particulars, and, if the application is for a permit, give such references, as may be prescribed.'

Then there is further provision in para 5 for sending a copy of the application to the appropriate officer of police and the local authority.

No question arises in the present case as regards the application itself, which was made on the proper form submitted to the proper authorities and made in proper

time; it is the advertisement of the application which is the subject of criticism by the respondent committee. The advertisement is dealt with in para 6 of Sch 1:

'Not later than fourteen days after the making of any such application as aforesaid to the appropriate authority, the applicant shall cause to be published by means of an advertisement in a newspaper circulating in the authority's area a notice of the making of the application which shall also state that any person who desires to object to the grant of the permit or licence should send to the clerk to the authority, before such date not earlier than fourteen days after the publication of the advertisement as may be specified in the notice, two copies of a brief statement in writing of the grounds of his objection.'

There is further provision for a similar notice being placed on the door of the premises. Everything in the present application hinges on the nature of the notice advertised by the applicant in intended performance of the obligations in para 6. The notice which was put into the newspaper and which also was posted on the door is copied for the court and it provides that:

'NOTICE IS HEREBY GIVEN that on the 17th day of September 1971, I, THOMAS ELLIS PEARCY of 175 Streatham Road, Mitcham, Surrey—duly authorised in that behalf of A. WILLIAMS & SONS (LONDON) LIMITED, whose registered office is situate at 1, Alston Road, London, S.W.17—for and on behalf of the said Company—made application to the Betting Licensing Committee for the Petty Sessional Division of West Central for the grant of a Betting Office Licence in respect of premises at 88 Grafton Road, London, N.W.5 . . .'

It seems to me that no one can doubt that that sentence satisfies the obligation that the advertisement shall contain a notice of the making of the application. The first ten lines or so of the notice are undoubtedly a notice of the making of the application. The notice then goes on strictly in accordance with para 6 to say that any person who desires to object may send notice of his objection to the clerk of the licensing committee at an address, and before a date both of which are mentioned. So far, therefore, it seems to me that the notice used in this case meticulously follows the requirements of para 6. However, underneath the signature at the foot of the notice there appears the following: 'N.B. These premises are already operating as a Licensed Betting Office.' Those words are not contemplated by para 6, and are surplus to the requirements of the paragraph. It was the presence of those words which caused the respondent committee in this case to think that the notice was defective, and indeed so defective as to deprive them of jurisdiction. We are told by counsel for the applicant that the reason why this addition was made is because this is in fact a transfer of a licence from one company to an associated company. The premises are already the subject of a licensed betting office permit, and practice and experience has shown that if in such cases a note is placed at the bottom of the notice that the premises are already used in this way, it prevents people making objections which they would not make if they realised no additional accommodation for use as a betting office was contemplated, so these words have been added with that object. The question for us is whether the inclusion of those words makes the notice invalid to the extent of depriving the respondent committee of jurisdiction. The respondent committee thought that it did, and in reaching that conclusion they were guided by several authorities¹ in this court and in the Court of Appeal dealing with a parallel subject of the grant, renewal and cancellation of gaming licences. These licences are granted under a different Act, namely the Gaming Act 1968, but there is some similarity in the procedure which has to be followed to obtain a gaming licence and

¹ *1e R v Pontypool Gaming Licensing Committee, ex parte Risca Cinemas Ltd* [1970] 3 All ER 241, [1970] 1 WLR 1299; *R v Leicester Gaming Licensing Committee, ex parte Shine*, [1971] 3 All ER 1082, [1971] 1 WLR 1648

e to obtain a betting office permit. In particular, Sch 2 to the 1968 Act sets out the form of application which has to be made for a gaming licence and deals with the advertisement of the application, but this schedule contains in para 6 (4) a provision which has no counterpart in the 1963 Act. Paragraph 6 (4) of Sch 2 to the 1968 Act provides:

b 'A notice published or displayed under this paragraph shall not include any matter which is not required by the preceding provisions of this paragraph to be included in it.'

c There has in consequence been more than one case brought to this court, and in some instances going further to the Court of Appeal, in which a notice under the 1968 Act has been held invalid because it contained some matter additional to that required by the terms of the schedule, and the reason in my judgment why in those cases, of which *R v Leicester Gaming Licensing Committee, ex parte Shine*² is the principal example, the additional matter has rendered the notice invalid is simply because in the 1968 Act it is expressly so provided that such an addition is prohibited.

d The present case is quite different because in the absence of any such prohibition one merely has to go back to the requirements of Sch 1 to the 1963 Act and see if they are complied with, and if they are complied with, there is on the face of it no reason why some unnecessary addition should invalidate the notice unless that addition should prevent the notice having its due force and effect. In the present case no possible reduction of the effectiveness of the notice can result from the words following 'N.B.' and in my judgment they are in no sense a reason for regarding the notice as being ineffective. Counsel, in his duty to the court, has drawn our attention to the fact that there may be other reasons for thinking that the addition of these words was unwise in the present case, because he has referred us to s 10 of the Betting, Gaming and Lotteries Act 1963 which in sub-s (5) makes it an offence for a person—

e 'save in a licensed betting office or in such manner as may be prescribed on premises giving access to such an office, [to publish any advertisement]—(a) indicating that any particular premises are a licensed betting office.'

f He said, and I think he is right, that the words 'N.B. These premises are already operating as a Licensed Betting Office' do amount to an advertisement that those premises are what is there described, a licensed betting office. I think probably he is right when he says his clients have perhaps unwittingly committed a criminal offence under s 10 by reason of the addition of those words. For my part I see no reason why that should militate against the effect of the notice for the purpose for which it is given, namely, for the purpose of Sch 1 to the 1963 Act.

g I sympathise with the respondent committee and understand that they could easily have been misled into thinking that the principles applicable to the legislation under one Act must necessarily be the same under the other. In my judgment that is not so. I think they were wrong; I think they had jurisdiction to consider this application and that the order of mandamus should go.

h **ASHWORTH J.** I agree.

GRIFFITHS J. I also agree.

j *Order for mandamus.*

Solicitors: *F C Roope & Co* (for the applicant).

The Joint Law Officers v *Inner London Betting Committee* N P Metcalfe Esq Barrister.

R v Huchison

COURT OF APPEAL, CRIMINAL DIVISION

LORD WIDGERY CJ, PHILLIMORE LJ AND LAWSON J

20th JANUARY 1972

Criminal law – Sentence – Evidence of other similar offences – Plea of guilty to charge in respect of single incident – Evidence of other similar incidents forming course of conduct – Incest – Admission of single act of incest with daughter – Allegations by daughter of regular intercourse over long period – Denial of other acts of incest by accused – Judge hearing evidence of accused and daughter before passing sentence – Judge not believing accused and sentencing him on basis that incest committed by accused as regular course of conduct – Effect to deprive accused of right to trial by jury – Propriety of course followed by judge.

The appellant pleaded guilty to a single count of incest with his daughter, who was under 16 at the time. He claimed that only one act of intercourse had taken place, but in her depositions the daughter had stated that there had been regular intercourse over a long period. The judge formed the view that he could not sentence the appellant until he had decided which version was correct, so he adjourned the case to hear evidence both from the appellant and his daughter, the complainant. After hearing that evidence, the judge decided that the appellant was not to be believed, and sentenced him to four years' imprisonment on the basis that the incest committed by the appellant had taken place as a regular course of conduct. On appeal,

Held – The course followed by the trial judge had been wrong, for if he thought that he could not do justice in the case by adopting the appellant's admission of one incident and one incident only he ought either to have allowed the prosecution to prefer a voluntary bill charging the other instances as stated by the daughter, or to have allowed the indictment to be amended and then dealt with the whole matter at a later date; accordingly, as the appellant had in effect been deprived of his right to trial by jury in respect of the other alleged offences, the court would allow the appeal to the extent that the sentence would be reduced to one of two years' imprisonment (see p 937 e to g and j, post).

Notes

For matters to be taken into consideration in fixing punishment, see 10 Halsbury's Laws (3rd Edn) 488, 489, para 890, and for cases on the subject, see 14 Digest (Repl) 548-550, 5305-5343.

Appeal

This was an appeal by Edward Roy Huchison against a sentence of four years' imprisonment imposed on him by Paull J at Lewes Assizes on 26th July 1971 after he had pleaded guilty to a single count of incest. The facts are set out in the judgment of the court.

R E Hammerton for the appellant.

PHILLIMORE LJ delivered the judgment of the court. The appellant pleaded guilty on 22nd July 1971 at Lewes Assizes to a single count of incest with his daughter, a girl under 16 at the time. He was sentenced at an adjourned hearing on 26th July to four years' imprisonment.

The position was that he had admitted to one act, but the girl had made a statement in which she had referred to the appellant, her father, making sexual approaches to her from the age of six onwards, to an attempt at intercourse with her when she was about 13, and to another act thereafter in which he succeeded.

a According to her statement he had then taken her out regularly following intercourse, taking her to a night club and to various public houses and giving her presents; then, when his wife left the home, she had moved into his bed and they had had intercourse almost every night up until about February 1970, when he had brought another woman into the house, after which intercourse between herself and the appellant had ceased, and she indeed thereafter had left the house.

b The trial judge felt—and one sympathises with him—that he must make up his mind as to what was the truth of all this, whether the appellant had really only had intercourse on the one occasion with which he was charged and which he admitted, or whether the truth of the matter was as described by the daughter. So on 26th July he proceeded to hear evidence; he heard the appellant, he heard him give evidence-in-chief, cross-examined and re-examined, then he heard the evidence of the daughter. At the conclusion of it all he said this:

c ‘Well, you know, my conclusion is that this story about that one occasion is just not true. I am not saying I am prepared to take [the daughter’s] statement as it stands, but it is perfectly obvious to me that the [appellant] had made a habit of having intercourse with his daughter.’

d He thereafter proceeded to pass this sentence of four years on that occasion, pointing out that this was a disgraceful case.

e What is said by counsel for the appellant is this. He says that the course adopted by the trial judge was wrong. The appellant was in effect deprived of trial by a jury in regard to these additional offences suggested by the daughter; in the result the trial judge heard the evidence, he did not, for example, address his mind, it appears, to the question of whether there was corroboration of all these other incidents, and indeed if there was any corroboration it was extremely slight. Altogether this is quite unsatisfactory. Of course there are cases where the prosecution puts forward a count as a sample count, and in those cases it is well understood that if that course is taken and the defence are notified, a judge is entitled to deal with the whole matter on the basis that the offence in fact was repeated more than once, or there were other similar incidents. But that is not this case; this was put forward as a single offence, and counsel says that in those circumstances the trial judge ought, if he thought he could not do justice in a case by adopting the appellant’s admission of one incident and one incident only, either to have allowed the prosecution to prefer a voluntary bill charging the other instances as stated by the daughter, or to have allowed the indictment to be amended and then to deal with the whole matter at a later date. The court thinks that this contention is right. The course followed by the trial judge was wrong and did in effect deprive the appellant of his right to trial by jury in respect of these other alleged offences.

g So far as the actual sentence is concerned, counsel suggests that since the appellant has now been in prison for some six months, the proper course might be to put him on probation at this stage, and possibly to arrange that he should have medical treatment under s 4 of the Mental Health Act 1959. The court does not think that that is the right course. This was an act of intercourse by a father with his daughter under 16, indeed probably under 14, and the court thinks it was a grave offence and one which on any view must be treated severely. In all the circumstances the court is prepared to reduce this sentence from four years to two years, and to allow the appeal to that extent.

h
i *Appeal allowed. Sentence varied.*

Solicitor: Registrar of Criminal Appeals.

N P Metcalfe Esq Barrister.

Stoker v Stansfield

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND GRIFFITHS JJ

13th DECEMBER 1971

Landlord and tenant – Recovery of possession – Procedure before magistrates – Application to magistrates for warrant – Notice of application – Service of notice – Service on tenant personally – Substituted service where tenant cannot be found – Need to prove due diligence to find missing tenant before substituted service permissible – Small Tenements Recovery Act 1838, s 2.

In 1965 the appellants were granted the tenancy of a council flat. On 3rd April 1971 a valid notice to quit and yield up possession of the premises on 10th May was served by the local authority on the appellants but they did not leave. On 23rd June a notice of intention to make application to the justices to issue a warrant was prepared in accordance with s 1 of the Small Tenements Recovery Act 1838. On the same day, at 10.15 am and 2.30 pm, attempts were made by an agent of the local authority to serve the notice on the appellants personally in accordance with s 2^a of the 1838 Act but on each occasion no reply was received when the agent knocked on the door of the premises. On the second occasion a neighbour told him that the appellants would be back 'fourish'. The agent returned to the premises at 4.15 pm and the same neighbour told him that the appellants had been in and had gone out again and that she did not know when they would be back. No further attempts were made by the local authority to serve the notice on the appellants personally but the notice was posted on a conspicuous part of the premises. The local authority then commenced proceedings before the justices for the recovery of possession of the premises under the 1838 Act. The justices held that the local authority had complied with s 2 of the 1838 Act, inasmuch as after three calls the appellants could not be found, and therefore, the notice having been posted on a conspicuous part of the premises in accordance with the proviso to s 2, they had no discretion to refuse a warrant which was duly granted. On appeal,

Held – (i) Although s 2 of the 1838 Act provided that the notice 'may be served' either personally or by leaving it with some person who was apparently residing at the premises, the effect of the section was that the landlord was bound to serve it in one of those two ways and to read over and explain the contents to the person receiving it; the landlord could only escape from that requirement and employ the alternative method of substituted service under the proviso to s 2, if he could prove that he had used due diligence to find the tenant and that despite his efforts the tenant could not be found (see p 941 a to c g and h and p 942 g, post); dictum of Palles CB in *Blue v Fullerton* (1876) 1R 10 CL at 240 applied.

(ii) Although on the day in question the agent of the local authority had called on the premises on three occasions without success it was evident that the appellants were neither away on holiday nor had left the premises for good; it must have been clear to the agent that the appellants were still available within the area and that if he called at some other time, or possibly next day, there would be every chance of his finding them. In the circumstances the local authority had failed to prove that due diligence had been used to find the appellants. The appeal would therefore be allowed and the warrant issued by the justices set aside (see p 941 d e and h and p 942 g, post).

Per Griffiths J (Lord Widgery CJ concurring). Although it was only by virtue of the provisions of s 158 (2)^b of the Housing Act 1957 that the local authority were able to take proceedings under the Small Tenements Recovery Act 1838, in doing so the

^a Section 2 is set out at p 940 g and j, post

^b Section 158 (2) is set out at p 942 b, post

- a authority were bound to comply with the strict requirements as to service contained in s 2 of the 1838 Act despite the less exacting requirements contained in s 169^e of the 1957 Act (see p 942 f and g, post).

Notes

- b For recovery of possession before magistrates, see 23 Halsburys Laws (3rd Edn) 710-712, para 1454, and for cases on the subject, see 31 Digest (Repl) 617, 7321-7325.
- For the Small Tenements Recovery Act 1838, s 2, see 18 Halsbury's Statutes (3rd Edn) 424.
- For the Housing Act 1957, ss 158, 169, see 16 Halsbury's Statutes (3rd Edn) 227, 234.

Case referred to in judgment

Blue v Fullerton (1876) IR 10 CL 233.

c Case stated

This was an appeal by way of case stated by justices for the county borough of South Shields in respect of their adjudication as a magistrates' court sitting at South Shields on 8th July 1971.

- d On 8th July 1971 a complaint was made by the respondent, Alan Stansfield, as agent to the mayor, aldermen and burgesses of the borough of South Shields, that the mayor, aldermen and burgesses did let to the appellants, Edward Stoker and Mary Stoker, a tenement situated at 303 Dean Road in the borough under the rent of £2.97 per week, and that the tenancy was determined by notice to quit on 10th May 1971, and that on 23rd June 1971 a notice in writing of intention to apply to recover possession of the tenement was served on the appellants, and that notwithstanding
- e the notice the appellants refused to deliver up possession of the tenement and still detained the same, and the respondent applied to the justices to recover possession under the Small Tenements Recovery Act 1838.

- The following facts were found. The appellants were granted the tenancy of the council flat situated at 303 Dean Road, South Shields, from 11th October 1965. Notice to quit and yield up on 10th May 1971 possession of 303 Dean Road was served
- f on the appellants on 3rd April 1971. The appellants did not quit the premises. Notice of intention to make application to the justices to issue a warrant directing the constables of the district to enter and take possession of the tenement and to eject any person therefrom was served on 23rd June 1971 at 4.15 pm by affixing a copy of the notice to the door of the premises and putting a copy of the notice through the letterbox. Two attempts to serve the notice personally had been made previously,
- g at 10.15 am and at 2.30 pm on 23rd June 1971, when after knocking on the door no reply was received. On this latter occasion a lady neighbour was seen who said that the appellants were likely to be back 'fourish'; on returning at 4.15 pm the same lady told Mr Smith (senior housing assistant) that the appellants had been in, gone out and she did not know when they would be back. The reason for the application was complaints from other tenants that they were not allowed to live in
- h harmony in a communal block. Alternative accommodation had been offered to the appellants.

- It was contended by the appellants that the notice of application was not served in accordance with the provisions of s 2 of the Small Tenements Recovery Act 1838, because (i) the notice had not been served personally and the purport and intent thereof explained; and (ii) three calls at the premises on the same day without reply
- j did not give cause to suppose that admission could not be obtained, and that the persons holding over could not be found. It was contended by the respondent that the Act made provision for circumstances such as had arisen in this case, and that the requirements had been complied with by posting the notice on a conspicuous part of the premises.

The justices were satisfied that the respondent had complied with the provisions of s 2 of the Small Tenements Recovery Act 1838 inasmuch as after three calls at the premises the persons holding over could not be found and admission could not be obtained, the notice was posted on a conspicuous part of the premises, and they had no discretion to refuse the warrant which they granted for possession in not less than 21 nor more than 30 clear days.

J R Reid for the appellants.

G O A Sebestyen for the respondent.

ASHWORTH J delivered the first judgment at the invitation of Lord Widgery CJ. This is an appeal by way of case stated by justices for the county borough of South Shields who on 8th July 1971 heard proceedings initiated by the respondent under the Small Tenements Recovery Act 1838 in order to recover possession of a tenement occupied by the two appellants and let to them. The tenancy in question had been determined and duly determined by notice to quit on 10th May 1971, and on 23rd June 1971 a notice in accordance with the 1838 Act was prepared on behalf of the respondent. The main issue in this case is the question whether sufficient proof was before the justices to show that that notice of intention to proceed was duly served as provided by that Act.

The facts are in a very short compass and were not in dispute in the court below. The notice of intention was served, so the case finds, on 23rd June at 4.15 p m by affixing a copy of the notice to the door of the premises and putting a copy of the notice through the letterbox. Two attempts to serve the notice personally had been made previously, at 10.15 a m and at 2.30 p m on the same day when after knocking on the door no reply was received. On this latter occasion a lady neighbour was seen who said that the appellants were likely to be back 'fourish', and that on returning at 4.15 p m the same lady told the housing assistant that the appellants had been in, gone out and she did not know when they would be back. It was contended on behalf of the appellants that the notice was not served in accordance with the 1838 Act. On the other hand, the respondent said that this was just such a case as was caught by the proviso to s 2.

The Small Tenements Recovery Act 1838, as its title shows, was an Act to facilitate the recovery of possession of tenements. It is a cheap and expeditious way of recovering possession, but it has conditions in it which certainly in my view have to be strictly fulfilled, and which are for the most part for the protection of the tenant. I need not read s 1 which is lengthy and in language associated with 1838 as a period. Section 2 is important:

'Such notice of application intended to be made under this Act may be served either personally or by leaving the same with some person being in and apparently residing at the place of abode of the persons so holding over as aforesaid; and the person serving the same shall read over the same to the person served or with whom the same shall be left as aforesaid, and explain the purport and intent thereof'...

Pausing there, it is quite plain that more is required than the mere handing of the notice to the occupant tenant of the house. It is essential that the person serving the same shall read it over to the person served. Moreover, having read it over, the serving authority must explain the purport and intent thereof. However, the section does contain a proviso that—

'if the person so holding over cannot be found, and the place of abode of such person shall either not be known or admission thereto cannot be obtained for serving such summons, the posting up of the said summons on some conspicuous part of the premises so held over shall be deemed to be good service upon such person.'

a One point taken by counsel for the respondent was that this was in its own terms a section conferring an option on the landlord or local authority to serve either in one of two ways. I am quite satisfied that that argument is wrong, that in fact the word 'may' does mean 'must' be served in one of those two ways. Of course, that is reinforced by the requirement that the notice must be read over and explained to the person receiving it.

b There is no authority that counsel have found in the courts of this country dealing with this matter, but reference was made to an Irish case, *Blue v Fullerton*¹, where Palles CB emphasised that in a corresponding provision the implication was that due diligence should be used before the alternative remedy of substituted service could be invoked. I for my part would apply precisely the same reasoning to s 2 of the 1838 Act. Before a local authority or other landlord can seek to invoke the summary remedy given by the 1838 Act on the footing that he has served a notice of intent c by posting it on the door, because the tenant cannot be found, he must be in a position in my view not only to state but to prove that he has exercised due diligence in his efforts to find the missing tenant. In this case it is in my view of significance that all the efforts deposed to on behalf of the local authority were concentrated on one day and one only. It is true that on that particular day three visits were paid, but d it also emerges from the facts accepted by the justices that the present appellants were not away on holiday, they had not left the premises for good, and indeed the neighbour said that they were expected back around four o'clock. That must have made it quite evident to the respondent's agent who had been trying to serve the notice that the appellants were at least available within the area of South Shields and if he called at some other time, or possibly next day, there was every chance of his finding them. It is in my view impossible to lay down, so to speak, strict rules as e to the number of occasions on which visits must be paid. Still less is it possible to say on how many days such visits should be paid. But I feel constrained to say in this case that on this evidence there was not due diligence proved in order to serve this summons.

f What I think may have misled the justices is their consideration of the three words 'cannot be found' because their attention was not called to the Irish case of *Blue v Fullerton*² in which the implication of due diligence being necessary was explained, and they may have thought and indeed in giving their reasons the justices rather suggested that it was enough for the present respondent to prove that physically he could not on the date in question find either of the appellants, whereas what he ought to have done was to prove that and prove further that he had taken due diligence to find them. For these reasons I do not feel that the justices really applied g their minds to the important question in a matter which does raise some concern, because as is already stated this is a summary remedy really affecting, as the name of the Act shows, small tenements at low rents with people who may not understand their landlords' remedies. I would be in favour of allowing this appeal with the result that the warrant issued by the justices should be set aside.

h **GRIFFITHS J.** I agree with the reasons which have been given by Ashworth J for allowing this appeal. I would wish to deal only with a further argument that was put before this court on behalf of the respondent, based on the provisions of the Housing Act 1957. It was argued on behalf of the respondent that it was only by virtue of the provisions of the Housing Act 1957 that they were able to rely on the procedure under the Small Tenements Recovery Act 1838 in order to recover possession of these premises; this is because the annual rental of the premises was over j £20 a year. Counsel for the respondent has drawn the attention of the court to the

1 (1876) IR 10 CL 233 at 240

2 (1876) IR 10 CL 233

following provisions of the Housing Act 1957. Firstly, to s 158 of the Act, where by sub-s (2) it is provided: a

‘Where a local authority, for the purpose of exercising their powers under any enactment relating to housing, require possession of any building or any part of a building of which they are the owners, then, whatever may be the value or rent of the building or part of a building, they may obtain possession thereof under the Small Tenements Recovery Act, 1838, as in the cases therein provided for, at any time after the tenancy of the occupier has expired, or has been determined.’ b

This is the section which empowers the local authority to proceed under the Housing Act 1957. Counsel for the respondent then drew attention to s 169. This relates to the service of a notice under the Housing Act 1957 and provides: c

‘(1) Subject to the provisions of this and the last foregoing section, any notice, order or other document required or authorised to be served under this Act may be served either—(a) by delivering it to the person on whom it is to be served, or (b) by leaving it at the usual or last known place of abode of that person . . .’ d

In this case notice was posted through the letterbox and so, says counsel for the respondent, we have satisfied the requirements of s 169. He thereafter drew attention to s 188 which provides that the powers of the Act are cumulative, and reads:

‘All powers given by this Act shall be deemed to be in addition to and not in derogation of any other powers conferred by Act of Parliament, law, or custom, and such other powers may be exercised in the same manner as if this Act had not passed . . .’ e

So, argues counsel for the respondent, we had the option either to effect service as provided by the Small Tenements Recovery Act 1838, or alternatively to use one of the methods provided for by s 169 of the Housing Act 1957. I for my part cannot read s 169 in that light. In my view, if it is desired to proceed by virtue of the Housing Act 1957 under the Small Tenements Recovery Act 1838, it is still incumbent on the local authority to abide strictly by the provisions of the Small Tenements Recovery Act 1838. This they have not done in the present case. I also would allow this appeal. f

LORD WIDGERY CJ. I agree with both judgments. In effect the appeal will be allowed and the warrant set aside. g

Appeal allowed. Warrant set aside.

Solicitors: *Gamlens*, agents for *T D Marshall, Hall & Levy*, South Shields (for the appellants); *Lewis, Gregory, Mead & Sons*, agents for *R S Young*, South Shields (for the respondent). h

N P Metcalfe Esq Barrister.

Cowcher v Cowcher

FAMILY DIVISION

BAGNALL J

1st, 2nd, 3rd, 20th, 21st DECEMBER 1971

Husband and wife – Property – Matrimonial home – Husband sole owner at law – Both parties contributing to purchase – Wife's beneficial interest – Apportionment of beneficial interest – Basis of apportionment – Resulting trust – Proportions in which parties contributed to purchase moneys – Inference of agreement or intention as to shares in which parties to be treated as having provided purchase money – Application of principles of equitable accounting – Wife making cash contribution to purchase price – Husband raising balance by means of loans including mortgage on house – Husband solely responsible for mortgage repayments – Wife making overdue interest payments on mortgage.

The parties were married in 1953 and had four children. Until 1962 they lived in rented accommodation, and while she was working the wife made some contribution towards the rent. In 1956 the company of which the husband was a director went into liquidation. After a period of unemployment he obtained employment at a salary of £1,500 per annum. In 1960 the wife's father died and she became entitled to a legacy out of his estate. In 1962 the husband went into business on his own account. In July 1962 the husband and wife found a house which they decided to buy. The purchase price was £12,000. In the same month the wife received £4,000 on account of her legacy and in October she received the balance of £1,191. Between July and November the wife paid £3,063 to the husband's firm and £1,306 to the husband. Meanwhile in September the husband paid a deposit of £1,000 on the house and they went into occupation in December, the purchase being completed in February 1963 when the house was conveyed to the husband alone. The balance of the purchase price was paid by the husband from a loan on overdraft of £3,000 from his bank guaranteed as to £1,000 by a friend and as to £2,000 by the wife's brother. The balance of £8,000 was borrowed by a loan secured by a legal mortgage of the house and an endowment policy on the life of the husband for a sum of £8,000 with profits. The policy was not however effected solely for the husband's benefit. It was written under the Married Women's Property Act 1882 for the benefit of the wife subject to the charge for £8,000. In 1962 and for some years thereafter the husband's business venture brought in £3,000 per annum but in 1967 the business failed. Since then he had had further employment but his earnings were not substantial. The wife meanwhile had received further legacies, including one of £3,150 in 1966 and £500 in 1967. In 1963 her aunt had paid £1,000 for the installation of central heating in the house and in 1966 had given her £438 to be applied in paying an overdue premium on the policy and overdue interest on the mortgage. The wife also paid £517 as premium and interest in 1968. Whilst they were living in the matrimonial home the wife made substantial contributions to general living expenses, including school fees for their children. In 1969 the wife petitioned for divorce and the husband cross-petitioned. Both were granted decrees and the marriage was dissolved in August 1971. The wife brought proceedings under s 17 of the 1882 Act claiming to be beneficially entitled to a half share in the matrimonial home. The value of the home at the time of the proceedings was £18,000 although, subject to planning permission, offers of £42,000 and £50,000 had been received. The husband conceded that the wife had contributed £4,000 to the purchase price and contended that she was entitled in consequence to a one-third share, but no more, in the proceeds of sale.

Held – (i) Under s 17 of the 1882 Act the function of the court was to decide existing rights of property; it had no power, discretionary or otherwise, to confer or vary any such rights; if a person claimed an interest in property other than that of an

absolute and beneficial owner the claim was to be determined in accordance with equitable principles relating to trusts; the same principles applied to a dispute between spouses or former spouses as to disputes between strangers where equitable ownership was in question; rights of property were not to be determined according to what was reasonable and fair or just in all the circumstances; in particular those rights did not alter on the break-up of a marriage (see p 947 g and p 948 c, post);

(ii) In cases where one of the parties was the sole owner of the property at law and there was no express trust, the beneficial interest in the property would belong to the owner of the legal estate unless there could be implied a resulting trust based on the proportions in which the purchase money had actually been provided or an agreement (or common intention) to be inferred from all the relevant facts as to the shares in which the parties, as between themselves, should be treated as having provided the purchase money; such an agreement could be inferred from the whole of the evidence including acts of the parties before, at the time of, and after the purchase; an agreement between the parties during the continuance of the trust to alter their respective beneficial interests could only be implied from conduct in the most exceptional circumstances; in particular the mere payment by one beneficial owner of a mortgage instalment properly payable by another could not alter the beneficial interests or imply an agreement to alter those interests (see p 950 d to f and h, p 951 b, p 952 b and p 954 b c and h, post).

(iii) Where a sale of the property took place the proceeds were to be distributed in accordance with the ascertained beneficial interests, applying where appropriate equitable principles of accounting, i.e. (a) that where a fund was being distributed a party could not take anything out of the fund until he had made good what he owed the fund, and (b) that a party who had discharged another's secured obligation, wholly or in part, was entitled to be repaid out of the security the sums paid by him (see p 950 j to p 951 a and p 955 b, post).

(iv) Since in the present case one-third of the purchase price had been provided by the wife and two-thirds by the husband, their respective equitable interests were in the same proportions unless on the totality of the evidence a common intention could be inferred at the time of the purchase that they were to be treated as providing the money in equal shares; on the totality of the evidence the facts could at best only be treated as equivocal and so were not capable of supporting an inference that, in 1962, the parties intended to contribute equally to the purchase of the house; further the fact that the husband had unequivocally treated the insurance policy as his own by settling it on the wife and that in future the husband alone was to be the source of the family income were themselves conclusive against any such inference; accordingly the house was to be held on trust for sale and the net proceeds of sale were to be held on trust for the wife and husband as tenants in common as to one-third thereof for the wife and two-thirds thereof for the husband (see p 957 f and p 958 j to p 959 b, post).

(v) Applying the principles of equitable accounting there were to be debited against the husband's share the whole of the outstanding mortgage as well as the unpaid interest and premiums charged on the house and policy; further the husband was to be debited and the wife credited with the sums paid by her as premiums and interest; however since the whole of the insurance policy had been charged with the mortgage debt, the total surrender moneys were to be applied towards payment of that debt in reduction of the debit against the husband's share and not merely that part which was attributable to the basic sum of £8,000; there were no grounds therefore for the contention that the discounted profit element should be held on trust for the wife (see p 959 c to g, post).

Pettitt v Pettitt [1969] 2 All ER 385 and *Gissing v Gissing* [1970] 2 All ER 780 applied.

Smith v Baker [1970] 2 All ER 826, *Falconer v Falconer* [1970] 3 All ER 449, *Heseltine v Heseltine* [1971] 1 All ER 952, *Davis v Vale* [1971] 2 All ER 1021 and *Hargrave v Newton* [1971] 3 All ER 866 considered.

Notes

- a** For property purchased partly with a wife's money, see 19 Halsbury's Laws (3rd Edn) 841, 842, para 1372, and for a case on the beneficial ownership of the matrimonial home, see 27 Digest (Repl) 264, 2130.

Cases referred to in judgment

- b** *Balfour v Balfour* [1919] 2 KB 571, [1918-19] All ER Rep 860, 88 LJKB 1054, 121 LT 346, 27 Digest (Repl) 201, 1604.
Bedson v Bedson [1965] 3 All ER 307, [1965] 2 QB 666, [1965] 2 WLR 891, Digest (Cont Vol B) 349, 2130fa.
Davis v Vale [1971] 2 All ER 1021, [1971] 1 WLR 1022.
Falconer v Falconer [1970] 3 All ER 449, [1970] 1 WLR 1333, Digest (Cont Vol C) 435, 2130aca.
c *Gissing v Gissing* [1970] 2 All ER 780, [1971] AC 886, [1970] 3 WLR 255; *rvsg* [1969] 1 All ER 1043, [1969] 2 Ch 85, [1969] 2 WLR 525, Digest (Cont Vol C) 436, 2130ag.
Grey v Inland Revenue Comrs [1959] 3 All ER 603, [1960] AC 1, [1959] 3 WLR 759, 39 Digest (Repl) 333, 723.
Hargrave v Newton (formerly *Hargrave*) [1971] 3 All ER 866, [1971] 1 WLR 1611.
Heseltine v Heseltine [1971] 1 All ER 952, [1971] 1 WLR 342.
d *Latimer v Latimer* (1st December 1970) unreported.
Oughtred v Inland Revenue Comrs [1959] 3 All ER 623, [1960] AC 206, [1959] 3 WLR 898, 39 Digest (Repl) 326, 692.
Outram v Hyde (1875) 24 WR 268, 27 Digest (Repl) 132, 956.
Pettitt v Pettitt [1969] 2 All ER 385, [1970] AC 777, [1969] 2 WLR 966, Digest (Cont Vol C) 429, 621hh.
e *Pitt v Pitt* (1823) Turn & R 180, 37 ER 1065, 27 Digest (Repl) 132, 958.
Rhodesia Goldfields Ltd, Re [1910] 1 Ch 239, 79 LJCh 133, 102 LT 126, 47 Digest (Repl) 428, 3820.
Shephard v Cartwright [1954] 3 All ER 649, [1955] AC 431; *rvsg sub nom Re Shephard, Shephard v Cartwright* [1953] 2 All ER 608, [1953] Ch 728, 25 Digest (Repl) 564, 124.
Shirlaw v Southern Foundries (1926) Ltd [1939] 2 All ER 113, [1939] 2 KB 206; *affd* HL [1940] 2 All ER 445, [1940] AC 701, 109 LJKB 461, 164 LT 251, 9 Digest (Repl) 557, 3689.
f *Sims, Re* [1946] 2 All ER 138, 175 LT 113, 27 Digest (Repl) 133, 968.
Smith v Baker [1970] 2 All ER 826, [1970] 1 WLR 1160, Digest (Cont Vol C) 430, 621ll.
Ulrich v Ulrich and Felton [1968] 1 All ER 67, [1968] 1 WLR 180, Digest (Cont Vol C) 465, 6106ba.

g Cases also cited

- Brett v Brett* [1969] 1 All ER 1007, [1969] 1 WLR 487.
Chapman v Chapman [1969] 3 All ER 476, [1969] 1 WLR 1367.
J v J [1955] 2 All ER 617, [1955] P 236.

Summons

- h** This was an application under s 17 of the Married Women's Property Act 1882 by the wife, Agnes Petricia Campbell Cowcher, whereby she sought the determination of all questions between herself and the husband, Paul Thomas Cowcher, in respect of the interest of each in, inter alia, the premises known as Appletrees, Woodside Road, Cobham, in the county of Surrey. The facts are set out in the judgment.
- j** *A B Hollis QC* and *A J Phelan* for the wife.
Joseph Jackson QC and *James Townend* for the husband.

Cur adv vult

21st December. **BAGNALL J** read the following judgment. The parties in this case were married on 23rd March 1953. The husband was then 30; the wife 21. They have had four children: two boys now aged 17 and nearly 12 and two girls

now aged nearly 14 and nearly ten. The wife presented a petition for divorce on 21st November 1969 whereby (after amendment) she alleged cruelty and adultery; the husband denied both and cross-petitioned on the ground of adultery. On 14th May 1971 each was granted a decree nisi on the ground of adultery; the allegation of cruelty was not pursued. The marriage was dissolved by decree absolute on 16th August 1971.

During the marriage there were frequent if not continuous financial difficulties. Until 1956 the husband was a director of and employed by a company which went into liquidation, leaving him with substantial liabilities. For a time he was unemployed but then obtained employment at a modest salary of under £1,500 per annum. In 1962 he went into business on his own account as a management consultant under the firm name Paul Cowcher Associates. He says that in six months in 1962 his earnings were £4,000 and that for some years the venture brought in £3,000 per annum. In 1967 the husband's business failed. Since then he has had further employment but his earnings have not been substantial. The wife worked until 1954 and again from 1956 until her second child was born in January 1958. She earned about £300. I am satisfied that until 1962 her financial contributions to the household were small.

Until 1962 the parties lived in rented accommodation and, no doubt, while she was working the wife must be treated as having made some contribution towards the rent. In 1960 the wife's father died and she became entitled to a legacy out of his estate. They decided to look for a house and in July 1962 found Appletrees, Woodside Road, Cobham, Surrey, a substantial property with six bedrooms, three reception rooms, two bathrooms and the usual offices and also some two acres of land. The purchase price was £12,000.

On 13th July 1962 the wife received £4,000 on account of her legacy and on 26th October 1962 she received the balance of £1,191—a total of £5,191. Between July and November 1962 the wife paid £3,063 to or on behalf of Paul Cowcher Associates and £1,306 to the husband, a total of £4,366. During that period and subsequently she also made contributions to the household expenses. On 18th September 1962 the husband paid £1,000 as a deposit on Appletrees. They went into occupation in December 1962 and the purchase was completed on 1st February 1963, when the house was conveyed to the husband alone. The balance of the purchase price was paid as to £3,000 from a loan on overdraft from his bankers guaranteed by a friend, a Mr Carter, as to £1,000, and as to £2,000 by the wife's brother, and the remaining £8,000 was borrowed by the husband from London and Manchester Assurance Co Ltd secured on a legal mortgage of the house and a 25 year endowment policy on the life of the husband for a sum of £8,000 with profits. The rate of interest charged on the mortgage was $6\frac{1}{2}$ per cent, that is £520 gross per annum, and the annual premium on the policy was £358. The interest was an allowable charge on the husband's income (which for this purpose would include the wife's income if any) for income tax purposes and the husband obtained some income tax allowance on the premiums.

The husband did not effect the policy wholly for his own benefit. It was written under the Married Women's Property Act 1882 for the benefit of the wife, described by name, subject, of course, to the charge for £8,000. Insofar as the policy moneys on maturity were used to pay off the mortgage (as no doubt was the husband's intention) they would accrue for his benefit; any balance representing the profit element would be held on trust for the wife absolutely and indefeasibly. I am told that the present surrender value of the policy is £2,882 and the discounted value of the accrued profits is £1,207.

I understand the value of Appletrees as a dwelling-house is about £18,000, but offers have been received for its purchase conditional on planning permission being obtained to enable the site to be included in a larger scheme of development. One of the offers was for £50,000, another for £42,000. The wife is living in the house with the children and wishes to remain there.

a At the start of the hearing before me, counsel for the husband conceded, and I think rightly conceded, that the wife should be treated as having contributed to the purchase price of the house the whole of the £4,000 paid in cash at the time of the purchase. However, he reserves the right, as I think he is entitled to do, to rely on details of the actual processes of payment in dealing with any inferences which have to be drawn from the conduct of the parties. He submits that the husband must be treated as having contributed the whole of the remaining £8,000.

b The questions relating to property and finance which by order dated 21st July 1971 have been referred to me and which I have to decide are as follows: 1. Under s 17 of the Married Women's Property Act 1882, what, if any, interest in Appletrees and its proceeds of sale is vested in the wife? A similar question relating to other property was also referred to me but has been disposed of by agreement. 2. Under ss 2, 3 and 4 of the Matrimonial Proceedings and Property Act 1970, what provision by way of transfer or settlement of property or variation of settlement or by way of periodical payments maintenance or secured provision (or by any of those ways) shall be made for the wife and the children of the family?

c Under question 1, each party originally claimed to be entitled to the whole beneficial interest; before me those extreme positions were abandoned and the wife claims to be entitled to an undivided half share in the proceeds of sale of Appletrees; the husband contends that she is entitled only to an undivided one-third share therein. It is plain, and indeed common ground, that I must decide this question before I can address my mind to the questions of discretion which arise under the 1970 Act.

d During the course of a very full and helpful argument from counsel on the question under s 17, I was referred to three groups of authorities: first, the decisions of the House of Lords in *Pettitt v Pettitt*¹ and *Gissing v Gissing*²; secondly, four cases decided by the Court of Appeal before the opinions in *Gissing v Gissing*² were delivered; thirdly, decisions of the Court of Appeal after those opinions had been delivered. I am of opinion that every aspect of the problem before me is within the ambit of the ratio decidendi of *Pettitt v Pettitt*¹ and *Gissing v Gissing*², and I do not think it necessary to refer to any, except two, of the earlier cases. However, in relation to some of the later decisions of the Court of Appeal I have found difficulty. I think that the right course for me to adopt is to consider the problem on principle in the light of the opinions expressed in the House of Lords and only thereafter to advert to subsequent decisions in the Court of Appeal.

e In my judgment the following propositions are established beyond doubt by the House of Lords in the two cases I have mentioned:

f 1. Under s 17 the court simply decides existing rights of property; the court has no power, discretionary or otherwise, to confer, or vary, any such rights. This was the unanimous decision in *Pettitt v Pettitt*¹.

g 2. If, under s 17, a person claims an interest in property other than that of an absolute legal and beneficial owner, the claim must be determined in accordance with equitable principles relating to trusts. This was fundamental to the majority opinions in *Pettitt v Pettitt*¹ and was asserted in all the opinions in *Gissing v Gissing*². I add that the relevant principles have been settled for well over 150 years and (apart from some observations on the presumption of advancement which is not here material) none of their Lordships in either case indicated that he was in any way adding to or detracting from the principles so settled.

j 3. The same principles apply if the dispute is between spouses or former spouses as apply to any other dispute where equitable ownership is in question (*Pettitt v Pettitt*³)

1 [1969] 2 All ER 385, [1970] AC 777

2 [1970] 2 All ER 780, [1971] AC 886

3 [1969] 2 All ER at 397, [1970] AC at 803

per Lord Morris, Lord Upjohn⁴ and Lord Diplock⁵; *Gissing v Gissing*⁶ per Viscount Dilhorne). The contrary proposition, which would have been crucial to the issue in *Gissing v Gissing*⁷ was not asserted by any of their Lordships in that case. In my judgment *Ulrich v Ulrich and Felton*⁸, insofar as it proceeded on the footing that the beneficial interests would differ according to whether the parties did or did not marry, can no longer be regarded as authoritative.

4. The expression 'family assets', although in some contexts convenient, has no legal meaning and its use affords no assistance in determining property rights (*Pettitt v Pettitt*⁹ per Lord Hodson and Lord Upjohn¹⁰, *Gissing v Gissing*¹¹ per Viscount Dilhorne and Lord Diplock¹²). Again the contrary proposition was not asserted by any of their Lordships in *Gissing v Gissing*⁷.

5. Rights of property are not to be determined according to what is reasonable and fair or just in all the circumstances; in particular those rights do not alter on the break-up of a marriage. This proposition was fundamental to the decisions in both cases but was also expressly asserted (*Pettitt v Pettitt* per Lord Reid¹³, Lord Morris¹⁴, Lord Hodson¹⁵ and Lord Diplock¹⁶).

In any individual case the application of these propositions may produce a result which appears unfair. So be it; in my view that is not an injustice. I am convinced that in determining rights, particularly property rights, the only justice that can be attained by mortals, who are fallible and are not omniscient, is justice according to law; the justice which flows from the application of sure and settled principles to proved or admitted facts. So in the field of equity the length of the Chancellor's foot has been measured or is capable of measurement. This does not mean that equity is past childbearing; simply that its progeny must be legitimate—by precedent out of principle. It is well that this should be so; otherwise no lawyer could safely advise on his client's title and every quarrel would lead to a law suit.

Trust principles are relevant here at three stages, the formation of the trust, its continuance and its winding up, including the taking of equitable accounts on a sale of the property. The principles relating to formation of the trust are stated in substantially the same terms in all the recognised textbooks. I have extracted them (although not verbatim) from Maitland on Equity¹⁷ and Snell on Equity¹⁸. So far as here material and with the relevant statutory provisions they are:

1. There can be no trust unless the nature and quantum of the several beneficial interests are certain at the inception, and during the whole life, of the trust.

2. The trust may be express or implied.

3. Formal words are not required to create an express trust; any words evincing a clear intention to create a trust will suffice and the beneficial interests are determined with certainty as a matter of construction of the words used. As this case is concerned with absolute shares in the property and possibly with equality it is convenient to add some further observations. A trust for A and B without further definition creates an equitable joint interest. This is not, I think, an application of the

4 [1969] 2 All ER at 405, [1970] AC at 813

5 [1969] 2 All ER at 412, [1970] AC at 821

6 [1970] 2 All ER at 785, [1971] AC at 899

7 [1970] 2 All ER 780, [1971] AC 886

8 [1968] 1 All ER 67, [1968] 1 WLR 180

9 [1969] 2 All ER at 403, [1970] AC at 809, 810

10 [1969] 2 All ER at 408, [1970] AC at 817

11 [1970] 2 All ER at 784, [1971] AC at 899

12 [1970] 2 All ER at 789, [1971] AC at 904

13 [1969] 2 All ER at 394, [1970] AC at 793

14 [1969] 2 All ER at 395, 397, 398, [1970] AC 801, 803, 805

15 [1969] 2 All ER at 402, [1970] AC at 809

16 [1969] 2 All ER at 416, [1970] AC at 825

17 2nd Edn (1936)

18 26th Edn (1966)

a maxim 'equality is equity' but rather of the maxim 'equity follows the law'. A conveyance at law to two or more, without words of severance, creates a joint tenancy at law. Indeed one of the principal illustrations of the maxim 'equality is equity' is equity's dislike of a joint tenancy, which involves the chance of survivorship rather than the true equality of moieties, and the consequent ease with which an equitable joint tenancy can be severed. As between spouses there was, at one time, an unseverable joint tenancy—tenancy by entireties. The Married Women's Property Act 1882 precluded the creation of such tenancies; and by Part VI of Sch 1 to the Law of Property Act 1925 all existing tenancies by entireties were converted into joint tenancies, severable (if equitable) under s 36 (2) of that Act. (See *Bedson v Bedson*¹⁹ per Russell LJ.) Their basis was the outmoded legal concept of husband and wife as one person. I think that their resuscitation would not now be sociologically acceptable and would in any event require legislation. Lastly a joint interest in equal shares is a contradiction in terms, the words of severance creating a tenancy in common; and there is, I think, no such interest known in law or equity as a joint tenancy in unequal shares.

d 4. By s 53 (1) (b) of the Law of Property Act 1925 an express trust must be manifested by and proved by writing signed by the creator of the trust. Notwithstanding this provision an express trust may be created by an agreement of which equity will grant specific performance, that is an agreement under seal or for consideration, including marriage consideration.

e 5. Implied trusts may be resulting or constructive trusts. Strictly, constructive trusts arise where one who is already a trustee or otherwise clothed with a fiduciary character seeks to retain an advantage from his trust; but the expression is often used interchangeably with resulting trust.

e 6. A resulting trust arises where a person acquires a legal estate but has not provided the consideration or the whole of the consideration for its acquisition, unless a contrary intention is proved. This is the crucial principle in the present case and I must, I think, add some elaboration.

f Thus if land is conveyed to A and the purchase money is provided by A as to two-thirds and B as to one-third, there will be a resulting trust for A and B in those proportions unless a contrary intention is proved so as to rebut the presumption of resulting trust. The relevant contrary intention is that of B to confer bounty on A. If the intention of the parties is to create a trust in equal shares or as to a quarter for B and three-quarters for A or any shares other than those in which the purchase price is provided, the trust can only be an express trust; for the beneficial interests neither coincide with the legal estate nor 'result' in equity from the provision of the purchase money. Such a trust would, therefore, require to be evidenced by writing under s 53 (1) (b) or to arise from an enforceable agreement under seal or supported by consideration. I should add my view that if the whole purchase price is provided by A, a trust giving an interest to B can also only be an express trust there being nothing to bring the doctrine of resulting trust into operation.

h However, I think that there is another stage of the transaction at which a common agreement or intention can be relevant; this again can best be illustrated by examples. Suppose a conveyance to A for £24,000 with A admittedly providing £8,000 out of his own free available moneys. The remaining £16,000 may be provided by B in a number of ways: (i) out of his own free available moneys; (ii) by loan from a third party; (iii) by loan from A; (iv) by a loan secured by a mortgage on the freehold of the property. Cases (i) and (ii) are indistinguishable and will give B, if no contrary intention, a two-thirds interest under a resulting trust, leaving A with one-third. In cases (iii) and (iv) A is involved because he either lends the money or it is raised on property in which he has an interest. In my judgment in such a case, *prima facie* B will also have a two-thirds interest because he or his obligation to repay a loan has been

the source of £16,000 of the purchase money. But suppose that at the time A says that as between himself and B he, A, will be responsible for half of the mortgage repayments, a different result ensues. Although as between A and B and the vendor A has provided £8,000 and B £16,000, as between A and B themselves A has provided £8,000 and made himself liable for the repayment of half the £16,000 mortgage namely a further £8,000, a total of £16,000; the resulting trust will therefore be as to two-thirds for A and one-third for B—the reverse of the former situation. It is significant to observe, particularly when one comes to consider the husband and wife cases, that A's agreement to share equally in the mortgage repayments has not produced overall equality, but has given A a larger share than B; overall equality would be produced if either A agreed to be responsible for one-third of the mortgage repayments, £4,000, or A agreed to pay half those repayments and also to treat B as having provided half of A's contribution of £8,000—in effect a gift of £4,000 from A to B. A similar equality would be produced if the £8,000 although nominally paid by A, in fact came from a common fund to which A and B were jointly entitled and, although B nominally raised the £16,000 on mortgage, A and B agreed as between themselves to be equally liable for its repayment.

If my analysis has been correct, there are thus two types of agreement or common intention which may affect A's and B's respective equitable interests: (1) an agreement that, irrespective of the actual payments to the vendor and the legal obligations to an outside mortgagee, as between themselves A and B shall be treated as providing the money (including being liable for mortgage repayments) in, say, equal shares; (2) an agreement that irrespective of the shares in which, as between themselves, the money has been provided, the property shall be held on an express trust for A and B in, say, equal shares. The first type of agreement or common intention could, in my judgment, be inferred from conduct antecedent, contemporaneous or subsequent, for it would be part of the arrangement which gave rise to the resulting trust and consistent with it. On the other hand, in my opinion, it would be extremely difficult to infer the second type of agreement from any conduct, because it would involve relying on conduct to substitute for the resulting trust that would otherwise have been implied also from conduct, a contractual express trust inconsistent with that resulting trust.

So much for the formation of the trust. As to its continuance there can be no doubt that the trust, and the equitable interests arising under it, cannot be changed except with the consent of all interested parties, and that such a change must involve a disposition of all or part of an equitable interest by one party to another (see *Grey v Inland Revenue Comrs*²⁰). By s 53 (1) (c) of the Law of Property Act 1925 such a disposition must be in writing; and this requirement applies to a disposition of an equitable interest arising under a resulting trust (see *Oughtred v Inland Revenue Comrs*¹). In spite of this a parole agreement for valuable consideration to vary the trusts, of which equity would grant specific performance, would be as valid as an assignment in writing; for it would operate as an agreement for sale of an equitable interest on which the vendor would become a trustee for the purchaser subject only to the payment of the consideration. In my opinion such an agreement, having terms of sufficient certainty, could be implied from conduct only in the most exceptional circumstances. In particular the mere payment by one beneficial owner of a mortgage instalment properly payable by the other could not alter the beneficial interests or, in my view, imply an agreement to alter those interests.

Lastly I turn to the winding-up of the trust which, I think, again involves well settled principles; first the principle which—

'is of general application that where . . . a fund is being distributed, a party cannot take anything out of the fund until he has made good what he owes to the fund'

a (see *Re Rhodesia Goldfields Ltd*² per Swinfen Eady J); secondly that he who discharges another's secured obligation, wholly or in part, is entitled to be repaid out of the security the amount of the sum or sums paid by him (see *Pitt v Pitt*³, and *Outram v Hyde*⁴). Again an example will illustrate the point. Suppose land be conveyed to A for £24,000, B providing in cash £8,000 and A raising on mortgage of the property the remaining £16,000; suppose A has paid off £5,000 of the mortgage and B (although under no obligation) has paid off a further £2,000 leaving £9,000 outstanding; b finally suppose the property to be sold for £60,000. The shares under the resulting trust are one-third to B and two-thirds to A; but A must account for the outstanding mortgage of £9,000 and B is entitled to be reimbursed the £2,000 paid by him in part discharge of the mortgage. Thus out of £60,000 realised £9,000 goes to the mortgagee, B takes £22,000, his one-third share of £20,000 together with £2,000 paid off the mortgage, and A takes £29,000, that is his two-thirds share of £40,000 less £9,000 c outstanding on the mortgage and £2,000 repayable to B. This must be the result even if A and B are husband and wife if my third initial proposition, that the same principles apply as between husband and wife as between strangers, is sound (see also *Re Sims*⁵). If so, I think that *Ulrich v Ulrich and Felton*⁶ which, as between husband and wife, treated the equity of redemption as the divisible trust property is no longer d authoritative. It may well be, however, that as between husband and wife there will be a clear contrary intention that mortgage instalments, by whomsoever paid, are to be treated as discharging the husband's obligation without giving any right of subrogation to the wife.

I must now return to *Pettitt v Pettitt*⁷ and *Gissing v Gissing*⁸. In each case the legal estate in the matrimonial home was vested in one only of the spouses; in each case the other spouse had made no direct contribution to the purchase price but claimed to be entitled to an equitable interest under an implied or resulting trust. In *Pettitt v e Pettitt*⁷ the spouse so claiming had effected improvements to the property but the House of Lords considered the general principles relating to ascertaining the beneficial interests of husband and wife in the matrimonial home. In *Gissing v Gissing*⁸ the claiming spouse was said to have made a notional or indirect contribution to the purchase price of the matrimonial home. In neither case was the claim held to have f been substantiated.

In *Pettitt v Pettitt*⁷ the minority view was that the function of the court under s 17 was to decide what the spouses would, as a reasonable husband and wife, have agreed as to their respective beneficial interests had they directed their minds to the problem (see per Lord Reid⁹ and Lord Diplock¹⁰). In my judgment the majority opinion may be summarised as that the beneficial interests must be those which arise under g a resulting trust based on the proportions in which the purchase moneys were actually provided or were treated as having been provided under an agreement (or common intention) expressed or to be inferred from all the relevant facts (see per Lord Morris¹¹, Lord Hodson¹² and Lord Upjohn¹³). I anticipate by adding that this seems to me to have been Lord Diplock's analysis in *Gissing v Gissing*⁸ of the minority and majority opinions respectively in *Pettitt v Pettitt*⁷.

h In analysing the ratio decidendi of *Gissing v Gissing*⁸, a difficulty arises at the outset.

2 [1910] 1 Ch 239 at 247

3 (1823) Turn & R 180

4 (1875) 24 WR 268

5 [1946] 2 All ER 138

6 [1968] 1 All ER 67, [1968] 1 WLR 180

7 [1969] 2 All ER 385, [1970] AC 777

8 [1970] 2 All ER 780, [1971] AC 886

9 [1969] 2 All ER at 390, [1970] AC at 795

10 [1969] 2 All ER at 415, [1970] AC at 823, 825

11 [1969] 2 All ER at 398, [1970] AC at 804, 805

12 [1969] 2 All ER at 403, [1970] AC at 807, 810

13 [1969] 2 All ER at 405, [1970] AC at 818

Lord Reid¹⁴ did not think that he was precluded by the decision in *Pettitt v Pettitt*¹⁵ from repeating the views that he there expressed; Lord Diplock¹⁶ said that the proposition formulated in the minority opinions in *Pettitt v Pettitt*¹⁵ was not the law. But that is a negative approach. I am of opinion that the law on this subject established in *Gissing v Gissing*¹⁷ is that the beneficial interest in the property must either (1) coincide with the legal estate or (2) arise under a resulting trust from the *actual* provision of the purchase price or (3) arise from a common agreement or common intention (these expressions are I think used interchangeably and I will use the word 'consensus' as synonymous with both) either express or to be inferred from the facts. The first two of these possibilities exist because the question has to be determined under the general law of trusts. As to the third I cite the relevant extracts from their Lordships' speeches. Lord Morris said¹⁸:

'When the full facts are discovered the court must say what is their effect in law. The court does not decide how the parties might have ordered their affairs; it only finds out how they did. The court cannot devise arrangements which the parties never made. The court cannot ascribe intentions which the parties in fact never had.'

Viscount Dilhorne said¹⁹:

'Where there was a common intention at the time of the acquisition of the house that the beneficial interest in it should be shared, it would be a breach of faith by the spouse in whose name the legal estate was vested to fail to give effect to that intention and the other spouse will be held entitled to a share in the beneficial interest. The difficulty where the dispute is between former spouses arises with regard to proof of the existence of any such common intention. It may be, as in this case, that the claim to a share in the beneficial interest is not made until years after the acquisition of the property. It is most likely that there will be no documentary evidence pointing to the existence of any such intention. In a great many cases, perhaps in the vast majority, no consideration will have been given by the parties to the marriage to the question of beneficial ownership of the matrimonial home at the time that it is being acquired. If on the evidence that appears to have been the case, then a claim based on the existence of such an intention at the time must fail . . . I appreciate that there may be very great difficulty in establishing such an intention where the dispute is between former spouses but that does not alter the question to be decided. In every case it has to be established that the circumstances are such that there is a resulting, implied or constructive trust in favour of the claimant to a beneficial interest or a share in it. In the case of former spouses that will ordinarily depend on whether it can be inferred from the evidence that there was such a common intention.'

Lord Pearson said²⁰:

'If the respondent's claim is to be valid, I think it must be on the basis that by virtue of contributions made by her towards the purchase of the house there was and is a resulting trust in her favour. If she did make contributions of substantial amount towards the purchase of the house, there would *prima facie* be a resulting trust in her favour. That would be the presumption as to the intention of the parties at the time or times when she made and he accepted the contributions. The presumption is a rebuttable presumption; it can be rebutted by

¹⁴ [1970] 2 All ER at 782, 783, [1971] AC at 895, 896

¹⁵ [1969] 2 All ER 385, [1970] AC 777

¹⁶ [1970] 2 All ER at 789, [1971] AC at 904

¹⁷ [1970] 2 All ER 780, [1971] AC 886

¹⁸ [1970] 2 All ER at 784, [1971] AC at 898

¹⁹ [1970] 2 All ER at 785, 786, [1971] AC at 900, 901

²⁰ [1970] 2 All ER at 787, 788, [1971] AC at 902

a evidence showing some other intention. The question as to what was the intention is a question of fact to be decided by the jury if there is one or, if not, by the judge acting as a jury . . . an intention can be imputed; it can be inferred from the evidence of their conduct and the surrounding circumstances.'

b It is, I think, clear from the rest of Lord Pearson's opinion that he was not there intending to exclude subsequent circumstances from the facts on which an inference can be based. Lord Diplock said¹:

c 'But parties to a transaction in connection with the acquisition of land may well have formed a common intention that the beneficial interest in the land shall be vested in them jointly without having used express words to communicate this intention to one another; or their recollections of the words used may be imperfect or conflicting by the time any dispute arises. In such a case—a common
d one where the parties are spouses whose marriage has broken down—it may be possible to infer their common intention from their conduct. As in so many branches of English law in which legal rights and obligations depend on the intentions of the parties to a transaction, the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously
e formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party. On the other hand, he is not bound by any inference which the other party draws as to his intention unless that inference is one which can reasonably be drawn from his words or conduct. It is in this sense that in the branch of English law relating to constructive, implied or resulting trusts effect is given to the inferences as to the intentions of parties to a transaction which a reasonable man would draw from their words or conduct and not to any subjective intention or absence of intention which was not made manifest at the time of the transaction itself. It is for the
f court to determine what those inferences are . . . The conduct of the spouses in relation to the payment of the mortgage instalments may be no less relevant to their common intention as to the beneficial interests in a matrimonial home acquired in this way than their conduct in relation to the payment of the cash deposit.'

Finally²:

g 'Difficult as they are to solve, however, these problems as to the amount of the share of a spouse in the beneficial interest in a matrimonial home where the legal estate is vested solely in the other spouse, only arise in cases where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other.'

h The same proposition is expressed in the dissenting judgment of Edmund Davies LJ³ in the Court of Appeal which was upheld in the House of Lords⁴:

j 'In the present case, there being no express agreement relating to the matrimonial home, the task is that of inferring what the common intention of the parties would have been expressed to be had they reduced it to words before the matrimonial difficulties arose.'

In cases (which will probably be infrequent) where there is express agreement no

1 [1970] 2 All ER at 790, 791, [1971] AC at 906

2 [1970] 2 All ER at 793, [1971] AC at 909

3 [1969] 1 All ER 1043 at 1048, [1969] 2 Ch 85 at 96

4 [1970] 2 All ER 780, [1971] AC 886

difficulties are likely to arise; the outcome will depend on the true construction of the agreement, on whether s 53 (1) (b) of the Law of Property Act 1925 applies and if so whether its provisions are satisfied; and perhaps on whether the agreement is one which equity would specifically enforce so as to obviate the necessity for compliance with that section. If there is an express agreement, even if it is ineffective by reason of s 53 (1) (b) or otherwise to achieve the intention of the parties, it must, I think, inevitably preclude any implied consensus.

The crucial question, it seems to me, is which of the two types of implied or inferred consensus to which I have already referred is contemplated in the ratio decidendi of *Gissing v Gissing*⁵; is it consensus as to the proportions in which the parties are to be taken as having provided the purchase moneys (which I will call 'money consensus') thus defining the beneficial interests arising under a resulting trust? or consensus as to what the beneficial interests of the spouses are to be (which I will call 'interest consensus') irrespective of the source or sources of the purchase money—interests inconsistent with and displacing the resulting trust (if any) that would otherwise have arisen? In my judgment the opinions in *Gissing v Gissing*⁵ contemplated money consensus and not interest consensus. I reach that conclusion for the following reasons: 1. Interest consensus postulates an express trust, whereas the basis of all the opinions in the House of Lords is resulting trust. 2. On that footing, if an express trust is to be valid there must be compliance with s 53 (1) (b) of the Law of Property Act 1925 or an enforceable agreement. Apart from the difficulties inherent in such cases as *Balfour v Balfour*⁶, it seems clear from references in the opinions to common intention and other indications that the House of Lords was not contemplating a consensus that was enforceable as an executory contract. 3. If the consensus is treated as rebutting the presumption of a resulting trust, subsequent acts and declarations would be admissible as evidence only against the party doing or making them (see *Shephard v Cartwright*⁷). It is explicit in the opinions in the House of Lords that subsequent acts may found an inference in favour of the party performing them. 4. All the examples given by their Lordships in *Gissing v Gissing*⁵ were of payments of money (directly or indirectly) or the discharge of obligations which would found inferences as to the shares in which the parties were to be treated as having contributed to the purchase consideration; that is would found inferences of money consensus. 5. The maxim 'equality is equity' (for which no great enthusiasm was shown) was treated as applicable (if at all) where it was not possible to quantify the contribution intended to have been made by one or other spouse except by saying that it was substantial.

Accordingly, in my judgment, the steps to be taken in solving the sort of questions with which I am now concerned are: First, determine the actual source or sources of the purchase money, that is from whose bank account or savings account or other resources was it provided, treating the party who assumed liability to a mortgagee as the source of the money so raised. Secondly, determine whether there was any express agreement and if so whether it complied with s 53 (1) (b) of the Law of Property Act 1925 or was enforceable so as to obviate such compliance. Thirdly, from the whole of the evidence including acts of the parties before, at the time of and after the purchase, determine whether there can be inferred consensus as to the proportions in which they were to be treated as providing the purchase money. The test must, I think, be similar to that propounded by MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd*⁸, with this difference, that whereas in commercial dealings the general expectation is that the parties will record all the terms of their bargain, in matrimonial matters it is unlikely that the spouses will record all, or perhaps any, of

5 [1970] 2 All ER 780, [1971] AC 886

6 [1919] 2 KB 571, [1918-19] All ER Rep 860

7 [1954] 3 All ER 649, [1955] AC 431

8 [1939] 2 All ER 113 at 124, [1939] 2 KB 206 at 227; on appeal HL [1940] 2 All ER 445, [1940] AC 701

a such terms. But in each case it must be possible to infer that to the officious bystander's question, 'Ought you not to record that you are intending to pay for this house in equal (or some other) shares?' their common answer would be 'No; that goes without saying', and to infer moreover that each had the same intention as to what it was, that went without saying. Fourthly, determine whether the initial beneficial interests have been altered by a subsequent agreement (express or implied) or by the creation of a fresh express trust. Lastly, if there is a sale of the property, distribute the proceeds in accordance with the ascertained beneficial interests applying, where applicable, equitable principles of accounting.

b In the normal case the beneficial interest will depend on the conclusion reached under the first, third and fourth of these headings, and particularly whether money consensus can be inferred under the third heading. In a simple case where a couple have consistently applied a system of all purchases out of a common fund the inference c may present no difficulty. Otherwise, for my part, applying the reasoning of the House of Lords and the decision in *Gissing v Gissing*⁹, I think that only in rare cases will it be possible to infer that consensus with sufficient certainty, even if, as a last resort, the maxim 'equality is equity' is invoked. For that maxim can only assist if consensus that both spouses are to be treated as making substantial contributions is established, but the proportions cannot be precisely quantified. The maxim cannot, d I think, found an inference of such consensus if that inference cannot otherwise be drawn; nor, as Lord Pearson said in *Gissing v Gissing*¹⁰, can it displace a consensus that can be quantified.

e I find further support for this view in the Matrimonial Proceedings and Property Act 1970. That Act by s 37 provided a statutory solution to the type of problem that arose in *Pettitt v Pettitt*¹¹, but it did not deal at all with the problem of ascertaining property rights which arose in *Gissing v Gissing*⁹ and arises in this case. On the other hand, by ss 2 and 4 the Act gave to the court a discretionary power to deal in almost every conceivable way with the assets and property of the parties. Moreover, it is significant that under s 5 (1) (f) the court in exercising that jurisdiction must have regard to 'the contributions made by each of the parties to the welfare of the family, f including any contribution made by looking after the home or caring for the family'. So the principles established in *Gissing v Gissing*⁹, of course, remain applicable in a proper case. But I cannot escape the thought that Parliament evinced an intention that in the vast majority of cases justice would be done by exercising the statutory discretion in relation to all the capital and income resources of the parties rather than by isolating one asset—the matrimonial home—and by inferring a dubious consensus from equivocal facts fitting that particular asset uncomfortably into the framework g of resulting trust.

I must now consider the more recent cases in the Court of Appeal to which counsel have referred me. There are six.

h In *Smith v Baker*¹², Widgery and Karminski LJJ expressly based their conclusion on inferred consensus on the common answer that would have been given to the officious bystander; and I think that that was the implicit basis of Lord Denning MR's judgment. The decision thus anticipated the ratio decidendi of *Gissing v Gissing*⁹ and I think supports my conclusions.

In *Falconer v Falconer*¹³, Lord Denning MR said:

j 'It [the House of Lords] stated the principles on which a matrimonial home, which stands in the name of husband or wife alone, is nevertheless held to belong to them both jointly (in equal or unequal shares). It is done, not so much by

9 [1970] 2 All ER 780, [1971] AC 886

10 [1970] 2 All ER at 788, [1971] AC at 903

11 [1969] 2 All ER 385, [1970] AC 777

12 [1970] 2 All ER 826, [1970] 1 WLR 1160

13 [1970] 3 All ER 449 at 452, [1970] 1 WLR 1333 at 1336

virtue of an agreement, express or implied, but rather by virtue of a trust which is imposed by law. The law imputes to husband and wife an intention to create a trust, the one for the other. It does so by way of an inference from their conduct and the surrounding circumstances, even though the parties themselves made no agreement on it. This inference of a trust, the one for the other, is readily drawn when each has made a financial contribution to the purchase price or to the mortgage instalments. [He then went on to say:] So long as there is a substantial financial contribution to the family expenses, it raises the inference of a trust.' a

In the earlier passage I think that Lord Denning MR was contrasting an enforceable agreement with the inferred common intention which was the basis of the decision in *Gissing v Gissing*¹³. This accords with the decision of Megaw LJ who upheld the decision of the county court judge on the footing that his inference was based on all the evidence. Sir Frederic Sellers agreed with both judgments. So I think that decision supports my conclusions. I do not understand my second citation from Lord Denning MR to mean that substantial contributions will raise the inference of a trust regardless of all other considerations some of which might point to a contrary inference, because that would be inconsistent with the opinions of the House of Lords that the inference must be based on the whole of the evidence. I think that Lord Denning MR's observation must be read in the light of the facts of that case on the footing that there was no other relevant evidence. c

In *Heseltine v Heseltine*¹⁴, Lord Denning MR said:

'In the usual way the court imputes a trust under which the husband is to hold it for them both jointly in equal shares. But half-and-half is not an invariable division. If some other division is more fair, the court will adopt it: see *Gissing v Gissing*¹³. In the present case the registrar said that the division should be as to three-quarters to the wife and one-quarter to the husband. That seems to me to be entirely fair.' e

Karminski LJ¹⁵ agreed with Lord Denning MR and did not deal separately with the matrimonial home. Megaw LJ upholding the registrar's decision said¹⁶:

'I am unable to see how the proportion of three-quarters to one-quarter on which the registrar decided can be challenged as being unfair or excessive in relation to the husband's interest therein.' f

Looked at literally those statements seem to be a reference to the fair and reasonable test which was rejected by the House of Lords; but reading the judgments as a whole I think that the word 'fair' must indicate those proportions in which, as a matter of inference on the whole of the evidence, both parties intended to contribute to the purchase price. On that footing again the decision supports my conclusions. g

In *Latimer v Latimer*¹⁷ (which is unreported, but I was supplied with a transcript of the judgment) the decision must, I think, have proceeded on a similar basis of inferred common intention notwithstanding Lord Denning MR's reference to what the court orders and Edmund Davies LJ's statement that the Court of Appeal's conclusion 'more nearly approximates to justice than the decision of the learned registrar'. h

In *Davis v Vale*¹⁸ the basis of the decision was also, in my view, inference of consensus as to proportions of contribution. Lord Denning MR said¹⁹:

'... what is the proper trust for the courts to impose or infer? What is the

13 [1970] 2 All ER 780, [1971] AC 886

14 [1971] 1 All ER 952 at 954, [1971] 1 WLR 342 at 345

15 [1971] 1 All ER at 957, [1971] 1 WLR at 348

16 [1971] 1 All ER at 959, [1971] 1 WLR at 351

17 (1st December 1970) unreported

18 [1971] 2 All ER 1021, [1971] 1 WLR 1022

19 [1971] 2 All ER at 1026, [1971] 1 WLR at 1027 j

- a extent of the beneficial interests of each? What is "just in all the circumstances of the case?"

I think that the last question must imply that that solution is just which accords with the inferred consensus. Edmund Davies LJ asked the question²⁰ 'whether, in all the circumstances, an implied agreement should be inferred; and, if so, how it affected the beneficial interest'. Stamp LJ's approach¹ was the same although he expressed reservations whether the facts justified the inference that was drawn.

- b The last case, *Hargrave v Newton*², has caused me the greatest difficulty. The registrar found that there was an adjustment to the wife's contribution to expenses referable to the acquisition of the house when she went out to work. But she went out to work and attained her highest earnings before the house was acquired; and the whole of the purchase price was raised on loan. The Court of Appeal upheld the registrar's decision that each had a half share in the house but not on that ground. It seems that the basis of the decision was the mere fact that the wife made contributions to general expenses. Both Lord Denning MR and Megaw LJ relied on the opinion of Lord Reid in *Gissing v Gissing*³ which, so it seems to me, in significant respects did not accord with the other four opinions. The principal reason (although not the only reason) why the wife was able to make the contributions she did make was a wholly unforeseen and unforeseeable windfall of over £5,000. None of this was used (as it might have been) to repay all or part of the mortgage loan. I myself find difficulty in seeing how the windfall could have been a fact raising the inference of a common intention at the time of the purchase that the wife was to be treated as contributing one half of the purchase price of the house. I am respectfully of the opinion that the decision can only be reconciled with the principles in *Gissing v Gissing*³ if the Court of Appeal did draw that inference.

In my judgment those authorities do not compel me to resile from the conclusion of law that I have reached on a consideration of the relevant principles and the decisions in *Pettitt v Pettitt*⁴ and *Gissing v Gissing*³.

- c Counsel for the husband submitted that I should approach the question at issue on the footing that the purchase price was actually provided as to £4,000 by the wife and £8,000 by the husband, and that their respective equitable interests must be in those proportions unless on the totality of the evidence I can infer a common intention at the time of the purchase that they were to be treated as providing the money in equal shares. On the facts, he submitted that no such common intention could be inferred. Further he submitted (and counsel for the wife did not dissent) that there was no agreement express or implied to vary the original beneficial interests after the date of purchase. Counsel for the wife submitted that as a matter of equitable principle if the wife contributed to the purchase of the house, directly or indirectly, then if her contributions (either at the time of the purchase or subsequently) were substantial she was entitled to an equal share unless there was an express agreement to the contrary. Alternatively, on the facts, he submitted that a common intention that the wife was to be treated as having contributed half the purchase price was to be inferred. I have no doubt that on any view of the matter the wife's contribution here was substantial. But for the reasons I have indicated I think that the submission of counsel for the wife on the law is unsound, and I accept the submission of counsel for the husband on the principles to be applied. I must, therefore, consider what (if any) common intention is to be inferred on the footing that one-third of the purchase price was actually provided by the wife and two-thirds by the husband and that there was no relevant express agreement.

20 [1971] 2 All ER at 1026, 1027, [1971] 1 WLR at 1027

1 [1971] 2 All ER at 1028, [1971] 1 WLR at 1029

2 [1971] 3 All ER 866, [1971] 1 WLR 1611

3 [1970] 2 All ER 780, [1971] AC 886

4 [1969] 2 All ER 385, [1970] AC 777

The facts on which counsel for the wife relied as establishing a common intention for equal contributions are as follows. It was only when the parties knew that the wife had a substantial legacy under her father's will that they started to look for a house; if there had been no legacy there would have been no house. The husband had no capital. The total amount of the legacy (£5,591) substantially exceeded the £4,000 paid in cash. The wife had paid some rent, but admittedly only after she had received her legacy. The wife had received other legacies; £80 in 1962 at about the time of the purchase; £3,150 in 1966; £500 in 1967. Her aunt had paid £1,000 to have central heating installed in the house in 1963 and had given her £438 in 1966 to be applied in paying (as it was applied) an overdue premium on the policy and overdue interest on the mortgage. The wife paid that premium and interest in 1966 and also £517 as premium and interest in 1968. In addition, when the husband paid the first premium and instalment of interest he had had moneys from the wife although not expressly for that purpose. While the parties were married and living together in the matrimonial home the wife made substantial contributions to general living expenses (including school fees). Since July 1962 she had received from outside sources a total of £9,221 (including her father's legacy), £4,000 of which admittedly went towards the purchase price. The whole of the balance was spent either for family purposes or in supporting the husband's business. Since the parties separated the wife paid £650 as mortgage interest. According to the wife's evidence, at the time of the purchase she assumed that the house would be put in her name or joint names, and she relies on a letter dated 2nd July 1962 from the husband to the vendor containing references to 'we' and 'us' in relation to the purchase. The whole picture, says counsel for the wife, is one of a joint venture, and a joint venture means an equal venture.

Counsel for the husband relies on the following facts which, he submits, preclude any inference of a common intention to make equal contributions. The parties never had a joint banking account or joint savings or any other pooling of resources. The husband regarded himself as purchasing the house, notwithstanding his receipt of over £4,000 from the wife; he raised an overdraft with guarantees for the purpose. He also referred to himself as the purchaser in contemporary correspondence. Whatever the wife assumed at the time of the purchase, she made no representations on the subject to the husband; in any event her assumption that she was to have an interest would be as consistent with a one-third share as with an equal share. If the intention had been for equal contributions, each would have been equally entitled to the surplus policy moneys. But the husband unequivocally treated the policy as his own by settling it under the Married Women's Property Act 1882 in trust for the wife. Indeed in her evidence she referred to it as 'his' policy. Although in fact the wife made contributions to general expenses and eventually paid some premiums and interest she was able to do so only because of unexpected legacies and gifts. No inferences as to the state of mind of the parties in 1962 can be drawn from what the wife did with such legacies and gifts in 1966, 1967 and 1968. Indeed, in 1962, whatever past experience might have been, and whatever suspicions the wife might have had as to the future based on them, they both thought that the husband was firmly established in a business which would provide for their needs and neither contemplated that in future the wife would go out to work to supplement the family income, or receive money from any source other than the husband, or do anything other than carry out the normal duties of a wife and mother. Since 1962 and while the parties were together the husband received from outside sources over £25,000 all of which was disbursed either on living expenses (including payments of premiums and interest) or on the husband's business which, although it turned out unsuccessfully, was in 1962 intended to be the basis of the family's prosperity.

The submissions of counsel for the wife have cogency and attraction. But in my judgment, looking at the totality of the evidence and putting the matter at its highest in his favour, the facts are equivocal; and I am wholly unable to draw from them an

a inference that the parties in 1962 intended to contribute equally to the purchase of the house. But I go further. I am of opinion that the settlement of the policy on trust for the wife and the then contemplation of the parties that in future the husband alone was to be the source of the family income are themselves conclusive against any such inference. I propose, therefore, to declare that Appletrees is held on trust for sale and that the net proceeds of sale are held on trust for the wife and the husband as tenants in common as to one-third thereof for the wife and two-thirds thereof for the husband.

b The parties are agreed that there should be a sale of the house, and I so order. I will deal in chambers with the question of the terms as to date of completion and otherwise on which the sale should take place and with the wife's right of occupation in the meantime. I shall also adjourn to chambers the question of provision for the wife and children under the 1970 Act to be determined after the purchase price for the house has been ascertained.

c I must, however, deal with the question of equitable accounting. It is common ground, in the light of my conclusion on the facts, that the parties must be regarded as having treated their moneys separately for this purpose. It follows that there must be debited against the husband's share the whole of the outstanding mortgage and the unpaid interest and premiums that are charged on the house and the policy. There must also be debited against his share a sum of £1,500 which he raised on the security of the policy and £1,749 the subject of a charging order on the house as a result of a judgment against the husband for a business liability; also the sum owed to Mr Carter and the wife's brother on their guarantees. The wife must be credited and the husband debited with the sums of £517 and £438 paid by her as premiums and interest and with the £650 that she has paid since the separation for interest. So much is common ground. There is, however, a question as to the policy. It is agreed that it must be surrendered. Counsel for the wife submits that only the surrender moneys attributable to the basic sum of £8,000 should enure for the benefit of the husband and that the discounted profit element should be held on trust for the wife on the footing that that would have been the result if the policy had matured by effluxion of time or on the husband's death. Although the submission has some superficial attraction, I cannot accept it. The whole policy is charged with the mortgage debt. Only subject to that charge has the wife any beneficial interest in it. All the premiums were paid with the primary object of repaying that debt. In my opinion the total surrender moneys must be applied towards payment of that debt in reduction of the debit against the husband's share. There should be liberty to apply in chambers in event of any dispute in working out this order.

g I am constrained to add one further observation. The purchase of a matrimonial home cannot be accomplished without professional advice and assistance. In dealing with the purchase solicitors make many common form enquiries dealing with such matters as planning, registration of charges, and so forth. Although it is not for me to dictate such matters I think that it would be desirable, also as a matter of common form, that they should make specific enquiries of the spouses of their intentions as to beneficial ownership. The just resolution of future disputes would be facilitated; the additional costs would be insignificant; and I cannot think that connubial harmony would be unduly jeopardised.

Order accordingly.

j Solicitors: *Geoffrey S Beccle & Co* (for the wife); *Crane & Hawkins* (for the husband).

Alice Bloomfield Barrister.

C H Giles & Co Ltd v Morris and others

CHANCERY DIVISION

MEGARRY J

5th, 9th, 29th NOVEMBER 1971

Specific performance – Contract to execute service agreement – Service agreement not specifically enforceable – Contract containing provision requiring defendants to appoint third party managing director of company for five years – Contract requiring only the performance of single act, i.e. execution of service agreement – Contract specifically enforceable – Immaterial that service agreement as a contract for personal services not specifically enforceable.

By a contract dated 6th November 1970, I P Ltd, a firm of insurance brokers, whose shares were all owned by the defendants, agreed with G and G's company, G Ltd (the plaintiffs) to adopt new articles of association, to reorganise its share capital and to sell certain shares to the plaintiff company. The contract contained a variety of other provisions, one of which was that the defendants would procure that G should be appointed by a service agreement as managing director of I P Ltd for five years. Completion of the contract did not take place owing to disagreement among the defendants and on 22nd June 1971 the plaintiff company issued a writ claiming specific performance of the contract. The application was heard before a master on 8th September when all the defendants, after taking legal advice, consented to the master making an order for specific performance by 4th October. The order was for the defendants to procure, inter alia, the execution by I P Ltd of the service agreement with G. The board of I P Ltd met on 4th October but refused to appoint G as managing director on the ground that he had not appropriate insurance experience. By a motion the plaintiffs sought committal of three of the nine personal defendants who had refused to take the necessary steps to procure G's appointment as managing director in accordance with the consent order, and for leave to sue out a writ of sequestration in respect of the tenth defendant, a limited company. It was contended on behalf of the defendants that they had been wrongly advised to give their consent to the order of 8th September and that the court should not use the remedies of committal and sequestration to secure the appointment of G to a position under a service agreement from which he would be promptly excluded in breach of contract, thus giving rise to a claim for damages.

Held – The defendants were in contempt of court for their disobedience to the order for specific performance of 8th September and there was no defence to the plaintiffs' motion. Although the court would not usually decree specific performance of a contract for personal services, all that the decree required in the present case was the procuring of a single act, i.e. the execution of the service agreement. The mere fact that the contract to be made was one of which the court would not decree specific performance was not a ground for refusing to decree that the contract be entered into. Furthermore the obligation to enter into a service agreement was merely one part of a contract that dealt with many other matters; it did not follow that, because a contract contained one provision which by itself would not be specifically enforceable, the contract as a whole could not be specifically enforced (see p 968 a and f and p 970 e, post).

Per Megarry J. It should not be assumed that as soon as any element of personal service or continuous services can be discerned in a contract the court will, without more, refuse specific performance (see p 970 b, post).

- a* Quaere. Whether since the enactment of s 15 (4)^a of the Administration of Justice Act 1956 the court has jurisdiction to entertain a motion to set aside or discharge an order made by a judge or master in chambers (see p 966 a e g and j to p 967 a, post).

Notes

For specific performance of contracts for personal service or work, see 36 Halsbury's Laws (3rd Edn) 268, para 366 and for cases on the subject, see 44 Digest (Repl) 15, 16, 66-75.

- b* For the Administration of Justice Act 1956, s 15, see 7 Halsbury's Statutes (3rd Edn) 702.

Cases referred to in judgment

- Ainsworth v Wilding* [1896] 1 Ch 673, 65 LJCh 432, 74 LT 193, 50 Digest (Repl) 531, 1979.
- c* *Boake v Stevenson* [1895] 1 Ch 358, 64 LJCh 261, 71 LT 722, 51 Digest (Repl) 638, 2470. *Fortescue v Lostwithiel and Fowey Railway Co* [1894] 3 Ch 621, 64 LJCh 37, 71 LT 423, 44 Digest (Repl) 16, 75.
- Giles, Re, Real and Personal Advance Co v Michell* (1890) 43 Ch D 391, 59 LJCh 226, 62 LT 375, 51 Digest 638, 2478.
- d* *Granville v Betts* (1848) 18 LJCh 32.
- Heatley v Newton* (1881) 19 Ch D 326, 51 LJCh 225, 45 LT 455, 51 Digest (Repl) 805, 3618.
- Holloway v Cheston* (1881) 19 Ch D 516, 51 LJCh 208, 51 Digest (Repl) 638, 2471.
- Johnson, Re, Manchester and Liverpool Banking Co v Beales, Johnson v Hooley* (1889) 42 Ch D 505, 59 LJCh 99, 61 LT 160, 51 Digest (Repl) 638, 2477.
- e* *London Permanent Benefit Building Society v de Baer* [1968] 1 All ER 372, [1969] 1 Ch 321, [1968] 2 WLR 465, Digest (Cont Vol C) 719, 3141a.
- Mileage Conference Group of the Tyre Manufacturers' Conference Ltd's Agreement, Re* [1966] 2 All ER 849, [1966] 1 WLR 1137, Digest (Cont Vol B) 711, 227a.
- Paxton v Newton* (1854) 2 Sm & G 437, 65 ER 470, 31 Digest (Repl) 369, 5003.
- Purcell v F C Trigell Ltd* (trading as Southern Window and General Cleaning Co) [1970] 3 All ER 671, [1971] 1 QB 358, [1970] 3 WLR 884, Digest (Cont Vol C) 1095, 3232a.
- f* *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116, 62 LJCh 252, 67 LT 820, 44 Digest (Repl) 23, 141.
- Stocker v Wedderburn* (1857) 3 K & J 393, 26 LJCh 713, 30 LTOS 71, 44 Digest (Repl) 19, 101.
- Thomas, Re, Bartley v Thomas* [1911] 2 Ch 389, 105 LT 59, 51 Digest (Repl) 626, 2388.
- g* *Wilson v West Hartlepool Railway Co* (1865) 2 De GJ & Sm 475, 34 LJCh 241, 11 LT 692, 34 Beav 187, 44 Digest (Repl) 45, 315.
- Wilson v Wilson* (1854) 5 HL Cas 40, 23 LJCh 697, 23 LTOS 134, 27 Digest (Repl) 241, 1944.

Motion and cross-motion

- h* The plaintiffs, C H Giles & Co Ltd moved for an order for the committal to prison of Jessie Marie Stuart Morris, Yvonne Stuart Matthews and Leonard Arthur William Thurgood and leave to sue out a writ of sequestration against Defiance Investments Ltd who were among ten defendants in an action by the plaintiffs for specific performance of a contract dated 6th November 1970. The contract was the subject of an order for specific performance made with the consent of the parties by Master

- j* *a* Section 15 (4) provides: 'Section sixty-two of the [Supreme Court of Judicature (Consolidation) Act 1925] (which enables orders of a judge in chambers to be set aside or discharged by a judge in court or by a Divisional Court) and paragraph (g) of subsection (1) of section thirty-one of that Act (which requires the leave of the judge or of the Court of Appeal for an appeal against any order of a judge in chambers unless an application has been made to have it set aside or discharged as aforesaid) shall cease to have effect, without prejudice, however, to the power of rules of court to make provision corresponding to the said section sixty-two.'

Dinwiddy on 8th September 1971. By cross-notice of motion the aforementioned defendants sought to vary or discharge that consent order. The facts are set out in the judgment.

F P Neill QC and Richard Sykes for the plaintiffs.

Jeremiah Harman QC and L H Hoffman for the defendants to the motion.

Cur adv vult

29th November. **MEGARRY J** read the following judgment. This is a motion by the plaintiff company to commit three of nine personal defendants, and for leave to sue out a writ of sequestration in respect of the tenth defendant, a limited company called Defiance Investments Ltd, which I shall refer to as 'Defiance'. The matter arises out of a consent order for specific performance made by Master Dinwiddy on 8th September 1971. The contract in question was made on 6th November 1970 and is of considerable complexity. The defendants between them own all the issued shares in a company called Invincible Policies Ltd, which I shall call 'Invincible'. Invincible carries on the business of insurance brokers, and has a subsidiary called Trafalgar Insurance Co Ltd (which I shall call 'Trafalgar') which carries on a motor insurance business; and Invincible owns well over 75 per cent of the shares in Trafalgar. The broad picture is that the moving spirit in Defiance and Invincible was Mr Arthur Stuart Morris, who for many years had been chairman and managing director of both companies. In 1970 Mr Morris, who was well on into his sixties and was contemplating ultimate retirement, entered into discussions with a Mr C H Giles, a man in his middle twenties who had experience of lending money on second mortgages, but who seems to have had no experience with motor or other insurance. The upshot of these discussions was the agreement of 6th November 1970. Just over two months later, Mr Morris died suddenly; and the first and second defendants, against whom orders of committal are sought, are the administrators of his estate.

Under the agreement, Mr Morris and all the other defendants (save his administrators, who stand in his shoes) are named as the vendors; Defiance, which is also one of the vendors, is named as the second party, the then directors of Invincible as the parties of the third part, Mr Giles as the fourth party, and Mr Giles's company, C H Giles & Co Ltd, the plaintiffs, as the fifth party. It is the plaintiffs in the action who are bringing this motion. The contract provides for Invincible to adopt new articles of association and reorganise its share capital, and also for the sale of certain shares in Invincible to the plaintiffs on certain terms, together with a variety of other provisions, filling over 40 pages of foolscap; but I think I need mention only two provisions in any detail.

Clause 2 provides that 'On or before completion the Vendors will procure the following to be done'. Among the seven paragraphs of the clause appears para (f): 'Mr. Giles shall enter into a Service Agreement with [Invincible] in the form of the draft annexed hereto marked "A"'. The draft marked 'A' provides for Mr Giles to be appointed 'as a Managing Director' of Invincible for five years, and for him to exercise such powers and comply with and perform such directions and duties consistent with his office as 'a Managing Director' in relation to the business and affairs of the company 'as may from time to time be vested in or given to him by the Board of Directors of [Invincible] . . .'. There is a further provision in the contract, in cl (2 g), that 'Mr. Giles shall be appointed a Director of Trafalgar'. It is from the first of these two provisions that the main difficulty arises. By cl 8 the sale and purchase of the shares was to be completed 'as soon as practicable'.

After the death of Mr Morris on 10th January 1971 various discussions took place which all came to nothing. Completion was originally fixed for 31st December 1970 but did not take place. During March and April 1971 various dates for completion were arranged, but still completion did not take place. On 18th March the solicitors for the defendants gave the plaintiffs notice to complete within seven days,

a so that some time after the death of Mr Morris the defendants, far from resisting completion, were pressing for it. Five of the defendants have for over five months expressed themselves as being willing to comply with the terms of the agreement, and no order is sought against them on this motion; nor is any order sought against the defendant Mr Tyson, who is abroad and has not been served. The respondents to the motion for committal and sequestration are the defendants Mrs Morris and Mrs Matthews, who are the administrators of Mr Morris; Mr Thurgood; and Defiance.

b The plaintiffs' writ claiming specific performance was issued on 22nd June 1971; and on 8th September 1971 Master Dinwiddy heard an application by the plaintiffs for summary judgment for specific performance under RSC Ord 86. The defendants who are willing to perform the contract were represented by solicitors; the first defendant was in person, and the other defendants were represented by counsel. c All defendants consented to the master making an order for specific performance; and the order made was for the defendants to procure that various specified acts be done before 4.00 pm on 4th October 1971 or subsequently within four days after service of the order. Two of the acts in question were the execution by Invincible of the service agreement with Mr Giles, and the appointment of Mr Giles as a director of Trafalgar.

d On 4th October 1971 the board of Invincible met. By then, four additional directors had been appointed; and by six votes to one the board refused to appoint Mr Giles as a managing director of Invincible on the terms of the service agreement or at all. The board has also expressed its refusal to have Mr Giles appointed as a director of Trafalgar. The board's objections to Mr Giles are based on allegations of his inexperience in motor insurance, his conduct while taking part in the running of Trafalgar for a period which began over three months before Mr Morris's death and e continued for some six months in all, and a number of other matters, including the importance to the public of a motor insurance business being conducted on sound financial lines, and allegations of Mr Giles's intention to adopt policies of which the board does not approve. The board recognises that the agreement is legally binding, and has expressed the willingness of the board to perform the whole of it except the f two provisions that I have mentioned; but the board seeks to be released from the order so far as it relates to these two provisions.

As I have mentioned, the order is a consent order. The consent was given on the advice of experienced junior counsel practising in this Division. Every objection to performing the two disputed obligations was known to the defendants when they gave their consent to the making of the order. Leading counsel now says on behalf g of the defendants for whom he appears that the advice given them by junior counsel was wrong, and that had they put forward the objections which they now urge it is at least highly doubtful whether the order would have been made. That may be so, or it may not. The facts remains that, with no change of circumstances, the defendants are refusing to carry out the order for specific performance to which, on advice, they consented. Counsel for the defendants says that they are willing to pay h damages, but that the court should not use the remedies of committal and sequestration to secure the appointment of Mr Giles to directorships and a position under a service agreement from which, said counsel, Mr Giles would be promptly excluded in breach of contract, thus giving rise to a claim for damages.

It is true that the defendants cannot directly control the directors of Invincible in this respect; but the defendants have sufficient control of Invincible to be able to remove the appointment of a managing director to the company in general meeting, j and in that way 'procure' the necessary appointment in accordance with the agreement and the order. The plaintiffs in fact have put forward a draft special resolution for this purpose in an affidavit sworn over a week before day 1 of this motion. The defendants have done nothing towards taking this step. Nor have they done anything towards setting aside the judgment. Until in court on day 1, the defendants had not even mentioned to the plaintiffs' solicitors or counsel that they intended to do anything of the kind. There was no more than a part of a single sentence in an affidavit

sworn the day before day 1 by one of the directors of Defiance and Trafalgar who is not a party to these proceedings, respectfully asking on behalf of the board of Invincible that they should be released from any part of the order which would compel them to appoint Mr Giles a managing director of Invincible. Not only did that request somewhat miss the point, but also it seemed to be advanced merely as part of a defence against the motion for committal and sequestration, on the footing that the order of the court would remain in force but that to this extent the defendants should not be required to obey it.

The course of the proceedings was that on day 1 counsel for the plaintiffs opened the motion, and towards the end of the day counsel for the defendants began his reply. Initially, counsel for the defendants appeared to be proceeding on the footing of putting forward a defence to the motion based on contentions such as the order for specific performance being an order that never should have been made, the public importance of motor insurance companies being properly conducted by experienced persons, and the futility of procuring the appointment of Mr Giles as a managing director of Invincible when the board would, he asserted, promptly dismiss him in breach of contract and pay damages. However, counsel for the defendants ultimately accepted that there were difficulties in this line of argument so long as the order for specific performance stood, not least in the contention that it was a good defence to a motion for contempt that there was a firm resolution to persist in the contempt. He accepted that it was necessary or at least desirable for him to apply to vary or discharge the consent order.

A weekend happily intervened, and on day 2, with counsel for the plaintiffs not objecting to the shortness of notice, counsel for the defendants moved under a cross-notice of motion to vary or discharge the consent order. The question that then arose was whether it was possible for him to proceed in this way in respect of a consent order that had been perfected, or whether a new action to vary or set aside the order was requisite. In the latter case, I would have no jurisdiction to vary or discharge the order on counsel for the defendants' cross-motion. I am here concerned, of course, not with the process of adjournment from a master to a judge before any order is entered, but with a perfected order. Furthermore, counsel for the defendants' submissions took on a somewhat different aspect. His emphasis was on cl 2 (f) of the contract, relating to the service agreement with Invincible whereunder Mr Giles would become a managing director of that company. This, he said, was a contract for personal services, and so on the face of the order it was plain that the master should never have made it, even by consent. Ultimately, the whole of counsel for the defendants' contention that specific performance should not have been ordered came down to cl 2 (f). By the end of the argument he had accepted the obligation to perform all the provisions of the contract, including the appointment of Mr Giles as a director of Trafalgar under cl 2 (g). But to the performance of cl 2 (f) counsel for the defendants offered the strongest opposition, although stressing that the defendants for whom he appeared were willing to pay damages, and accepting their vulnerability as regards costs. The two issues before me were thus the procedural matter and the question of specific performance. I shall consider the procedural point first.

A convenient starting point is the headnote to *Ainsworth v Wilding*¹. This reads as follows:

'After a judgment has been passed and entered—even where it has been taken by consent and under a mistake—the Court cannot set it aside otherwise than in a fresh action brought for the purpose unless (1.) there has been a clerical mistake or an error arising from an accidental slip or omission within the meaning of the Rules of the Supreme Court, 1883, Order XXVIII, r. 11, or (2.) the judgment as drawn up does not correctly state what the Court actually decided and intended to decide—in either of which cases the application may be made

a by motion in the action. *Semble*, that different considerations apply to interlocutory orders; but that even if a judgment has not been passed and entered the Court will not always interfere on motion, e.g., where from the nature of the ground relied on conflicting evidence is essential.'

This decision has been repeatedly applied and approved; and on the face of it the decision appears to require that a fresh action should be brought in a case like this.

b However, motions to discharge or vary an order have long been known, and so the question is what part is left for them to play. In 1965 a *Practice Direction*² was made which seemed to recognise their role. By para 2:

'If a master's order is drawn up and perfected, no party can thereafter require that matter to be adjourned to the judge. Any dissatisfied party must then proceed by motion to apply for the order to be discharged or varied.'

c This *Practice Direction*², I may say, was helpfully discussed in *London Permanent Benefit Building Society v de Baer*³. An obvious question is how this part of the *Practice Direction*² is to be reconciled with *Ainsworth v Wilding*⁴. Counsel for the defendants contended that the distinction was not between interlocutory and final orders (although *Ainsworth v Wilding*⁴ recognises that there may well be a distinction of this kind), nor between orders made by the master and orders made by a judge, but between orders made in chambers, whether by a master or a judge, and orders made in court. He submitted that, though perfected, an order made in chambers is open to review on motion, whereas an order made in court, at all events if a final order, can be discharged or varied only by means of a new action. In *Ainsworth v Wilding*⁴, the order, a final order made by consent, was made in court during the trial, and was not an order made in chambers. Here, of course, the consent order was made by the master.

f That may indeed have been the distinction; the question is not easy and requires further consideration. But it is pointless to embark on this if the process of moving to vary or discharge an order in chambers no longer exists, at any rate where the order is a master's order; and on this issue counsel for the plaintiffs referred me to the Administration of Justice Act 1956, s 15 (4). The Supreme Court of Judicature (Consolidation) Act 1925, s 62, which replaced the Supreme Court of Judicature Act 1873, s 50, enabled orders of a judge in chambers to be set aside or discharged on motion by, inter alia, a judge sitting in court. There are many instances where motions to vary or discharge orders in chambers have been recognised as having been brought under these provisions: see, for example, *Heatley v Newton*⁵, *Re Johnson*⁶, *Re Giles*⁷ and *Boake v Stevenson*⁸. In support of counsel for the defendants' distinction between orders made in chambers and orders made in court, I may say that in three of these cases the order was a judge's order, and in one, *Re Johnson*⁶, it was an order of a chief clerk (as the masters were formerly called), so that no distinction between a judge's order and a master's order seems to have been made. Furthermore, in days past the words 'judge in chambers' plainly included the master acting as deputy for the judge: see, for example, per Warrington J in *Re Thomas*⁹, quoted in *de Baer's* case¹⁰. The Administration of Justice Act 1956, s 15 (4), however, provided that the Judicature Act 1925, s 62, should cease to have effect, without prejudice to the power of rules of court to make corresponding

2 [1965] 3 All ER 306, [1965] 1 WLR 1259

3 [1968] 1 All ER 372, [1969] 1 Ch 321

4 [1896] 1 Ch 673

5 (1881) 19 Ch D 326 at 334

6 (1889) 42 Ch D 505

7 (1890) 43 Ch D 391

8 [1895] 1 Ch 358

9 [1911] 2 Ch 389 at 396

10 [1968] 1 All ER at 375, [1969] 1 Ch at 328

provisions. Accordingly, it appears that the power to move to vary or discharge an order made in chambers can no longer be based on the statute book, and so, unless it is an inherent power of the court, must be based on some rule of court. No question has arisen before me on the absence of the word 'vary' from the statute, for doubtless a power to set aside or discharge an order a fortiori includes a power to vary it.

In this respect, the only rule that counsel for the defendants relied on was RSC Ord 58, r 7 (2) (a). This is dealing, inter alia, with appeals to the Court of Appeal from 'any judgment, order or decision of a judge in chambers' in the Chancery Division. The sub-rule provides that the appeal is to lie 'after an application to set aside or discharge the judgment, order or decision has been made to the judge sitting in court and has been refused'. One question, then, is whether this sub-rule confers the power to move to vary or discharge an order which had formerly been contained in the Judicature Acts.

There are a number of difficulties. First, the sub-rule appears to be assuming that the power to make such an application exists; it does not in terms purport to confer such a power, either for the purpose of appeals to the Court of Appeal or, a fortiori, generally. In the case of appeals, I may say, the purpose of the adjournment into court is so that the judge may have the opportunity of delivering a judgment which will enable the Court of Appeal to understand the reasons for his decision: see *Holloway v Cheston*¹¹. Secondly, the sub-rule is derived from RSC (No 1) 1957, as amended by RSC (No 1) 1958, which added a new RSC Ord 55, r 14D, to the Rules of the Supreme Court as they then stood; and I cannot see anything in these statutory instruments (1957 No 1178 and 1958 No 650) to suggest any conscious exercise of the power conferred by the Administration of Justice Act 1956, s 15 (4). If the Rules Committee was seeking to confer under the rules the power which the Judicature Acts had formerly conferred in terms, I can only say that, with the words of the power under the Judicature Acts presumably in mind, the different language chosen for the new rule seems singularly oblique, phrased as it is in terms of assumption and of condition precedent to an appeal. Thirdly, the present RSC Ord 58, r 7 (2), is dealing only with appeals from 'a judge in chambers', and I do not think that in the present rules, the Rules of the Supreme Court 1965, the phrase 'a judge in chambers' includes a master. Under RSC Ord 1, r 4 (2), 'the Court' includes masters; the old phrase 'the Court or a Judge' has in the main disappeared from the rules: see Supreme Court Practice 1970¹². 'Judge' now means 'judge', and not 'master' and the rules show themselves perfectly capable of using the word 'master' when 'master' is meant: see RSC Ord 58, r 3, another rule in the order that I have to construe.

As for the inherent jurisdiction, I suppose that it may be that some such jurisdiction has subsisted throughout, and that, although cast into shadow while the statutory power existed, that jurisdiction has now, over 80 years later, emerged once again into the light. But there is nothing before me to suggest that there is such a jurisdiction, and such a point could hardly be resolved without further consideration. The assumption in the Supreme Court Practice 1970¹³, in the notes to RSC Ord 58, r 7, is that motions to set aside or discharge an order in chambers may still be brought. Confidence in this assumption would be greater if there had been any reference to the Administration of Justice Act 1956, s 15 (4); but according to the Table of Statutes¹⁴ the book, although citing sub-ss (2) and (3) of the section, nowhere even mentions sub-s (4).

In those circumstances, the question is what course I ought to take. It may perhaps be that I have jurisdiction to hear counsel for the defendants' motion, and it may well be that I have not. It is possible, of course, that there is some simple explanation

¹¹ (1881) 19 Ch D 516

¹² Page 5, para 1/4/2

¹³ Page 763, para 58/7/1

¹⁴ Page ccix

a that has yet to come my way. Certainly without further argument I should be unwilling to decide the point unless I had to. I have discussed it, I fear at some length, as it was argued in this case, and is a point of some procedural importance which, I think, merits the attention of the Rules Committee, if only because it may arise in some case which cannot be decided on other grounds. In this case, however, I have in fact reached a clear conclusion on the question of specific performance, and this makes it unnecessary for me to decide the question of jurisdiction. After b I have dealt with one other matter, I shall accordingly turn from the question of jurisdiction to that of specific performance. The matter that I should deal with first is that counsel for the defendants' notice of motion also seeks an extension of time for his cross-motion. This is because the courts have adopted a time limit for such motions, and this, originally 21 days, is now 14 days: see *Re Johnson*¹³, *Re Giles*¹⁴ and the Supreme Court Practice 1970¹⁵. The master's order is dated 8th September c 1971 and the defendants' notice of motion is dated 5th November 1971, so that on the face of it the cross-motion is out of time. There is, moreover, very little material before me to support any such extension as is sought. At the least I should require to know in some detail when and under what circumstances the allegedly erroneous advice to the defendants was replaced by the allegedly sound advice; and on this d there is no real evidence before me, although I think counsel for the defendants accepted that it was not until day 1 that the allegedly sound advice was given. Furthermore, for reasons that will appear, I do not think that the cross-motion has any real substance in it. I bear in mind, too, that the burden of setting aside a consent order made on legal advice is very high: see, for example, *Purcell v F C Trigell Ltd*¹⁶. If I have jurisdiction to hear the cross-motion, I can only say that on the evidence e before me I cannot see any real grounds for extending the time; and I therefore would refuse to extend it.

I should, however, be reluctant to dispose of this case on the ground that, if I have jurisdiction, the defendants' cross-motion is out of time and the time ought not to be extended. I should also be reluctant to dispose of the case on the footing that f since the Administration of Justice Act 1956 it is no longer possible to proceed by way of a motion to vary or discharge the order but that a fresh action must be brought; for that would involve expense, delay and prolonged uncertainty. I accordingly think that the right course is for me to assume that I have jurisdiction on the cross-motion, despite my doubts, and consider the question of specific performance, which is also one of the factors that I have borne in mind in holding that no extension of time ought to be granted. Furthermore, there is plainly no question about my g jurisdiction under the plaintiffs' motion, and on that motion it seems at least of some relevance to determine whether or not the order that has been disobeyed is one that ought never to have been made. What I have to consider is whether the presence in the agreement of cl 2 (f), providing for Mr Giles to enter into a service agreement with Invincible in the form of the draft annexed to the contract, prevents the court from decreeing specific performance of the entire agreement, including that sub-clause. It will be observed that there is no question of the plaintiffs seeking to enforce h any order of the court which will compel any of the defendants to carry out, either as employer or employee, any personal services. The order made is an order to procure 'the execution by the Company of the engrossment' of the service agreement. The question is whether such an order falls within the principle that the court will not decree specific performance of a contract for personal services.

j On the face of it the answer must be No. There is no question of the execution of the decree requiring constant superintendence by the court of a continuous series

13 (1889) 42 Ch D 505

14 (1889) 43 Ch D 391

15 Page 763, para 58/7/1

16 [1970] 3 All ER 671, [1971] 1 QB 358

of acts such as arose in *Ryan v Mutual Tontine Westminster Chambers Association*¹⁷, a case that was mentioned but not cited during argument. All that the decree requires in this respect is the procuring of a single act, namely, the execution of the service agreement. When that has been done, the question of any breach of the service agreement and any remedies for that breach is one between Invincible and Mr Giles, and not between Invincible and the plaintiffs. Invincible, too, is a party neither to the contract nor to the action.

The distinction between an order to perform a contract for services and an order to procure the execution of such a contract seems to me to be sound both in principle and on authority. I do not think that the mere fact that the contract to be made is one of which the court would not decree specific performance is a ground for refusing to decree that the contract be entered into. During the argument, counsel for the defendants cited *Fry on Specific Performance*¹⁸ in support of the proposition that the court will not order specific performance of a contract of hiring and service. This, however, is not the whole of the story; and if one turns on¹⁹ one finds *Ryan's case*¹⁷ cited, together with certain other cases. To one of the latter, *Wilson v West Hartlepool Railway Co*²⁰ I drew the attention of counsel towards the conclusion of counsel for the plaintiffs' argument. A variety of points arose in that case, in which Sir John Romilly MR had decreed specific performance¹. On appeal, Knight Bruce and Turner LJJ disagreed, and so the decision was affirmed, in accordance with the judgment of Turner LJ. So far as relevant, the difference between the Lords Justices was on whether or not the agreement in question provided for the execution of any further instrument. Knight Bruce LJ thought not, but Turner LJ held the contrary. However, Knight Bruce LJ said²:

'I agree that there may be and have been cases in which it may well be and has been held that there may, under a bill for specific performance of a contract, be a decree against a Defendant to execute a deed containing covenants on his part to do acts of which, from their nature, specific performance could not directly be enforced. But the present is I think not a case of that description.'

As Turner LJ held not only that the agreement did contemplate the execution of a further deed, but also that the execution of such a deed should be specifically enforced, I think it is clear that both members of the court took the view that specific performance may be decreed of an agreement to execute an instrument even if the obligations under that instrument would not be specifically enforced. It is true that the ground on which specific performance was resisted in that case was not that the further instrument related to acts of personal service but that it was too indefinite in its obligations, requiring a contracting party to use a particular railway 'in preference to all others', 'whenever reasonably practicable', and 'for the longest distance it is reasonably capable of use'. However, in this context I can see no sensible distinction between this objection to specific performance and an objection based on the performance of personal services; and I do not think that the judgments support any such distinction.

That is not the only authority to this effect. Thus there is *Granville v Betts*³, of which Fry⁴ says, 'the real contract here which the Court enforces is a contract to execute

¹⁷ [1893] 1 Ch 116

¹⁸ 6th Edn, 1921, pp 50, 51

¹⁹ See pp 388-390

²⁰ (1865) 2 De GJ & Sm 475

¹ (1864) 34 Beav 187

² (1865) 2 De GJ & Sm at 488

³ (1848) 18 LJCh 32

⁴ 6th Edn, 1921, p 389

a the deed'; and see *Stocker v Wedderburn*⁵. So too in *Wilson v Wilson*⁶, Lord St Leonards said:

b '... it does not at all follow, because the Court of Equity compels the Appellant in this case to enter into a covenant that he will not, by the force of ecclesiastical censures, compel restitution of his conjugal rights, that the Court would enjoin him from breaking that covenant which he has entered into; the Court, I apprehend, would leave him to answer any action that might be brought for damages upon the covenant.'

c Indeed, were the rule otherwise, I do not see why a lessor could not resist specific performance of a contract to grant a lease if that lease contained any term of which specific performance would not be granted, such as a provision like that in *Ryan's case*⁷ for the services of a porter, or for repairs; yet he cannot: see *Paxton v Newton*⁸.

d There is a further consideration. The obligation to enter into a service agreement is merely one part of a contract which deals with many other matters; and that obligation is the only part of that complex which is said not to be specifically enforceable. Now there is authority for saying that the mere presence in a contract of one provision which, by itself, would not be specifically enforceable (because, for example, it requires the performance of personal services) does not prevent the contract as a whole from being specifically enforced. This is so even if the obligation to perform personal services could be enforced only, for instance, by ordering sequestration: see *Fortescue v Lostwithiel and Fowey Railway Co*⁹, and *Fry*¹⁰. In such cases, the contract must be regarded as a whole, and the court may refuse to let the disadvantages and difficulties of specifically enforcing the obligation to perform personal services outweigh the suitability of the rest of the contract for specific performance, and the desirability of the contract as a whole being enforced. After all, *pacta sunt servanda*.

e One day, perhaps, the courts will look again at the so-called rule that contracts for personal services or involving the continuous performance of services will not be specifically enforced. Such a rule is plainly not absolute and without exception, nor do I think that it can be based on any narrow consideration such as difficulties of constant superintendence by the court. Mandatory injunctions are by no means unknown, and there is normally no question of the court having to send its officers to supervise the performance of the order of the court. Prohibitory injunctions are common, and again there is no direct supervision by the court. Performance of each type of injunction is normally secured by the realisation of the person enjoined that he is liable to be punished for contempt if evidence of his disobedience to the order is put before the court; and if the injunction is prohibitory, actual committal will usually, so long as it continues, make disobedience impossible. If instead the order is for specific performance of a contract for personal services, a similar machinery of enforcement could be employed, again without there being any question of supervision by any officer of the court. The reasons why the court is reluctant to decree specific performance of a contract for personal services (and I would regard it as a strong reluctance rather than a rule) are, I think, more complex and more firmly bottomed on human nature. If a singer contracts to sing, there could no doubt be proceedings for committal if, ordered to sing, the singer remained obstinately dumb. But if instead the singer sang flat, or sharp, or too fast, or too slowly, or too loudly, or too quietly, or resorted to a dozen of the manifestations of temperament traditionally associated with some singers, the threat of committal would reveal

5 (1857) 3 K & J 393 at 403

6 (1854) 5 HL Cas 40 at 61

7 [1893] 1 Ch 116

8 (1854) 2 Sm & G 437

9 [1894] 3 Ch 621

10 Specific Performance, 6th Edn, 1921, p 53

itself as a most unsatisfactory weapon; for who could say whether the imperfections of performance were natural or self-induced? To make an order with such possibilities of evasion would be vain; and so the order will not be made. However, not all contracts of personal service or for the continuous performance of services are as dependent as this on matters of opinion and judgment, nor do all such contracts involve the same degree of the daily impact of person on person. In general, no doubt, the inconvenience and mischief of decreeing specific performance of most of such contracts will greatly outweigh the advantages, and specific performance will be refused. But I do not think that it should be assumed that as soon as any element of personal service or continuous services can be discerned in a contract the court will, without more, refuse specific performance. Of course, a requirement for the continuous performance of services has the disadvantage that repeated breaches may engender repeated applications to the court for enforcement. But so may many injunctions; and the prospects of repetition, although an important consideration, ought not to be allowed to negative a right. As is so often the case in equity, the matter is one of the balance of advantage and disadvantage in relation to the particular obligations in question; and the fact that the balance will usually lie on one side does not turn this probability into a rule. The present case, of course, is a fortiori, since the contract of which specific performance has been decreed requires not the performance of personal services or any continuous series of acts, but merely procuring the execution of an agreement which contains a provision for such services or acts.

It follows that in my judgment the agreement is specifically enforceable, the consent order was properly made, and the advice given by junior counsel that there was no defence to the action on this score was sound advice. In those circumstances, I can see no defence to the plaintiffs' motion to enforce the order. There is no suggestion that any of the procedural requirements have not been satisfied: see in particular RSC Ord 45. Apart from procedural matters, in the end the sole point comes to the specific enforceability of the agreement in view of cl 2 (f); and that point has now been resolved. The question that remains is what order should be made on the plaintiffs' motion for committal and for leave to sue out a writ of sequestration.

In response to a question from the bench, counsel for the plaintiffs, after taking instructions, very properly told me that he was not seeking any immediate order; and accordingly, when I reserved judgment, I told the defendants that no such order would be made, and that they thus would have a *locus poenitentiae*. Subject to what counsel may have to say on the point, what I propose to do is to adjourn the case for a short while in order to enable the defendants to consider their position, and to take advice on what course they should take and what undertakings, if any, they should proffer to the court. I bear in mind that there is authority for the proposition that it is no defence to proceedings for contempt that the acts or omissions which constituted the contempt were effected reasonably on legal advice: see *Re Agreement of the Mileage Conference Group of the Tyre Manufacturers' Conference Ltd*¹¹. The defendants have in the past shown that they are capable of acting on legal advice, and if they take prompt and vigorous steps to comply with the decree in this case, now that there has been a full ventilation of the opposition to it, that, of course, may materially affect the order that I shall make on the motion. So that there may be no misunderstanding, let me say in terms that I hold the defendants *Jessie Marie Stuart Morris*, *Yvonne Stuart Matthews*, *Leonard Arthur William Thurgood* and *Defiance Investments Ltd* in contempt of court for their disobedience to the order for specific performance made on 8th September 1971 in the terms stated in the plaintiffs' notice of motion. Subject to one matter, I shall proceed to hear counsel on the question of the adjournment; and if it will facilitate matters, I shall rise for a short while so that counsel may take instructions and discuss the matter.

a That one matter is this. In this judgment I have referred to a number of authorities not cited in argument. On the procedural point I have reached no final conclusion, and so the citation of additional authorities in that respect does not raise any particular difficulty. But it is otherwise in relation to the question of specific enforceability. On this, the only authority cited to me by either side was Fry¹², cited by counsel for the defendants. *Wilson v West Hartlepool Railway Co*¹³ came into the picture because, looking at Snell's Equity¹⁴ during the argument, I found the case cited there on what seemed to be the relevant point, and I drew counsel for the plaintiffs' attention to it; and at the conclusion of leading counsel for the plaintiffs' argument his junior read me certain passages from the case in support of the plaintiffs' cause. The case was thus both mentioned and cited before counsel for the defendants began his reply; and at an earlier stage I had put questions to him based on there being a distinction between a contract for personal services and a contract to enter into a contract for personal services. At the conclusion of the argument, I intimated that I might require further argument, particularly as my copy of the report of *Wilson's case*¹³ showed that the decision had been referred to in a number of subsequent cases. I have now pursued these references, and find that they relate to issues in *Wilson's case*¹³ other than that of the specific enforceability of the agreement. In those circumstances, I have not thought it right to involve those concerned in the trouble and delay that would result from restoring the case for further argument. The point and the leading authority on it were fairly before counsel, and the other authorities seem to me in the main merely to support and amplify that authority. Indeed, *Granville v Betts*¹⁵, *Stocker v Wedderburn*¹⁶ and *Wilson v Wilson*¹⁷ were all cited in *Wilson's case*¹⁸. *Fortescue's case*¹⁹, it is true, exemplifies a different aspect, but even if in some way it could be shown to be nihil ad rem, that would not destroy either the authority of *Wilson's case*¹³ or the principle. *Fortescue's case*¹⁹, I may say, is duly cited in Fry²⁰, two pages on from the passage which counsel for the defendants cited to me. I am dealing explicitly with this point because, of course, this is a committal case, with all that that implies, and the citation in a judgment of authorities not discussed during argument is a matter that must be approached with caution. Accordingly, although I do not require further argument, if counsel on either side desire that there should be any further argument, I shall readily listen to any application for the purpose.

[After a short adjournment counsel intimated that they did not wish to address any further argument to his Lordship and counsel for the defendants gave an undertaking to set in motion the necessary procedures to comply with the consent order. The case was adjourned until 12th January 1972 when the court, on being satisfied that the order had been complied with and that the defendants had tendered apologies, made no order on the motion or cross-motion save that the defendants to the motion should pay the plaintiffs' costs of the motion and cross-motion on a common fund basis.]

Solicitors: *Herbert Smith & Co* (for the plaintiffs); *Goodman, Derrick & Co* (for the defendants to the motion).

R W Farrin Barrister.

12 6th Edn, 1921, pp 50, 51

13 (1865) 2 De GJ & Sm 475

14 26th Edn, 1966, p 646

15 (1848) 18 LJCh 32

16 (1857) 3 K & J 393

17 (1854) 5 HL Cas 40

18 (1865) 2 De GJ & Sm at 486, 487

19 [1894] 3 Ch 621

20 6th Edn, 1921, p 53

Norwich Pharmacal Co and others v Commissioners of Customs and Excise

CHANCERY DIVISION

GRAHAM J

2nd, 3rd, 6th, 7th, 8th, 16th DECEMBER 1971

Discovery – Production of documents – Parties – Defendant for purpose of discovery only – Circumstances in which order may be made – Purpose of order to obtain information so that proceedings might be brought against third parties – Information obtained by defendant under statutory powers – Commissioners of Customs and Excise – Information in possession of commissioners including names and addresses of importers of drug – Import of drug constituting infringement of plaintiffs' patent – Plaintiffs seeking order for discovery against commissioners to enable plaintiffs to proceed against importers – Plaintiffs entitled to order for discovery limited to names and addresses of third parties.

The plaintiffs were the registered proprietors of letters patent which covered the specific compound known as furazolidone, a drug used as a medicament for poultry. Third parties, who were unknown to the plaintiffs, imported furazolidone into the United Kingdom thereby infringing the letters patent, subject to the possibility that certain consignments had in fact been licensed by the plaintiffs. The plaintiffs accordingly, wishing and intending to take proceedings against the third parties when they had discovered their identity, commenced an action against the Commissioners of Customs and Excise seeking, inter alia, an order that the commissioners give to the plaintiffs the names and addresses of the importers in question and all documents relating to the imported furazolidone. In carrying out their duties, and by virtue of their powers under s 28 of the Customs and Excise Act 1952, the commissioners required importers to fill up certain forms stating, inter alia, their names and addresses and the amount of goods imported. It was those documents which the plaintiffs claimed should be produced. The commissioners objected to the discovery of the documents on the following grounds: (i) that the documents were subject to Crown privilege in that it was contrary to the public interest that the commissioners should make the disclosure since that would hamper them in discharging their statutory duties effectively because consignors and importers would tend to withhold information from or falsify information given to the commissioners if it were known that the latter were liable to be compelled to disclose such information; (ii) that the commissioners could legally only use information received in carrying out their duties under the 1952 Act for purposes authorised by that Act; and (iii) that even if the commissioners had power to disclose the information requested they were under no duty to disclose and could not be compelled to do so in proceedings in which they were mere witnesses and in which the only order that could be made against them was the order for discovery.

Held – (i) The claim to Crown privilege in respect of the documents could not be upheld; the only basis on which such a claim could be made was that the document fell within a class which the public interest, in the sense of the proper functioning of the public service, required should be withheld; since there was little substance in the contention that the disclosure in the limited form sought would discourage other importers from fulfilling their legal obligation to supply correct information to the commissioners, the grounds for the claim were outweighed by the public interest in ensuring that the administration of justice was expeditiously dispatched and not thwarted or delayed by the withholding of information the disclosure of which could do no harm to anyone except those who were admitted wrongdoers (see p 980 f and p 981 f to h, post); dicta of Lord Reid and Lord Morris of Borth-y-Gest in *Conway v Rimmer* [1968] 1 All ER at 888, 900, 901, applied.

a (ii) There was no absolute rule that the commissioners could not legally use information obtained in the course of their duties for purposes other than those for which it was collected unless there was some statute authorising them to do so; furthermore the provisions of s 3 of the Finance Act 1967 authorising the commissioners to disclose certain information on notification by the Secretary of State could not by implication overrule the right of the court to direct that discovery of relevant matters should be given in what the court considered to be a proper case; in special circumstances information about third parties which could normally be classed as confidential might have to be disclosed; the fact that the information had been obtained as a result of statutory power rather than in some other way made no difference to the circumstances under which it should or should not be disclosed (see p 984 g to p 985 a, post).

c (iii) Although in general no independent action for discovery lay against a party against whom no reasonable cause of action could be alleged or who was in the position of a mere witness in the strict sense, the rule was not invariable; in appropriate circumstances an action would lie against an 'interested' party to make him discover the names of persons who from the facts must be presumed to be wrongdoers; even though the only order which could be successfully made against him was based on that discovery there was power to make such an order in exceptional cases where it could properly be said that the evidence might be relevant to an issue in the main action and where discovery would aid the proper and expeditious administration of justice (see p 983 d and p 986 b to f, post); *Upmann v Elkan* (1871) LR 12 Eq 140, *Orr v Diaper* (1876) 4 Ch D 92 and *Panthalu v Ramnord Research Laboratories Ltd* [1965] 2 All ER 921 applied.

e (iv) The present case was exceptional in that it concerned the infringement of letters patent and also in that the main issues, i.e. the validity of the letters patent and the nature of the infringement, were clear on the record; the only possible outstanding point was whether any particular consignment was licensed, an issue which the plaintiffs would immediately be able to prove or disprove when they learnt who the importers were; accordingly, in order that justice might be done as speedily and cheaply as possible, it was highly desirable that the short cut should be taken and the plaintiffs enabled to obtain the names of admitted infringers from the commissioners; an order would therefore be made against the commissioners for discovery limited to the names and addresses of the importers in question (see p 986 f and g and p 987 a, post).

Notes

g For discovery when party defendant for purposes of discovery only, see 12 Halsbury's Laws (3rd Edn) 10, 11, para 11, and for cases on the subject, see 18 Digest (Repl) 6-7, 17-23.

For privilege where disclosure of documents is contrary to public interest, see 12 Halsbury's Laws (3rd Edn) 53-55, para 73, and for cases on the subject, see 18 Digest (Repl) 139-142, 1256-1282.

h For the Customs and Excise Act 1952, s 28, see 9 Halsbury's Statutes (3rd Edn) 80. For the Finance Act 1967, s 3, see *ibid* p 432.

Cases referred to in judgment

Burchard v Macfarlane, ex parte Tindall [1891] 2 QB 241, [1891-94] All ER Rep 137, 60 LJQB 587, 65 LT 282, 18 Digest (Repl) 20, 141.

j *Burstall v Beyfus* (1884) 26 Ch D 35, 53 LJCh 565, 50 LT 542, 18 Digest (Repl) 7, 31.

Carver v Pinto Leite (1871) 7 Ch App 90, 41 LJCh 92, 25 LT 722, 18 Digest (Repl) 14, 86.

Conway v Rimmer [1968] 1 All ER 874, [1968] AC 910, [1968] 2 WLR 998, 112 Sol Jo 191, Digest (Cont Vol C) 299, 1264b.

Crompton (Alfred) Amusement Machines Ltd v Comrs of Customs and Excise (15th July 1971) unreported.

- Dixon v Enoch* (1872) LR 13 Eq 394, 41 LJCh 231, 26 LT 127, 18 Digest (Repl) 184, 1589. a
- Edmondson v Birch & Co Ltd* [1905] 2 KB 523, [1904-7] All ER Rep 996, 74 LJKB 777, 93 LT 462, 18 Digest (Repl) 185, 1609.
- Elder v Carter, ex parte Slide & Spur Gold Mining Co* (1890) 25 QBD 194, 59 LJQB 281, 62 LT 516, 54 JP 692, 18 Digest (Repl) 90, 738.
- Glasgow Corp'n v Central Land Board* 1956 SC (HL) 1, 1956 SLT 41; *affg* 1955 SC 64, 1955 SLT 155, 16 Digest (Repl) 279, *167.
- Hillman's Airways Ltd v Société Anonyme d'Éditions Aéronautiques Internationales* [1934] 2 KB 356, 103 LJKB 670, 151 LT 451, 18 Digest (Repl) 184, 1590. b
- Hope v Brash* [1897] 2 QB 188, [1895-99] All ER Rep 343, 66 LJQB 653, 76 LT 823, 18 Digest (Repl) 64, 502.
- Murray v Clayton* (1872) LR 15 Eq 115, 42 LJCh 191, 27 LT 644, 18 Digest (Repl) 200, 1728.
- Nobel's Explosives Co Ltd v Jones, Scott & Co* (1881) 17 Ch D 721, *on appeal* (1882) 8 AC 5, 52 LJCh 339, 48 LT 490, 36 Digest (Repl) 920, 2735. c
- Orr v Diaper* (1876) 4 Ch D 92, 46 LJCh 41, 35 LT 468, 18 Digest (Repl) 6, 17.
- Panthalu v Ramnord Research Laboratories Ltd* [1965] 2 All ER 921, [1966] 2 QB 173, [1965] 3 WLR 682, 109 Sol Jo 496, Digest (Cont Vol B) 265, 6942cb.
- Plymouth Mutual Co-operative & Industrial Society Ltd v Traders' Publishing Assn Ltd* [1906] 1 KB 403, 75 LJKB 259, 94 LT 258, 18 Digest (Repl) 186, 1610. d
- Portugal (Queen of) v Glyn* (1840) 7 Cl & Fin 466, 7 ER 1147, 18 Digest (Repl) 8, 41.
- Saccharin Corp'n Ltd v Chemicals & Drugs Co Ltd* [1900] 2 Ch 556, 69 LJCh 820, 83 LT 206, 17 RPC 612, 18 Digest (Repl) 200, 1727.
- Tournier v National Provincial & Union Bank of England* [1924] 1 KB 461, [1923] All ER Rep 550, 93 LJKB 449, 130 LT 682, 32 Digest (Repl) 80, 1028.
- Upmann v Elkan* (1871) LR 12 Eq 140, *on appeal* (1871) 7 Ch App 130, 41 LJCh 246, 25 LT 813, 36 JP 36, 46 Digest (Repl) 156, 1014. e
- Upmann v Forester* (1883) 24 Ch D 231, 52 LJCh 946, 49 LT 122, 47 JP 807, 46 Digest (Repl) 157, 1033.

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- Beecham Group Ltd v Bristol Laboratories Ltd* [1967] RPC 406. f
- Crompton (Alfred) Amusement Machines Ltd v Comrs of Customs and Excise* [1971] 2 All ER 843.
- Fraser v Evans* [1969] 1 All ER 8, [1969] 1 QB 349.
- Gartside v Outram* (1856) 26 LJCh 113.
- Grosvenor Hotel, London, Re* [1964] 1 All ER 92, [1964] Ch 464.
- Hargreaves (Joseph) Ltd, Re* [1900] 1 Ch 347.
- Henderson v M'Gown* 1916 SC 821. g
- Hubbard v Vosper* (1971) *The Times*, 20th November.
- Initial Services Ltd v Putterill* [1967] 3 All ER 145, [1968] 1 QB 396.
- International General Electric Co of New York v Comrs of Customs and Excise* [1962] 2 All ER 398, [1962] Ch 784, [1962] RPC 235.
- Meters Ltd v Metropolitan Gas Meters Ltd* (1911) 104 LT 113, 28 RPC 157. h
- Penn-Texas Corp'n v Murat Anstalt (No 2)* [1964] 2 All ER 594, [1964] 2 QB 647.
- Pfizer Corp'n v Ministry of Health* [1965] 1 All ER 450, [1965] AC 512.
- Palermo, The* [1883] 9 PD 6.
- R v Lewes Justices* [1971] 2 All ER 1126, [1971] 2 WLR 1466.
- Shaw v Kay* [1904] 5 Tax Cas 74.
- Weld-Blundell v Stephens* [1919] 1 KB 520, [1920] AC 596. i

Adjourned summons

By consolidated actions, the plaintiffs, Norwich Pharmacal Co (now known as Morton-Norwich Products Inc), Smith Kline and French Laboratories Ltd and Norwich Pharmacal Co, claimed against the Commissioners of Customs and Excise (1) a declaration that the commissioners were infringing or had infringed and were causing,

- a enabling or assisting and had caused, enabled or assisted others to infringe letters patent no 735,136; (2) a declaration that it was and had at all material times been the commissioners' statutory duty to forfeit all imported furazolidone in their possession, custody or control which was not licensed for importation by the plaintiffs, and (3) an order that the commissioners (a) set forth and disclose to the plaintiffs in the case of each consignment of the furazolidone imported without the licence of the plaintiffs, the names and addresses of the consignors and consignees thereof, the quantity of furazolidone therein and the date thereof, (b) give the plaintiffs full and complete discovery of all documents which were or had been in their possession, custody or control relating to such imported consignment of furazolidone. This was a summons by the plaintiffs in the action seeking production of documents enumerated in Part 3 of Sch I to the commissioners' list of documents dated 7th April 1970. The facts are set out in the judgment.

Anthony Walton QC and Robin Jacob for the plaintiffs.

Sydney Templeman QC, J P Warner and W Bruce Spalding for the commissioners.

Cur adv vult

- d 16th December. **GRAHAM J** read the following judgment. The issue in this case is whether in all the circumstances the plaintiffs, the proprietors of letters patent no 735,136, are entitled to obtain by discovery from the Commissioners of Customs and Excise, the names and addresses of third parties who have imported a drug called furazolidone into this country in infringement of such letters patent. The matter was fully argued before me and as will be seen hereafter involves the consideration of a number of points some of which I do not find easy to decide and in particular whether there can be special circumstances in which a plaintiff can obtain discovery against a defendant primarily at any rate for the purpose of bringing further actions against other persons who can clearly be shown to have committed wrongs against the plaintiff.

- f The relevant facts are as follows. Patent no 735,136 claims chemical substances falling within a general formula for N-(5-nitro-furyl)-Alkylidene-3 amino-2-oxazolidones and in particular covers the specific compound, known as furazolidone, which is being imported into this country. Furazolidone has the precise chemical formula N-(5-nitro-1 furfurylidene)-3 amino-2 oxazolidone, which is within the above general formula, and is used as a medicament for poultry and is, inter alia, incorporated in feeding stuffs for poultry on a large scale by manufacturers and particularly by large users of such foods. It is, however, the plaintiffs say, very difficult for them to find out by whom this is being done, particularly in the case of large users of the material who import it direct and then incorporate it in their own feeding stuff on their own poultry farms. These facts are dealt with in the affidavit of Mr Pickford dated 28th June 1971.

- h It is well understood that the mere fact that letters patent have been granted and subsist is no guarantee that such letters patent are valid, and that in addition to the issue of validity a patent action also frequently involves the often equally difficult question as to whether infringement is proved or not. The present case is exceptional in these respects in that, by paras 2 and 3 of the re-amended defence in action 1969 N230 and by the corresponding paras 2 and 3 in the defence in action 1970 N 1809, the two actions being consolidated, the commissioners have admitted validity of the letters patent no 735,136 for the purposes of this action, and also that goods described as furazolidone have been imported into the United Kingdom. No samples have been taken or analysed by the commissioners to show, and no suggestion is made, that the goods in question are not in fact furazolidone, i.e the compound having the specified chemical formula, and I consider therefore I must assume for present purposes that such importation, unless licensed, is in the circumstances in infringement of the

admittedly valid letters patent. I conclude therefore that the plaintiffs, subject to the possibility that perhaps some consignments might have been licensed by them, have established that actionable torts, contrary to the provisions of the royal grant giving to the plaintiffs their letters patent, are for practical purposes certain to have been committed by some at any rate of such importers. As I have said, the circumstances are exceptional and in the normal case of importation of alleged patented goods, where in the event of an action there would probably be outstanding issues of both validity and infringement to be decided, the position would be quite different and the basic facts constituting the commission of torts by importers would not have been proved.

In the present action the commissioners are themselves sued, the relief asked for being (1) a declaration that they have infringed and caused or enabled the importers to infringe the said letters patent; (2) a declaration that the commissioners are under a duty to forfeit all furazolidone in their possession, custody or control which has not been licensed for importation by the plaintiffs, and (3) orders that the commissioners give to the plaintiffs, *inter alia*, the names and addresses of the importers in question and all documents relating to such imported furazolidone.

It was made clear however by counsel for the plaintiffs that his clients of course had no quarrel with the commissioners and provided the latter gave the information asked for it was improbable that questions of their infringement or aiding and abetting infringement would be pressed further against them. Although therefore the plaintiffs do not abandon any rights which they may have against the commissioners in respect of their infringement, counsel for the plaintiffs agreed that on one branch of his case, which for reasons which will appear I will call the *Orr v Diaper*¹ argument, the present proceedings can be treated as a pure action for discovery against the commissioners for the production of documents giving information as to the identity of third parties, who are admittedly wrongdoers and against whom the plaintiffs wish and intend to proceed as soon as they find out who they are.

It will be convenient at this stage to make reference to a number of sections in various Acts and to passages in the royal grant of letters patent no 735,136 which are relevant to the present matter.

The appointment and general duties of the commissioners are governed by s 1 of the Customs and Excise Act 1952. They are an authorised department for the purposes of the Crown Proceedings Act 1947 and by s 21 (2) of the Patents Act 1949 the Crown, apart from having wide rights of user, is bound equally as is the subject by letters patent. The commissioners by s 1 of the 1952 Act are charged with the duty 'of collecting and accounting for, and otherwise managing, the revenues of customs and excise'. By ss 13, 14 and 17 they can appoint ports, wharves, and transit sheds 'for the deposit of goods imported . . . and not yet cleared from customs charge'. Section 28 enables them to give directions to importers to deliver such particulars as are required in relation to goods imported and appropriate penalties for failure to do so can be enforced. By s 33 regulations relating to the unloading, landing movement and removal of goods may be made.

Section 34 governs duties payable, no dutiable goods being removable by an importer until the appropriate duty is paid. Section 44 deals with forfeiture and states that any goods imported, landed or unloaded contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment shall be liable to forfeiture. A number of examples of goods which are 'prohibited' goods by virtue of various enactments are given in the note to the section in 9 Halsbury's Statutes (3rd Edn) 91. General provisions in regard to the procedure to be followed in cases of forfeiture are contained in Sch 7. Schedule 6 makes provision for ascertaining the value of imported goods and at para 3 states:

'Where the goods to be valued—(a) are manufactured in accordance with any

a patented invention . . . the normal price shall be determined on the assumption that the price covers the right to use the patent . . .'

In carrying out their duties the commissioners by virtue of their powers under the Act and in particular s 28 require importers to fill up forms such as XS107 and C105, which, inter alia, show the names and addresses of such importers and the amount of goods imported. It is these documents, itemised in Part 3 of Sch 1 to the commissioners' list of documents dated 7th April 1970, which the plaintiffs claim should be and the commissioners claim should not be produced. The commissioners' objection is based on two grounds: (a) that the commissioners are precluded by law from disclosing them and (b) that their disclosure would be injurious to the public interest because they contain confidential information about the affairs of persons other than the plaintiffs furnished to the commissioners by such persons pursuant to ss 26, 28 and 29 of the Customs and Excise Act 1952.

c From the royal grant it will be seen that the letters patent were granted as of 27th February 1953, the date of filing the complete specification, and would therefore normally have expired on 26th February 1969. They were however extended, as I was told, under s 24 of the Patents Act 1949 for three years and four months on the grounds of war loss and will therefore expire on 26th June 1972. The words of the royal grant which are material for present purposes are (1) those in the first part of the grant:

e 'that the said patentees by themselves, their agents or licensees and no others may . . . at all times hereafter during the term of years herein mentioned make use exercise and vend the said invention within the United Kingdom . . . and that the said patentees shall have and enjoy the whole profit and advantage from time to time accruing by reason of the said invention during the term of sixteen years from the date hereunder written . . .'

and (2) those in the prohibition:

f ' . . . and to the end that the patentees may have and enjoy the sole use and exercise and the full benefit of the said invention we do . . . command all our subjects . . . that they do not at any time . . . directly or indirectly make use of or put in practice the said invention nor in anywise imitate the same without the consent . . . of the said patentees in writing . . . on pain of incurring such penalties as may be justly inflicted on such offenders for their contempt of this our Royal Command, and of being answerable to the patentees according to law for their damages thereby occasioned.'

g The plaintiffs' argument is founded on two bases. (1) On the authority of such cases as *Orr v Diaper*² and *Upmann v Elkan*³ an action lies against the commissioners for discovery of the names and addresses of the importers in question because they are in possession of information as to an admitted wrongdoing which it is in the public interest should be disclosed, and because they are not mere witnesses but have such an interest in or control over the goods as to make them liable to discovery in the circumstances. The argument goes as far as saying that even if it is agreed that the commissioners have not themselves infringed the patent by making, using, exercising, or vending the invention their interest is such that they and the eventual disposal of the goods for the time being in their hands are likely to be affected by a decree in the action against them and/or in the proposed actions against importers. (2) The commissioners are themselves infringers of the letters patent in question because (i) they are making a profit out of the patent in charging duties on the patented material which are higher than they would be if the goods were not patented. This is based on the words in Sch 6 quoted above and on the words of the grant reserving

2 (1876) 4 Ch D 92

3 (1871) LR 12 Eq 140

'the whole profit and advantage . . . accruing by reason of the . . . invention' to the patentees. (ii) The commissioners by virtue of their powers and control over the goods are more than mere agents, such as the customs house agents in *Nobel's Explosives Co Ltd v Jones, Scott & Co⁴*, who had merely obtained permission to discharge goods from ship to lighter on behalf of the owners of the goods. The commissioners here it is argued have such powers and control over the goods that they could and should forfeit them under s 44 of the Customs and Excise Act 1952 because entry is 'prohibited or restricted' within the meaning of the words in that section, by virtue of the Patents Act 1949 and the royal grant which that Act brings into operation in respect of the letters patent in question. By doing nothing and failing to forfeit the goods the commissioners are aiding and abetting the infringement, enabling the importers to perfect their infringement and constituting themselves joint tortfeasors with the importers.

The commissioners' case is simple and direct, there being, it is said, three reasons against the grant of the discovery asked for. (1) The commissioners can legally only use information which they receive in carrying out their functions under the Customs and Excise Act 1952 for purposes authorised by that Act. The court will not compel them to use such information for some purpose not so authorised. (2) It is not in the public interest that the commissioners should make this disclosure since, as the evidence of Sir Louis Petch states, this would hamper them in discharging their statutory duties effectively, because consignors and importers would tend to withhold information from or falsify information given to the commissioners if it was known that the latter were liable to be compelled to disclose such information to third parties. This was called the 'candour point'. (3) The commissioners even if they have power to disclose the information requested have no duty to the plaintiffs to disclose it and cannot be compelled to disclose it by the present proceedings. There are only two kinds of 'animal', as counsel for the commissioners put it, infringers or witnesses and the commissioners are not infringers. It is also said that such control or interest as they have does not make them more than mere witnesses in possible actions by the plaintiffs against importers. When statutory powers to obtain information for certain purposes are given such information can only be used for those purposes save in very exceptional circumstances, such as the detection or prevention of crime. The circumstances here are not such as to be an exception to the general rule.

It will be convenient before coming to what I consider the vital aspect of the matter to clear some of the contentions of both sides out of the way.

(A) The plaintiffs' argument that the commissioners are infringers because they make a profit, ground 2 (i), is in my judgment misconceived and must be rejected, although of course if I am wrong and the commissioners are infringers they would have no proper ground for refusing this discovery as it would be strictly relevant to the normal relief in a patent action, if Crown privilege does not prevent its disclosure. The Customs and Excise Act 1952 must if possible be read consistently with the Patents Act 1949 and the words of the royal grant and I do not see any difficulty in doing so. Schedule 6 to the Customs and Excise Act 1952 merely provides that the duty on patented goods should be calculated as if the goods were licensed, i.e. as if a proper royalty had been paid on them. Neither the Patents Act 1949 nor the Customs and Excise Act 1952 gives any rights to a patentee to recover from the commissioners any sum which might notionally represent such royalty in the case of unlicensed goods. In such a case the remedy of the patentees is against the owner or consignor of the goods if unlicensed and the fact that the duty charged on patented goods, whether licensed or not, may be higher than it might be if the goods were not patented, and has to be calculated as if they were licensed, does not seem to me to give any right to the patentees nor to put the commissioners in the position in the words of the grant of making a 'profit' out of the patent to the detriment of the patentees.

a The latter will still have their remedy for damages against the importer if the goods are unlicensed. I do not think it necessary to say any more on this point.

(B) What is the position in regard to infringement by the commissioners themselves? The commissioners do not own goods liable to duty and I think it is correct that they do not have legal possession of the goods passing through their hands although there may be times when they have de facto possession and can at any rate prevent goods being moved. They do not make, use, exercise or vend an invention
b in the case of these patented goods in the words of the grant. It is argued however that they infringe because the facts justify the allegation that they are aiding and abetting infringement as soon as they know, as they have been told, that the goods infringe and are therefore joint tortfeasors with importers, by enabling the latter to perfect what they have been warned by the plaintiffs are infringements of their patent. They ought in such circumstances, it is said, to forfeit the goods and
c by not doing so aid and abet infringement and are joint tortfeasors. The point as to infringement is I think a bad one but I agree with counsel for the plaintiffs that it is not unarguable.

The argument as to forfeiture relies on s 44 and is dependent on establishing that the goods are 'prohibited or restricted goods' within the meaning of the section. The words of s 44 (b) are:
d

'Where . . . any goods are imported . . . contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment'.

I do not consider it would be right to give these words such a broad meaning that they would include the general prohibition against infringement in the royal grant, which issues from the royal prerogative and not a statute. Forfeiture is a very serious matter from the point of view of the subject and any Act granting a right of forfeiture must in principle be construed strictly against the grantee of such right. The words are in my judgment intended to relate only to specific prohibitions or restrictions directed at particular goods or classes of goods specified by particular Acts. This intention is clear from the natural meaning of the whole section and from the use of the words
e 'with respect thereto' which direct attention to the particular goods in question. The various Acts set out in the note in 9 Halsbury's Statutes (3rd Edn) 91 already referred to, indicate the types of goods and enactments to which the section is directed, for example, deleterious seeds by virtue of the Plant Varieties and Seeds Act 1964, s 32 (6), certain dangerous drugs under the Drugs (Prevention of Misuse) Act 1964, s 5 (4), and in particular specified medicinal products or animal feeding stuffs (of which
f it is presumed furazolidone is not one) under the Medicines Act 1968, s 116 (1), (3).

If, as I think it is, the true construction of s 44 is as set out above, the basis for the plaintiffs' argument as to infringement has virtually gone and they are left only with a rather vague allegation of joint tortfeasance founded on inaction by refusal to disclose. This is to my mind not good enough to constitute them joint tortfeasors with the importers since there is no common design and the refusal is based on an honest belief that they are not by law entitled to disclose and I do not see how the commissioners even after notice can properly be said to have been in any way jointly responsible for the infringement which is in fact committed by the importer alone. Whether in the special circumstances they can be compelled by the court to disclose is another matter dealt with later.
g

(C) Crown privilege. It is next desirable to deal with this allegation, claimed in respect of documents in question, which are in Part 3 of Sch 1 to the commissioners' list of documents served 7th April 1970. The allegation if good would of course be a complete bar to the production of such documents in any circumstances whether the *Orr v Diaper*⁵ argument is valid or not. If however the *Orr v Diaper*⁵ argument is
h

good then it is necessary to consider whether the claim to Crown privilege is justified and should be upheld. This is the 'candour point' as it was called in the argument. a

The basis of the claim for privilege is set out in para 8 of Sir Louis Petch's affidavit of 28th April 1971. It amounts to this, that the work of the commissioners in carrying out their statutory duties would be hampered and made more difficult if it became known to consignors and importers that information which they had under legal compulsion given to the commissioners about their goods could be the subject of disclosure to third parties. The affidavit goes as far as stating that, in Sir Louis Petch's view— b

'this would provide a strong and understandable incentive for consignors and importers to withhold information from or to give false information to the defendants, and would go far to destroy the good relations and confidence which at present usually exist between the [commissioners] and their officers and the traders with whom they have to deal.' c

Counsel for the plaintiffs made it clear that his clients were quite prepared that the discovery obtained from the documents in question should be limited strictly to the names and addresses of the importers in question. Since the basis of Sir Louis's view appears to be founded on the disclosure of information of a much wider nature than such limited disclosure would give it is not much in point. Apart from this, even if the wider class of information had to be disclosed it seems to me that Sir Louis's view is exaggerated. The suggestion that importers and consignors who are under a legal obligation to disclose correct information to the commissioners under pain of severe penalties would give false information seems to me to be highly unlikely, if limited disclosure, as is asked for here, were sometimes to be made to assist the administration of justice in special cases. d

However that may be, since the case of *Conway v Rimmer*⁶ the legal position of Crown privilege in respect of the disclosure of documents which are not in themselves of such a nature that, if disclosed, injury would be caused to the state, but for which privilege is claimed because they fall within a class of documents which the public interest, in the sense of the proper functioning of the public service, requires should be withheld from production, is now clear. The documents in question here are clearly 'class' documents, since no conceivable damage to the state could be caused by the disclosure of the name and address of an importer of a medicament for poultry. It is sufficient for present purposes to refer to the words of Lord Reid in the *Conway v Rimmer* case⁷: e

'I would therefore propose that the House ought now to decide that courts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by a Minister, to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice. That does not mean that a court would reject a Minister's view: full weight must be given to it in every case, and if the Minister's reasons are of a character which judicial experience is not competent to weigh then the Minister's view must prevail; but experience has shown that reasons given for withholding whole classes of documents are often not of that character. For example a court is perfectly well able to assess the likelihood that, if the writer of a certain class of document knew that there was a chance that his report might be produced in legal proceedings, he would make a less full and candid report than he would otherwise have done.' f

And to those of Lord Morris of Borth-y-Gest⁸: g

6 [1968] 1 All ER 874, [1968] AC 910

7 [1968] 1 All ER at 888, [1968] AC at 952

8 [1968] 1 All ER at 900, 901, [1968] AC at 971, 972 h

'In my view, it should now be made clear that whenever an objection is made to the production of a relevant document it is for the court to decide whether or not to uphold the objection. The inherent power of the court must include a power to ask for a clarification or an amplification of an objection to production, though the court will be careful not to impose a requirement which could only be met by divulging the very matters to which the objection related. The power of the court must also include a power to examine documents privately, a power, I think, which in practice should be sparingly exercised, but one which could operate as a safeguard for the executive in cases where a court is inclined to make an order for production though an objection is being pressed. I see no difference in principle between the consideration of what have been called the contents cases and the class cases. The principle which the courts will follow is that relevant documents normally liable to production will be withheld, if the public interest requires that they should be withheld. In many cases it will be plain that documents are within a class of documents which by their very nature ought not to be disclosed. Indeed, in the majority of cases I apprehend that a decision as to an objection will present no difficulty. The cases of difficulty will be those in which it will appear that, if there is non-disclosure, some injustice may result and that if there is disclosure the public interest may to some extent be affected prejudicially. The courts can and will recognise that a view honestly put forward by a Minister as to the public interest will be based on special knowledge and will be put forward by one who is charged with a special responsibility. As LORD RADCLIFFE said in the *Glasgow Corpn.* case⁹, the courts will not seek on a matter which is within the sphere and knowledge of a Minister to displace his view by their own; but where there is more than one aspect of the public interest to be considered it seems to me that a court, in reference to litigation pending before it, will be in the best position to decide where the weight of public interest predominates. I am convinced that the courts, with the independence which is their strength, can safely be entrusted with the duty of weighing all aspects of public interests and of private interests and of giving protection where it is found to be due.'

Applying these principles to the present case in my judgment if the documents in question are otherwise held to be liable to production they ought not to be prohibited from production on the ground that they fall within a class of documents which it is not in the public interest to disclose. Although there may be something in Sir Louis Petch's claim I feel it is one which judicial experience is competent to weigh and in my judgment, at any rate if disclosure is limited as asked, it is a claim which can have little weight when placed in the balance against the public interest in ensuring that the administration of justice is expeditiously dispatched and is not thwarted or delayed by the withholding of information, the disclosure of which can do no harm to anyone except those who are admitted wrongdoers. I do not therefore consider that the claim to Crown privilege in respect of these documents should be upheld if they are otherwise liable to production.

(D) *The Orr v Diaper*¹⁰ argument. The decision on this point is in my judgment the vital matter in the case and the various arguments of both sides not already dealt with will be disposed of in arriving at such decision. *Orr v Diaper*¹⁰ was a case tried in 1876, the decision being one of Hall V-C. It is very much in point, the decision seems eminently sensible and the case, so far as appeared from the argument before me, has never been overruled, distinguished or until now, adversely commented on. It is referred to in seven passages in *Bray on Discovery*¹¹, certainly with no disapproval, as being a case where discovery can in certain circumstances be sought against a party

⁹ *Glasgow Corpn v Central Land Board* 1956 SC (HL) 1 at 18

¹⁰ (1876) 4 Ch D 92

¹¹ (1885) pp 10, 40, 556, 609, 610, 612, 614

who is in possession of information for the purpose of obtaining the names of other persons against whom it is intended to bring an action. It was regarded by the learned author, afterwards Bray J, as one example of cases, of which there are a number, where the circumstances are such that an exception should be made to the general rule that no person without an interest could be made a defendant to a bill in Chancery for the purpose of discovery. By interest in this connection¹²—

'was meant such an interest as that a decree could be made against him or as that he might be affected by the decree.'

It is also referred to¹³ with apparent approval as still being good law for the proposition that an owner of a trade mark can obtain by discovery against a shipowner the names of consignors of infringing goods for the purpose of commencing actions against them.

The plaintiffs in the *Orr* case¹⁴ had had their rights invaded by third parties, exporters, whose names they did not know. The defendants were shippers of the exporters' goods which bore trade marks which were counterfeits of the plaintiffs' marks. The defendants refused when asked to give the names of the exporters and were sued for discovery. It was submitted that the defendants were mere witnesses, but Hall V-C said¹⁵:

'... but their position, they being the actual shippers, is different from that of mere witnesses. I think that the Plaintiffs do shew a title to sue. *Dixon v. Enoch*¹⁶ depended, no doubt, upon the construction of a statute, and the proceedings in that case were in their nature criminal. In *Carver v. Pinto Leite*¹⁷ the discovery was limited to a particular purpose. It was limited because the Court will not allow discovery for other purposes, and if the Court sees that all fair and legitimate purposes will be answered by a restricted discovery, it will so restrict it. In this case the Plaintiffs do not know, and cannot discover, who the persons are who have invaded their rights, and who may be said to have abstracted their property. Their proceedings have come to a dead lock, and it would be a denial of justice if means could not be found in this Court to assist the Plaintiffs. The demurrer must be overruled with costs, and the Defendants must put in their answer in one month.'

*Orr v Diaper*¹⁴ was cited in argument in *Hillman's Airways Ltd v Société Anonyme d'Editions Aéronautiques Internationales*¹⁸ which followed with approval the principle of *Dixon v Enoch*¹⁶ although the procedure by bill of discovery had been superseded since the Common Law Procedure Act 1854. *Dixon v Enoch*¹⁶ is itself referred to by Hall V-C at the start of his judgment with approval of the common sense view that in a proper case a plaintiff should be able by discovery to get the names of persons who had committed a tort against him. It was submitted by counsel for the commissioners that this reference to *Dixon v Enoch*¹⁶ at the start of his judgment showed that Hall V-C had come to his decision in the *Orr*¹⁴ case thinking that *Dixon v Enoch*¹⁶ was a case of general application and not based on the particular statute¹⁹. This is quite clearly not so from the reference already quoted¹⁵ where Hall V-C makes it clear that he realised that *Dixon v Enoch*¹⁶ was based on the statute. The *Orr* case¹⁴ was tried in 1876 but the wrongful export had taken place in 1874, that is

12 Bray on Discovery (1885) pp 40, 41, 556 and Chapter 10, p 609

13 See 12 Halsbury's Laws (3rd Edn) 11, para 11, footnote (u)

14 (1876) 4 Ch D 92

15 (1876) 4 Ch D at 96

16 (1872) LR 13 Eq 394

17 (1871) 7 Ch App 90

18 [1934] 2 KB 356

19 32 & 33 Vict c 24

a before there was any question of a right given by statute to have goods infringing trade marks stopped at ports, such as s 16 of the Merchandise Marks Act 1887 and subsequent Acts. The register of trade marks was in fact first established by the Trade Marks Registration Act 1875 and itself gave no such rights. Although according to the authority of *Upmann v Elkan*²⁰ referred to hereafter it seems that it might have been argued that the defendants, Diaper, themselves had infringed the trade mark by what they did, namely by shipping the goods to the order of third parties, b and counsel for the commissioners relied on this argument, it is clear that no such claim was made in the proceedings and this case does not seem to have been decided on that assumption. On the other hand, although again the report does not show that the point was in fact taken, it might well have been argued that a decree against the exporters including *inter alia* an order for delivery up of the goods would indeed have affected Diaper through whose hands the goods were passing for reward. c It seems that some such consideration may well have been in Hall V-C's mind when he said¹:

'... their position, they being the actual shippers, is different from that of mere witnesses.'

d Be that as it may, it seems to me that *Orr v Diaper*² is an authority supporting the proposition that in proper circumstances an action will lie against an 'interested' party to make him discover the names of person who from the facts must be presumed to be wrongdoers, even if the only order which can be successfully made against him is based on that discovery.

The other case strongly relied on by the plaintiffs was *Upmann v Elkan*³. This case was in 1871. The defendants, Elkan, a firm of forwarding agents in London, received e from correspondents abroad a case of cigars bearing an infringing trade mark label. On the forgery being brought to their notice by the plaintiffs the defendants gave full information to the plaintiffs as to how the goods came into their possession. When they were sued they submitted to act as the court should direct and, on giving an undertaking to give notice to the plaintiffs of the facts if any further boxes bearing f the false mark were consigned to them, they were not ordered to pay costs. The St Katharine's Dock Co were also made defendants in that action but no charge was made against them or costs asked for. The case is cited for the principles to be derived from the words of Lord Romilly MR⁴:

'I begin by assuming (which facts are proved here) that the correspondent of a London house sends goods to a London dock company to the order of that g London house, and that the goods have on them the spurious trade-mark or brand of a person to whom the goods do not belong, and who has not been concerned in sending them thither. The person whose trade-mark is fraudulently imitated ascertains this fact before the goods leave the dock: he applies to the dock company not to allow them to leave the dock with the spurious trade-mark, and he applies to the persons at whose order they stand, and asks them to give h him all information respecting them, and to undertake not to sell or distribute the goods until the spurious brand is removed. I assume, then, in addition, that the person so applied to is innocent and ignorant of the fraud. It is his duty at once to give all the information required, and to undertake that the goods shall not be removed or dealt with until the spurious brand has been removed, and to offer to give all facilities to the person injured for that purpose... It will j not do for him [the defendant Elkan] to say, as he does in this case, "I know

20 (1871) LR 12 Eq 140

1 (1876) 4 Ch D at 96

2 (1876) 4 Ch D 92

3 (1871) LR 12 Eq 140, on appeal, (1871) 7 Ch App 130

4 (1871) LR 12 Eq at 145, 146, 147

nothing about the goods sent. I do not know whether they have any, or, if any, what brand on them, or whose it is." It is his duty to know this, and if he receives notice that they bear a fraudulent imitation of another man's brand, he ought to ascertain this as speedily as possible after such notice, and to take the proper and necessary steps to prevent their being disposed of in that state. It may be that without notice, and when he sees the trade mark, he does not know that it belongs to another; if so, he may deal with them innocently; but as soon as he is informed of the fact, he should act at once, so as not to be in any event, either from wilful or from accidental ignorance, made a party to the fraud committed by another; and when he ascertains the fact he should at once inform his correspondent abroad . . . In fact, in many respects the position of the dock company does not differ from his. For all acts done in ignorance they are excusable, but as soon as they receive notice of the fraud, and either by bill filed or by Plaintiff's indemnity the dock company is protected, they must retain the goods until the question is determined, and if proved, the brand removed.'

This case is cited as an authority that not only the defendants, Elkan, who were admitted by counsel for the plaintiffs to be infringers, were liable to give full information to the plaintiffs but so also was the dock company, who were sued but against whom no charge was made or substantive relief asked.

The plaintiffs resting primarily on these two cases argue that they are entitled to discovery here because the commissioners are certainly more than mere witnesses and in some respects have more control over the goods than Diaper and certainly more than the dock company in *Upmann v Elkan*⁵, nonetheless in both those cases it was thought proper that discovery should be given.

Counsel for the commissioners first point is that there is a 'rule' that the commissioners cannot legally use this information for purposes other than those for which it is collected unless there is some statute authorising them to do so. In this connection he referred also to the Finance Act 1967, s 3, which must be read with the Customs and Excise Act 1952 and which gives specific powers to the commissioners to disclose certain information about imports on notification by the Secretary of State. The Finance Act 1967 specifically by s 3 (3) excludes the price of goods and the name of the importer of goods from information which may be so given. This says counsel for the commissioners strongly supports his argument. The so-called rule against disclosure in my judgment, although undoubtedly salutary and normally followed in practice, cannot be absolute and indeed counsel for the commissioners qualified it himself by saying that in the case of crime it must be relaxed. The Finance Act 1967 is in my judgment intended to authorise the commissioners to give to others when directed what they properly regard as confidential information about importers' activities which should not normally be disclosed. This Act cannot however by implication overrule the right of the court to direct that discovery of these or any other relevant matters should be given in what the court considers to be a proper case. The position is analogous to that of banker and customer where the court has power to require disclosure in a proper case such as *Tournier v National Provincial and Union Bank of England*⁶ per Bankes LJ⁷. *Orr v Diaper*⁸ and *Upmann v Elkan*⁵ are authorities to the contrary where no statute is involved and show that in special circumstances information about third parties which would normally be classed as confidential may have to be and in a proper case must be disclosed. I do not think that the fact that the confidential information has been obtained as

5 (1871) LR 12 Eq 140

6 [1924] 1 KB 461, [1923] All ER Rep 550

7 [1924] 1 KB at 473, [1923] All ER Rep at 554

8 (1876) 4 Ch D 92

a a result of statutory powers rather than in some other way makes any difference to the circumstances under which it should be retained or disclosed as the case may be. This is supported by the recent decision of Forbes J in *Alfred Crompton Amusement Machines Ltd v Comrs of Customs and Excise*⁹, where the same argument as to a 'general rule' was put to him. He says:

b 'The argument as I understood it was this. There is a number of statutes where Parliament has given the Commissioners and other bodies in a like situation, the power to disclose information collected by the exercise of statutory powers. These provisions, it is said, are only necessary because there is a general rule that information in the hands of a government department cannot by law be disclosed without some enabling enactment, so long, at any rate, as that
c information has been obtained by use of statutory powers. This general rule, it is said, may be deduced inferentially from the provisions in the statutes.'

He then sets out the relevant provisions of the statutes in question, deals with them individually and rejects the argument that there is such a general rule. I reject it also for the reasons which he gives and for those I have set out above.

d Counsel for the commissioners then cited a number of cases in order of dates, some of which had already been cited by counsel for the plaintiffs to show that the true proposition is that, as stated earlier there are only two classes of person: infringers and witnesses, and that although discovery material to the relief prayed can be obtained against the former it can never be obtained against the latter.

e These cases started with the *Queen of Portugal v Glyn*¹⁰, included *Upmann v Elkan*¹¹ and *Orr v Diaper*¹² and a large number of other cases. Some of these such as *Hope v Brash*¹³, *Edmondson v Birch & Co Ltd*¹⁴ and *Plymouth Mutual Co-operative & Industrial Society Ltd v Traders Publishing Assn Ltd*¹⁵ are libel cases showing that the court will not order a defendant to make discovery of the name of the persons from whom the information which formed the basis of the libel was obtained. Others such as the

f *Queen of Portugal* case¹⁰, *Carver v Pinto Leite*¹⁶, *Elder v Carter, ex parte Slide & Spur Gold Mining Co*¹⁷, *Burchard v Macfarlane, ex parte Tindall*¹⁸ and *Panthalu v Ramnord Research Laboratories Ltd*¹⁹, deal with the cases where production of documents generally, and in particular when ancillary to the evidence of a witness, will or will not be ordered. The general principles are that a plaintiff cannot make a mere witness (the emphasis is mine) a party to an action in order to get discovery from him, but it is also clear that, as was held in *Panthalu's* case¹⁹, there are cases where the court

g has power to order production of documents by a witness, in that case to be examined on commission under the Evidence by Commission Act 1859, because those documents were direct testimony relevant to the main issue for trial in the action. In the present case the names of importers are relevant to the issue whether any particular consignments are licensed or not, an issue still outstanding. Equally of course discovery will not be ordered if it can be used in a way prejudicial to a defendant's trade
h and if at the same time it is not likely to assist the plaintiff in making out his case,

9 Unreported (15th July 1971)

10 (1840) 7 Cl & Fin 466

11 (1871) LR 12 Eq 140

12 (1876) 4 Ch D 92

i 13 [1897] 2 QB 188, [1895-99] All ER Rep 343

14 [1905] 2 KB 523, [1904-7] All ER Rep 996

15 [1906] 1 KB 403

16 (1871) 7 Ch App 90

17 (1890) 25 QBD 194

18 [1891] 2 QB 241, [1891-94] All ER Rep 137

19 [1965] 2 All ER 921, [1966] 2 QB 173

nor where, as in *Burstall v Beyfus*²⁰, solicitors were joined as parties, although no reasonable causes of action could be shown against them, for the purpose of costs or discovery. The remaining cases such as *Murray v Clayton*¹, *Upmann v Forester*² and *Saccharin Corp'n Ltd v Chemicals & Drugs Co Ltd*³ are all cases where discovery of names of customers or third parties was granted but, as counsel for the commissioners submitted, these were all cases where it was established that a wrong had been committed and the discovery was ancillary to relief such as an account of profits.

Having given these cases careful consideration they seem to me to show that in general it is correct that no independent action for discovery lies against a party against whom no reasonable cause of action can be alleged or who is in the position of a mere witness in the strict sense. This is the normal rule but there is nothing in them which shows that the rule is invariable and is to be understood as excluding cases such as *Orr v Diaper*⁴ or *Upmann v Elkan*⁵ or indeed *Panthalu v Ramnord*⁶ where it can properly be said that the evidence may be relevant to an issue in the main action. In my judgment it is impossible to catalogue in detail the cases where discovery in special cases should be allowed and it is enough to say that there are special cases where, in the words of Bray⁷, the person sued has 'such an interest as that a decree could be made against him or as that he might be affected by the decree'. Furthermore the public interest must in my judgment also be considered. This demands on the one hand that discovery which is merely fishing or which is primarily for the purpose of damaging the defendant's legitimate business and not to assist the plaintiff should not be allowed, but equally it is in the public interest that discovery which aids the proper and expeditious administration of justice should be allowed. Cases of infringement of trade marks, copyright, and letters patent have always been regarded as cases where the public should be made aware that such infringement, even if, as sometimes happens, it is not deliberately committed, should be discouraged. For this reason a plaintiff is entitled to move in open court for an injunction and costs even if prior to the hearing the defendant has offered an undertaking which is in all respects equivalent to the injunction sought. Such cases are therefore exceptional in this respect. The present case, as already stated, is exceptional also in that the main issues, namely, validity and the chemical nature of the infringement, so that it can be seen to fall within the valid claim, are clear on the record. The only possible outstanding point is whether any particular consignment is licensed and that is a thing the plaintiffs will immediately be able to prove or disprove when they know who the importers are. It seems to me that in order that justice may be done and done as speedily and cheaply as possible thus avoiding the cost of extensive further enquiries by the plaintiffs it is highly desirable that the short cut should be taken and the commissioners made to disclose the names in question.

If a potential plaintiff is able, without demur, as he is, to obtain from the police the name of someone whose car has been in collision with his, why should not a potential plaintiff in an infringement action be able to obtain the name of an admitted infringer from the commissioners. As a practical matter both cases are in principle analogous, although the former may be ultimately derived from a statute, such as s 27 of the Vehicle and Driving Licences Act 1969 which makes records as to registration admissible in evidence, and if the interests of justice demand it in the one case

20 (1884) 26 Ch D 35

1 (1872) LR 15 Eq 115

2 (1883) 24 Ch D 231

3 [1900] 2 Ch 556, 17 RPC 612

4 (1876) 4 Ch D 92

5 (1871) LR 12 Eq 140

6 [1965] 2 All ER 921, [1966] 2 QB 173

7 Bray on Discovery (1885) pp 40, 41

a why should they not demand it in the other. In my judgment they do and I think the discovery asked for here should, in the discretion of the court, be given and I make an order accordingly limited to the names and addresses of the importers in question.

I would only add that the evidence of the plaintiffs shows that if these proceedings had taken place in the USA it seems there could be very little argument against the grant of discovery in this case. It was said by counsel for the commissioners that I was really being asked to amend the law so as to assimilate it to that in the USA. b Although it may be desirable that the matter should in future be regulated in this country also by statute and this may be a course which should be considered as a new Patents Act is now being drafted I do not think for the reasons which I have given that the court is powerless to act in present circumstances, and it would in my judgment, to paraphrase the words of Hall V-C in the *Orr* case⁸, be a great pity if necessity c was so absolute as to compel me to allow 'this demurrer'.

Order accordingly.

Solicitors: *Allen & Overy* (for the plaintiffs); *Solicitor, Customs and Excise.*

Jacqueline Metcalfe Barrister.

The Secretary of State for Employment v Atkins Auto Laundries Ltd

NATIONAL INDUSTRIAL RELATIONS COURT

SIR JOHN DONALDSON P, MR J H ARKELL AND MR A F BLACKLAWS

3rd DECEMBER 1971

f *Employment – Redundancy – Payment – Rebate to employer – Entitlement – Liability of employer to make payment – Claim for payment submitted to employer out of time – Waiver by employer of possible statutory objection – Effect of waiver – Effect on rights of Secretary of State as trustee of the Redundancy Fund – Effect on right of employee to claim payment – Whether employer liable to make payment – Whether employer entitled to rebate – Redundancy Payments Act 1965, ss 21, 30 (1) (a).*

g *Judgment – Judicial decision as authority – National Industrial Relations Court – Decisions of the Divisional Court not binding on Industrial Court.*

The employers were obliged to dismiss an employee because of redundancy with effect from 19th September 1970. Since the employee was to take up new employment immediately following his dismissal it was thought that no redundancy payment need be made to him. On 27th March 1971, i.e. more than six months after his dismissal, the employee made application for a redundancy payment from his former employers. The employers made the redundancy payment on 16th April and then claimed a rebate from the Secretary of State for Employment under the Redundancy Payments Act 1965, s 30. The industrial tribunal held that the employers were entitled to a rebate from the Secretary of State on the grounds that, j notwithstanding the employee's failure to make his application for redundancy payment within the period of six months required by s 21^a of the 1965 Act, the

⁸ (1876) 4 Ch D at 95

^a Section 21 is set out at p 990 e and f, post

employers had waived any defence to the employee's claim that they might have taken under that section, and that, consequently, at the time of payment, the employers were 'liable' within the meaning of s 30 (1) (a)^b of the 1965 Act to pay the employee. The Secretary of State appealed. a

Held—The appeal would be allowed, and an order substituted that the employers were not entitled to a rebate under the 1965 Act, for the following reasons— b

(i) s 21 of the 1965 Act was not a procedural provision which barred a remedy but an overriding provision which barred a right; accordingly, since none of the conditions laid down by s 21 of the 1965 Act had been satisfied, the employee had no right to claim a redundancy payment and, therefore, when the payment was made the employers were not 'liable' to make it (see p 990 g to j, post); dictum of Lord Parker CJ in *J Smith Coats (London) Ltd v Rifkin* (1970) 5 ITR at 189 considered; c

(ii) waiver of a possible defence under s 21 of the 1965 Act could not affect the rights of strangers to the litigation and the liability of the Secretary of State, who held entirely independent rights and obligations as trustee of the Redundancy Fund, must be strictly limited to the terms of the 1965 Act (see p 992 d and h, post). d

Per Curiam. Decisions of the Divisional Court, while of the highest persuasive authority, are not binding on the National Industrial Relations Court (see p 992 e and f, post). e

Notes

For the payment of rebates out of the Redundancy Fund to employers, see Supplement to 38 Halsbury's Laws (3rd Edn) para 808G, 2.

For the Redundancy Payments Act 1965, ss 21, 30, see 12 Halsbury's Statutes (3rd Edn) 256, 263. e

Cases referred to in judgment

Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1970] 2 All ER 871, [1970] 3 WLR 287, Digest (Cont Vol C) 616, 74172g.

Smith Coats (J) (London) Ltd v Rifkin (1970) 5 ITR 188.

Authority also cited f

Spencer Bower on Estoppel (2nd Edn) p 134, para 141.

Appeal

This was an appeal by the Secretary of State for Employment against a decision, given on 11th August 1971, of the industrial tribunal (chairman, Sir John Clayden) sitting in London, that the employers, Atkins Auto Laundries Ltd, were entitled to recover a rebate of £45 under the provisions of the Redundancy Payments Act 1965, s 30. The facts are set out in the judgment of the court. g

Thomas Bingham for the Secretary of State for Employment.

T Scott Baker for the employers. h

SIR JOHN DONALDSON P delivered the judgment of the court. This is an appeal by the Secretary of State for Employment from a decision of the industrial tribunal, sitting in London, which decided that the employers were entitled to a rebate under the Redundancy Payments Act 1965. The claim was made under s 30 (1) (a) of the Act, which is in these terms: i

'Subject to the provisions of this section, the Minister shall make a payment (in this Part of this Act referred to as a "rebate") out of the fund to any employer who—(a) is liable under Part I of this Act to pay, and has paid, a redundancy payment to an employee . . .'

^b Section 30 (1), so far as material, is set out *infra*

a The fund, it should be said, is a fund to which employers make contributions. This claim, which was disputed by the Secretary of State, was referred to the tribunal under s 34 of the Act, and for present purposes it is only necessary to refer to parts of sub-ss (1) and (2), which provide:

‘(1) Subsections (2) and (3) of this section shall have effect where—(a) a claim is made for a rebate on the grounds that an employer is liable to pay, and has paid, an employer’s payment . . .

b ‘(2) Where any such claim or application is made or such prior notice is given, there shall be referred to a tribunal, in accordance with regulations made under Part III of this Act,—(a) any question as to the liability of the employer to pay the employer’s payment . . .’

c It is clear that the section contemplates that employers may in fact make redundancy payments in circumstances in which they are not liable to make them. It is within the experience of some members of this court that this is done fairly commonly. It is done in circumstances, for example, where it is thought that in the interests of good industrial relations some payment should be made to an employee who does not qualify under the Act, because he has not been in continuous employment by that employer for the full minimum period of two years. Again, circumstances can arise in which an employer considers that the rate of payment provided under the Redundancy Payments Act 1965 is in all the circumstances inadequate, and the employer then increases the amount of the payment above that calculated in accordance with the Act. This court does not wish in any way to discourage this practice being adopted by good employers in appropriate circumstances, but it is not itself concerned with payments which are made either in excess of the amount laid down by the Act or in circumstances which do not qualify for a payment under the Act.

e The Secretary of State has no official or personal interest in the state of the Redundancy Fund out of which the rebates are paid. He is the guardian of that fund and is, indeed, a trustee of it. It is, therefore, his duty to ensure that while *f* all proper rebates are paid out of the fund, no sums are paid out in circumstances which do not qualify for a rebate. It is perfectly clear that in the present case there is a serious question to be decided affecting not only this case, but a number of other cases, and in the circumstances the Secretary of State has come to this court to obtain a ruling as to where his duty lies. He has appreciated that a very small sum was in dispute in this particular case—some £45—and that an employer, faced with a challenge with regard to so small a sum, might well take the view, and might reasonably take the view, that it was cheaper simply to abandon his claim than to resist the appeal.

g The task of a court which has to decide a matter which is not fully argued on both sides is very much more difficult, and in those circumstances the Secretary of State has thought it right—and we are grateful to him for having done so—to agree to pay *h* the costs of the employers whatever the result of this appeal.

Having said that, let me now state the facts out of which the appeal arises. They are conveniently set out in para 3 of the reasons which the tribunal gave for its decision. That paragraph states:

i ‘The [employers] had a shop in Norwich. At that shop Mr. Kulizs was employed. The [employers] sold the shop, and by reason of that had to dismiss Mr. Kulizs. The dismissal took effect on 19th September, 1970. A redundancy payment was paid to him on 16th April, 1971. The only written claim by the employee for a redundancy payment was made on 27th March 1971. The reason that no redundancy payment was made, in this clear case of entitlement, was because the directors of the [employers] knew that the employee was to be employed by a friend of one director, in Norwich and they were of the

view that redundancy payments were only payable when persons were out of employment as a result of dismissal by reason of redundancy. Because this employee was immediately to be employed it was thought that no redundancy payment need be made.' a

Unfortunately, that re-employment did not last, and it was in consequence of it coming to an end that the employee made further enquiries and claimed a redundancy payment. Once the claim came to the notice of the employers, they promptly—and no doubt very reasonably, in all the circumstances—paid the amount which either was due or would have been due had the claim been made at an earlier time. b

The Secretary of State says that on these facts the employers were not liable to pay the redundancy payment at the time at which they in fact paid it, and that accordingly the fund is not liable to make a rebate payment to the employers. That contention turns on two other sections of the Act, namely ss 1 and 21. Section 1, so far as is material, provides: c

'Where on or after the appointed day an employee who has been continuously employed for the requisite period—(a) is dismissed by his employer by reason of redundancy, or (b) . . . then, subject to the following provisions of this Part of this Act, the employer shall be liable to pay to him a sum (in this Act referred to as a "redundancy payment") calculated in accordance with Schedule 1 to this Act . . . ' d

The 'following provisions of this Part of this Act' to which that subsection refers include s 21, which is in these terms:

'Notwithstanding anything in the preceding provisions of this Part of this Act, an employee shall not be entitled to a redundancy payment unless, before the end of the period of six months beginning with the relevant date,—[the relevant date is the date when the dismissal notice took effect] (a) the payment has been agreed and paid, or (b) the employee has made a claim for the payment by notice in writing given to the employer, or (c) a question as to the right of the employee to the payment, or as to the amount of the payment, has been referred to a tribunal in accordance with regulations made under Part III of this Act.' e

The Secretary of State says that none of the three alternative conditions is satisfied on the facts of this case, and in that he is plainly right. He goes on to say that, that being so, there is no liability to make a redundancy payment under s 1, because s 1 is subject to s 21, and s 21 is an overriding provision. f

Counsel for the employers says that that is not correct because s 21 is, as he submits, a procedural provision which bars a remedy but not the right. Accordingly, he says, it is open to the employer to decide whether or not he will rely on this potential defence and, if he does not rely on it, the remedy remains. The right remains in any event. We have considered whether that submission is right, and we have come to the conclusion that it is not. g

The language of s 21 is, as counsel has pointed out on behalf of the Secretary of State, very strongly indicative of a provision intended to bar a right. The words are that 'an employee shall not be entitled to a redundancy payment'—not that he shall not be entitled to claim one. He shall not be entitled to a redundancy payment, notwithstanding anything in the preceding provisions of this part of the Act. By contrast, s 2 (1) of the Limitation Act 1939—the most commonly invoked limitation provision—is in terms that action shall not be brought after specified periods; and s 29 (3) of the Landlord and Tenant Act 1954, referred to in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd*¹, is in terms that 'No application under subsection (1) of section twenty-four of this Act shall be entertained'. Those two provisions are clearly procedural, whereas in our judgment s 21 is not. h

¹ [1970] 2 All ER 871, [1970] 3 WLR 287 i

a But counsel for the employers says that the conclusion which I have indicated is inconsistent with a decision of the Divisional Court in *J Smith Coats (London) Ltd v Rifkin*². He adds that that decision is, in his submission, binding on this court and that if and insofar—which he does not admit—it is wrong, it can only be put right by the Court of Appeal. That case, in our judgment, should be looked at with care. It was a claim by employees against employers. What had happened was that the business of S Rifkin Ltd had been transferred to J Smith Coats (London) Ltd and, as a result of that transfer, a redundancy situation was said to have arisen. There was an issue between the employees and the employers whether there had been sufficient continuity of employment. Written notices were given to both the original employer and the new employer, by or on behalf of the employees, and these notices were given in sufficient time to satisfy the provisions of s 21. The employees then started proceedings before a tribunal against the original employers, S Rifkin Ltd. Those proceedings, as we understand it, failed because it was held that it was not the original employers who were liable, if anybody was liable; it was the new employers, J Smith Coats (London) Ltd. Fresh proceedings were therefore brought against J Smith Coats (London) Ltd and, while it had been proved in the first proceedings that these notices were given to both parties, this was never proved in the second proceedings. Such a situation is common, not only in front of tribunals, but in front of courts, where both parties know that a particular state of facts exists and there is no issue about those facts. Those facts may not be proved and that is what happened in this case. The issue of continuity was investigated by the tribunal and a decision was reached that J Smith Coats (London) Ltd, the second employers, were liable to make a redundancy payment. The employers then appealed to the Divisional Court and put forward the, to us, quite astonishing contention that the tribunal had erred in law because they had allowed the employees' claim to a redundancy payment in the absence of any evidence that a written notice had been given. Technically this was, of course, correct; the employers had received proper notice, and they knew that they had received proper notice. But owing to the fact that it was common ground between the parties, it could be said that there was, strictly speaking, no evidence before the tribunal that the provisions of s 21 had been complied with. It is not surprising that so wholly unmeritorious a submission received short shrift from the Divisional Court, and we do not accept, as was suggested at one stage of the argument, that 'short shrift' is the same thing as 'lack of consideration'. Some points are so bad, that they are not in any way improved by prolonged consideration of them.

e Lord Parker CJ, in the course of his judgment, cited a passage from the reasons of the tribunal in which the tribunal recited that all three applicants, the employees, had applied in writing for redundancy payments both from S Rifkin Ltd and the respondent company, J Smith Coats (London) Ltd. He went on to say that there was no evidence of that, except in the proceedings against S Rifkin Ltd, and that evidence in those proceedings was not evidence against J Smith Coats (London) Ltd. Accordingly the tribunal were quite wrong in finding as a fact as against the appellants that they had received a notice complying with s 21 of the 1965 Act. He continued³:

h
i 'It is in those circumstances that [counsel for the appellants] urges that the tribunal were wrong in law in finding that the appropriate section 21 notice had been given when there was no evidence in the proceedings against the appellants to support it. For my part I would dismiss this appeal. The appellants never took the point before the tribunal; no reference was ever made before the tribunal to section 21. The passage that I have read is just something which the tribunal stated in reciting what had happened at the earlier proceedings against S. Rifkin Ltd. Section 21 is in the form of a limitation of proceedings clause; it is

2 (1970) 5 ITR 188

3 (1970) 5 ITR at 189

perfectly open to a party to waive it. These appellants, by never taking the point, in my judgment completely waived it, and I would not allow them and do not allow them to raise the point for the first time in this Court. Accordingly I would dismiss the appeal.'

And Ashworth and Talbot JJ said that they agreed.

Now, the issue which was being considered by the Divisional Court was whether this point could be taken on appeal for the first time. It was not a case where some point had been raised on appeal as to the jurisdiction of the tribunal; it was simply a point which went to the correctness of the decision of the tribunal. The court, furthermore, did not have to consider the effect of the tribunal's decision on the liability of the Redundancy Fund. It is perfectly true that Lord Parker CJ did say that s 21 is in the form of a limitation of proceedings clause. But if he meant thereby that this was a procedural provision barring a remedy, as opposed to a substantive provision barring a right, then in our judgment that expression of view was unnecessary for the decision in the case with which he was concerned. Within the limits of what that case decided, we respectfully agree with it. No employer can be heard to say that a tribunal had erred in law, when he has failed to draw their attention to the particular point of law in respect of which he is making a complaint on appeal. In similar circumstances, we have no doubt that this court would have reached exactly the same conclusion. But such an approach does not, of course, affect the rights of somebody who was a stranger to the litigation concerned.

The Secretary of State has entirely independent rights and obligations. Whether counsel for the employers is right or wrong in submitting that this court is bound by the decisions of the Divisional Court is a matter which may have to be decided in another case. Suffice it for present purposes to say that had it been a matter for decision in this case, we are satisfied that, whilst decisions of the Divisional Court are, of course, of the highest possible persuasive authority, and whilst we shall, of course, welcome being referred to them and shall consider them with the greatest possible respect, we do not, as at present advised, consider that we are bound by such decisions. It is otherwise, of course, with regard to decisions of the Court of Session and the Court of Appeal, those being courts to which appeal lies on matters of law from decisions of this court.

In those circumstances, it really suffices if we say that in our judgment the Secretary of State is right when he says that the employer seeking a rebate under s 30 (1) (a) has to prove that he was liable under the Act to pay at the time at which he paid.

We should not like to part from this case without stressing once again that nothing in this decision should be taken as discouraging employers from making payment to employees in redundancy situations, if they consider it appropriate in all the circumstances, without regard to whether or not they are, strictly speaking, redundancy payments in accordance with the terms of the Act. On the other hand, the Secretary of State's liability as trustee of the fund must be limited strictly to the terms of the Act. The appeal will be allowed, and we substitute an order that the employers are not entitled to a rebate under the Act.

Appeal allowed.

Solicitors: *Solicitor, Department of Employment; Longbourne & Co (for the employers).*

Gordon H Scott Esq Barrister.

a Derrick v Commissioners of Customs and Excise

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND GRIFFITHS JJ

7th DECEMBER 1971

b Customs – Importation of prohibited goods – Indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings, or any other indecent or obscene articles – Cinematograph film – Indecency of film not apparent on visual inspection – *Ejusdem generis* rule not applicable – No common genus in articles prohibited – Prohibition applying to any indecent or obscene articles, including cinematograph film – Customs Consolidation Act 1876, s 42.

c Customs – Importation of prohibited goods – Indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings, or any other indecent or obscene articles – Photographs – Cinematograph film – Whether cinematograph film ‘photographs’ – Customs Consolidation Act 1876, s 42.

d The Commissioners of Customs and Excise seized 16 reels of 35 mm cinematograph film, imported by the appellant, as being liable to forfeiture under s 42^a of the Customs Consolidation Act 1876 which prohibited the importation of ‘Indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings, or any other indecent or obscene articles’. The films were obscene or indecent. They were in transparency form and because they were small required mechanical apparatus to project them on to a screen before they could be visually enjoyed and inspected. On the question whether the film came within the prohibition in s 42,

e **Held** – The film came within the prohibition, and forfeiture of them was therefore justified, for the following reasons—

(i) the argument that the film was not capable of being indecent or obscene because it was not translated into a form which could give offence should not be accepted (see p 995 h and p 996 f and j, post); *Straker v Director of Public Prosecutions* [1963] 1 All ER 697 considered;

f (ii) the *ejusdem generis* rule did not apply to the concluding words of the prohibition, ‘or any other indecent or obscene articles’, so as to exclude from those words cinematograph films, for the items described in the prohibition did not form the single genus alleged, i.e. items which could be immediately realised as being indecent on mere visual inspection, since the alleged genus was not appropriate to the item ‘books’ in the prohibition; it followed that the prohibition applied to any articles, including cinematograph films, which were indecent or obscene (see p 995 j to p 996 a c f and j, post);

g (iii) alternatively, the films were ‘photographs’ within the prohibition despite the fact that mechanical apparatus was required to use them (see p 996 b c f and j, post).

h Per Lord Widgery CJ. The fact that cinematograph films are subject to other controls has no bearing on the interpretation of s 42 of the 1876 Act. Section 42 is an important means of preventing indecent films reaching the United Kingdom, and the other statutory restrictions which prevent their use once they are in the country are merely complementary to s 42 (see p 996 d, post).

Notes

j For the importation of prohibited goods, see 33 Halsbury’s Laws (3rd Edn) 50 para 105. For the Customs Consolidation Act 1876, s 42, see 9 Halsbury’s Statutes (3rd Edn) 20.

Case referred to in judgment

Straker v Director of Public Prosecutions [1963] 1 All ER 697, [1963] 1 QB 926, [1963] 2 WLR 598, 127 JP 260, Digest (Cont Vol A) 418, 8635a.

a Section 42, so far as material, is set out at p 994 h, post

Case also cited

Cox v Stinton [1951] 2 All ER 637, [1951] 2 KB 1021.

Case stated

This was an appeal by way of case stated by justices for the county of East Sussex in respect of their adjudication as a magistrates' court sitting at Lewes on 17th February 1971.

The respondents, the Commissioners of Customs and Excise, preferred a complaint against the appellant, William Sydney Derrick, that on 17th August 1970 at Newhaven Car Hall, Sussex, he imported 16 reels of 35 mm cinematograph film ('the films') which were liable to forfeiture on the grounds that they were indecent or obscene articles imported contrary to the prohibition contained in s 42 of the Customs Consolidation Act 1876, and further that, if any of the articles was in itself not indecent or obscene, it was mixed, packed or found with an indecent or obscene article liable to forfeiture under the Customs Acts the films having been seized on that date as liable to forfeiture under ss 44 and 277 of the Customs and Excise Act 1952.

It was contended by the appellant that—(a) the films were neither indecent nor obscene; (b) cinematographic films did not fall within the phrase 'any other indecent or obscene articles' contained in the expression 'Indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings, or any other indecent or obscene articles' in s 42 of the Customs Consolidation Act 1876. It was conceded by the appellant that if any of the films fell within the prohibition then all the films were liable to forfeiture as being found with goods liable to forfeiture by reason of s 277 (1) (b) of the Customs and Excise Act 1952.

It was contended on behalf of the commissioners that (a) the films were both indecent and obscene; (b) cinematographic films fell within the phrase 'any other indecent or obscene articles' in s 42; if they were not 'articles' they were photographs.

The justices found that the films were indecent and obscene articles; and were of the opinion that at the time of seizure, the films were liable to forfeiture. The justices condemned them as forfeited. The question for the opinion of the High Court was whether cinematographic films could fall within 'Indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings, or any other indecent or obscene articles' in s 42 of the Customs Consolidation Act 1876.

B T Wigoder QC and *W S E Getz* for the appellant.

Gordon Slynn for the commissioners.

LORD WIDGERY CJ. This is an appeal by case stated from justices for the county of East Sussex sitting at Lewes who, on 17th February 1971, made a forfeiture order, as I can conveniently describe it, in respect of 16 reels of 35 mm cinematograph film which had been imported at Newhaven and which were alleged by the Commissioners of Customs and Excise to be indecent or obscene articles.

The authority for seizure of such an article in the case as made out is the Customs Consolidation Act 1876 which in s 42 provides that:

'The goods enumerated and described in the following table of prohibitions and restrictions inwards are hereby prohibited to be imported or brought into the United Kingdom, save as thereby excepted, and if any goods so enumerated and described shall be imported or brought into the United Kingdom contrary to the prohibitions or restrictions contained therein, such goods shall be forfeited, and may be destroyed or otherwise disposed of as the Commissioners of Customs may direct¹.'

In the ensuing table inserted somewhat surprisingly, as counsel pointed out, between coffee and snuff one finds the following:

¹ The words in italics were repealed by the Customs and Excise Act 1952, s 320 and Sch 12, Part I. The provision for forfeiture of goods improperly imported is now contained in s 44 of the 1952 Act

a 'Indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings, or any other indecent or obscene articles.'

There was no issue before the justices as to the obscene or indecent character of the articles in question, and the only issue before us is whether 35 mm cinematograph film in reels comes within the prohibition which I have just read and comes within the terms of the charge in this case which alleged that they were indecent or obscene articles within the prohibition.

b Counsel who has argued the matter for the appellant invites us to apply the ejusdem generis doctrine to the construction of the prohibition. He says that there is to be found in these words of description a single genus and he points out in his submission that all the items specifically described are items of which on visual inspection it is possible to form an immediate judgment as to their indecent quality. He says that c cinematograph films are not within that genus because before their character in regard to decency or indecency can be judged, they have to be displayed with apparatus in some way and a picture thrown on a screen. Accordingly, when one comes to the concluding words of the prohibition, and I quote them again 'or any other indecent or obscene articles', he asks us to apply the ejusdem generis doctrine and to exclude from those final words films of the description here in question.

d His second argument, which is alternative to the first, is that a reel of 35 mm film is not capable of being indecent or obscene, and in support of that he relies on a decision in this court in *Straker v Director of Public Prosecutions*². That was a rather special case under the Obscene Publications Act 1959. The articles which had been seized from the defendant comprised a very large number of photographic negatives which were described by the court in the course of judgment as the 'stock-in-trade' e of the accused. The real question in *Straker's* case² was whether these negatives had been published within the meaning of the charge, but there is an observation of Lord Parker CJ³ which is rather closer to the circumstances of the present case. There, having read s 1 (2) of the Obscene Publications Act 1959, which is in these terms:

f '... any description of article containing or embodying matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures',

Lord Parker CJ went on to say:

g 'Pausing there, for my part it seems to me that it is possible, without deciding the matter finally, for a negative such as we are dealing with here to come within the words "any film or other record of a picture".'

The matter did not require further investigation in that case and for my part I would have had little doubt in construing the 1959 Act that a negative was a film or other record of a picture within the meaning of the phrase. I see no reason to distinguish between the positive and the negative for the purposes of that Act, and h accordingly, as it seems to me, the argument that this film is not capable of being indecent or obscene because it is not translated into a form in which it can give offence is not an argument which I find attractive in this case.

i Counsel for the commissioners seeks to meet the first argument in two ways. He submits in the first place that there is no single genus in the prohibition in the 1876 Act. He points out that the genus alleged by counsel for the appellant is not appropriate at any rate to books. He submits that it may well be impossible in the case of a novel to decide whether it is decent or indecent from a short and brief survey of its pages. Accordingly he says that even if the other matters in the prohibition may disclose a common genus, there is an exception at all events in the case of books

2 [1963] 1 All ER 697, [1963] 1 QB 926

3 [1963] 1 All ER at 699, [1963] 1 QB at 929

and thus, he says, the argument that *ejusdem generis* can be applied is self-rebutted. His contention, which he says is consistent with the understanding of this Act for many years, is that *ejusdem generis* should not be applied and that the prohibition therefore applies to any articles which are indecent or obscene. If that is the right view, of course, it justifies the forfeiture order made in the present case. a

Alternatively, although I think a little less enthusiastically, counsel for the commissioners would contend that cinematograph film is a 'photograph' within the precise words of the prohibition—a photograph not the less because it consisted of a series of photographs, not the less because the photographs were in transparency form, not the less because the photographs were small and required some kind of mechanical enlargement in order that they might be enjoyed. b

For my part I am prepared to accept that either of those arguments is sufficient for present purposes. I agree that the *ejusdem generis* rule cannot apply. It follows that any article which is indecent may be forfeited under this procedure, and had it been necessary, I would certainly have been prepared to hold that these films are photographs despite the limitations on their use to which I have already referred. c

The fact that cinematograph films are subject to other controls, as indeed they are, seems to me to be beside the point. The present section is a very important means of preventing indecent films from ever reaching the country at all, and the other statutory restrictions which prevent their use once they are in the country are, I think, merely complementary. Nor am I impressed by the fact that in a somewhat parallel provision in the Post Office Act 1953⁴, Parliament has thought it desirable with the production of the cinematograph film for the first time to refer to it in terms in prohibitions of this kind under the post office legislation. d

These points are of some persuasive power, but, in my judgment, they do not meet counsel for the commissioners' argument and I would dismiss this appeal. e

ASHWORTH J. I agree. I would only add that I entirely agree with Lord Widgery CJ that this is not a case in which the *ejusdem generis* rule of construction can be applied. As counsel for the commissioners put it, the object of this particular paragraph in the table of prohibitions is manifestly to prevent the importation of indecent things. Whatever their shape or form, the object is to prevent indecency being distributed in this country. He illustrated that by suggesting that it would be absurd if while this list of named articles was effective so far as it went, nonetheless an importer so minded could introduce without fear of trouble toys or statues which could quite obviously be indecent. f

Moreover, it seems to me a complete answer to counsel for the appellant's contentions for one has only got to study the facts in regard to books to realise that this is not limited to indecent objects which can be recognised as being indecent on mere inspection, otherwise one can imagine the country being flooded with paperbacks perfectly innocent on their outside but containing all manner of indecency within. This would mean, I think, putting a very limited and far too strict construction on the prohibition which was intended as already mentioned to prohibit the distribution of indecency within this country. I agree that the appeal should be dismissed. g h

GRIFFITHS J. I agree.

Appeal dismissed. Leave to appeal refused. j

Solicitors: Courts & Co (for the appellant); Solicitor, Customs and Excise.

Jacqueline Charles Barrister.

a

Jennison v Baker

COURT OF APPEAL, CIVIL DIVISION

SALMON, EDMUND DAVIES AND STAMP LJJ

22nd, 23rd, 24th NOVEMBER, 2nd DECEMBER 1971

b Contempt of court – Committal – Breach of injunction – County court – Jurisdiction – Injunction spent at date of order – Effect of committal punishment only – Landlord harassing tenants to procure their departure – Injunction prohibiting harassment – Landlord continuing to harass tenants in spite of injunction – Tenants all departing in consequence – Subsequent application for attachment – Power of county court to commit for contempt even though injunction no longer effective – County Courts Act 1959, s 74.

c

The landlord of a house let in single-roomed flats gave the tenants notice to quit and a notice purporting to increase their rents by about 100 per cent. The tenants referred the agreements to the rent tribunal, asking it to fix the rents and to defer the operation of the notices to quit. Thereafter the landlord embarked on a policy of persecuting and terrorising the tenants with the object of driving them from their

d homes. Eight of the tenants brought actions against the landlord in the county court claiming damages for breach of the covenant of quiet enjoyment and injunctions to restrain him from 'evicting or attempting to evict [them] . . . or from interfering with [their] reasonable enjoyment of' the premises, and the county court granted interim injunctions in the terms sought. The copies of the orders served on the landlord were endorsed with a notice as follows: "Take Notice that unless you obey

e the directions contained in this Order you will be guilty of Contempt of Court and will be liable to be committed to prison." The landlord completely ignored the orders and, as found by the trial judge, 'resorted to every means possible, short of physical force, in order to get [the tenants] out of the house . . . the principal elements were a mixture of causing intolerable inconvenience against a background of fear of what was going to happen next . . .'. As a result all the tenants left, and it was indicated

f at the hearing that they would not return. An application was made for an order of attachment committing the landlord to prison for having disobeyed the order on the grant of interim injunctions and at the hearing of the actions and the application together the county court judge awarded the tenants damages and ordered the landlord to be committed to prison for contempt. On appeal by the landlord it was contended that, whilst under s 74^a of the County Courts Act 1959 a county court judge

g had jurisdiction to commit to prison for breach of an injunction which he had granted provided that it was still effectively in existence, he had no jurisdiction to do so in circumstances where the injunction could no longer be of any effect, for the committal would not then be a deterrent against further breaches of the injunction but would merely be a punishment; accordingly, since the tenants had all left the house, the injunction was no longer of any effect and so the county court judge had no jurisdiction

h to commit the landlord for contempt.

Held – The High Court had jurisdiction to commit for contempt for breach of an injunction even though the injunction had ceased to have effect; it followed that, by virtue of s 74 of the 1959 Act, the county court had the same power since otherwise the injunction granted would not have afforded the tenants 'as full and ample' a

j remedy 'as ought to be granted or given in the like case by the High Court'; the fact that the landlord was liable to committal was an essential part of the remedy granted and it would not have been 'full and ample' unless the order for committal could be made in the county court (see p 1003 c and f to p 1004 c, p 1009 g and h and p 1010 b and c, post).

a Section 74, so far as material, is set out at p 1002 e, post

Dictum of Bramwell LJ in *Martin v Bannister* (1879) 4 QBD at 492 and of Cross LJ in *Phonographic Performance Ltd v Amusement Caterers (Peckham) Ltd* [1963] 3 All ER at 496 applied. a

Notes

For attachment for contempt of court in the county court, see 9 Halsbury's Laws (3rd Edn) 142, 143, para 280, 253, paras 585, 586, and 296, para 714; for attachment for contempt generally, see 8 *ibid* 30-33, paras 56-59; and for cases on the subject, see b 16 Digest 10-16, 24-101 and 57-60, 536-576.

For the County Courts Act 1959, s 74, see 7 Halsbury's Statutes (3rd Edn) 349.

Cases referred to in judgments

- Martin v Bannister* (1879) 4 QBD 491, sub nom *R v Harington* 48 LJQB 677, 43 JP 829; affg SC sub nom *Ex parte Martin* (1879) 4 QBD 212, 13 Digest (Repl) 381, 100. c
- Phonographic Performance Ltd v Amusement Caterers (Peckham) Ltd* [1963] 3 All ER 493, [1964] 1 Ch 195, [1963] 3 WLR 898, Digest (Cont Vol A) 169, 3542a.
- R v Almon* (1765) Wilm 243, 97 ER 94, 16 Digest (Repl) 6, 2.
- R v Brompton County Court Judge* [1893] 2 QB 195, 62 LJQB 604, 68 LT 829, 57 JP 648, 13 Digest (Repl) 438, 630.
- R v Davies* [1906] 1 KB 32, 75 LJKB 104, sub nom *R v Davies, ex parte Hunter* 93 LT 772, 16 Digest (Repl) 12, 44. d
- R v Edwards, ex parte Welsh Church Temporalities Comrs* (1933) 49 TLR 383, 16 Digest (Repl) 13, 58.
- R v Lefroy* (1873) LR 8 QB 134, 37 JP 566, sub nom *Ex parte Jolliffe* 42 LJQB 121, sub nom *Re County Court Judge, ex parte Jolliffe* 28 LT 132, 16 Digest (Repl) 15, 82.
- Seaward v Paterson* [1897] 1 Ch 545, [1895-99] All ER Rep 1127, 66 LJCh 267, 76 LT 215, 16 Digest (Repl) 10, 22. e

Appeal

The defendant, Susan Margaret Baker, appealed against (i) an order of his Honour Judge Curtis-Raleigh made in Bloomsbury and Marylebone County Court on 20th October 1971 in respect of an application by the plaintiff, Renee Jennison, for an order of attachment against the defendant, whereunder the judge ordered that the defendant be committed to prison for contempt of court by reason of her disobedience to an interlocutory order made against her on 30th June 1971; that order restrained her from evicting or attempting to evict the plaintiff without due process of law from the premises occupied by the plaintiff at 105 Sutherland Avenue, London W9, or from interfering with the plaintiff's reasonable enjoyment of those premises; and (ii) an order of his Honour Judge Leslie made on 29th October 1971 dismissing the defendant's application for immediate discharge from custody, but directing that the defendant be so discharged on 12th November 1971. The grounds of appeal were as follows: (1) The plaintiff's application for an order of attachment was made after the plaintiff had abandoned the benefit of her interlocutory injunction by quitting the premises with the permanent intention not to return there under any conditions. f

(2) The attachment procedure laid down in CCR Ord 25, rr 67-70, did not empower the court to impose punishment in respect of past disobedience to an injunction granted by the court once the necessity to secure further compliance with the court's order had ceased to exist. g

(3) The injunction, for disobedience to which the defendant had been ordered to be committed to prison, had ceased to be effective by the election of the plaintiff and the defendant's prior disobedience to that injunction had accordingly been waived. h

(4) His Honour Judge Curtis-Raleigh exceeded his jurisdiction in ordering that the defendant be committed to prison. i

(5) Alternatively, the judge acted on a wrong principle of law and misdirected himself as to the nature of the court's powers of attachment in ordering that the defendant be committed to prison.

(6) Alternatively, the judge, having made an award of punitive damages in favour of the plaintiff, ought not in addition to have committed the defendant to prison.

- e (7) His Honour Judge Leslie ought to have ordered the immediate release of the defendant from custody in all the circumstances of the case. (8) Insofar as the defendant's contempt of court was capable of being purged the defendant had purged her contempt. The facts are set out in the judgment of Salmon LJ.

S Goldblatt for the defendant.

J E A Samuels for the plaintiff.

b

Cur adv vult

2nd December. The following judgments were read.

- SALMON LJ.** This case raises a point of great general importance, namely, whether the county court judges have adequate authority and power to grant an effective remedy by way of injunction. It has always been generally supposed that they have such authority and power. So far at any rate there has certainly been no decision to the contrary. Before considering this question I must state the relevant facts.

- c 105 Sutherland Avenue, Paddington, is a house divided into single-roomed flats each with its own kitchen. There were adequate bathroom and lavatory facilities shared by the tenants of the flats, who also enjoyed the use of the garden. For many years prior to June 1971 the leasehold had been owed by a Mrs Irene Pearce. She maintained the friendliest relationship with the tenants, most of whom had been living in the house for a long time, two of them for as long as 20 years. The tenants were mostly middle-aged or elderly persons who behaved impeccably and paid their rent punctually. The learned county court judge found that they were 'mild, unaggressive . . . and . . . truthful'. Most of them are the plaintiffs in the actions with which the present appeal is concerned. On 11th June 1971 Mrs Pearce sold her leasehold interest to the defendant. From that moment the peace and happiness which the tenants had formerly enjoyed vanished. It is clear from the findings of the learned judge that the defendant immediately embarked on a policy of persecuting and terrorising her tenants with the object of driving them from their homes. The persecution increased in intensity until it finally succeeded in achieving its object. By 17th July all the tenants had departed and left the defendant triumphant, and in vacant possession of the house.

- e It is necessary that I should give a brief resumé of how the defendant accomplished her objective. On 14th June she served each of the tenants with a month's notice to quit and a notice purporting to increase their rents by about 100 per cent. The tenants immediately went to the rent tribunal asking it to fix the rents and to defer the operation of the notices to quit. On 17th June the tribunal notified the defendant that the matter had been referred and that the effect of the notices to quit was therefore postponed until after the tribunal had announced its decision. By 30th June the persecution to which I have referred had become so unbearable that eight of the tenants each started proceedings in the county court against the defendant, claiming damages for breach of the covenant of quiet enjoyment and an injunction to restrain the defendant—

h

'from evicting or attempting to evict the Plaintiff without due process of law [from 105 Sutherland Avenue] or from interfering with the Plaintiff's reasonable enjoyment of [these premises].'

j

On the same day as the tenants started proceedings the county court judge granted interim injunctions in the terms of the injunctions claimed in the actions. On the same day also, copies of the orders were served on the defendant. On the back of each copy, in accordance with the ordinary practice, the following notice appeared:

'Take Notice that unless you obey the directions contained in this Order you will be guilty of Contempt of Court and will be liable to be committed to prison.'

The defendant completely ignored this notice. Its only apparent effect was to

induce her to intensify her effort to evict the tenants. To quote the learned county court judge: a

‘... she resorted to every means possible, short of physical force, in order to get them out of the house. The methods were varied; in some cases subtle, in some cases crude, but the principal elements were a mixture of causing intolerable inconvenience against a background of fear of what was going to happen next, with the suggestion always in the background that more direct physical methods could not be excluded.’ b

The defendant introduced a man called George into the house whose very appearance frightened the tenants, and according to the learned county court judge’s findings, Mr George was installed by the defendant in order to terrorise the tenants. He certainly succeeded in doing so. He was given a room in the basement for which he paid no rent and he appeared to perform no function save that of causing the maximum inconvenience to the tenants. For example, the water was turned off by Mr George many times between 13th and 19th June and again on 9th July (nine days after the granting of the interim injunction) so that the tenants could not wash or even make tea in the house. When the tenants found out the whereabouts of the stop-cock and turned the water on, it was immediately turned off again by Mr George. c
Finally, on 9th July Mr George boarded up the access to the stop-cock. However, after the police and the water board officials had been called in, the boarding appears to have been removed but the water was still frequently turned off after 9th July for no good reason. d

Again, Mr George, on the defendant’s orders, distorted the lock on the front door so that the tenants could not open it with their keys. This meant that they could not get into the house but only out of it through the front door. Then the front door was nailed up from the inside so that the tenants could not even get out of the house by that means. Their only way of getting into or out of the house was through the door in the basement to which none of them had a key. It was always kept open after 11th June; and this alarmed them. It also alarmed them that in using that door they had to pass Mr George’s room. Another man was introduced into the house by the defendant under the guise of a painter. His chief qualification seems to have been that he had until very recently been a professional all-in wrestler—and looked it. Again his chief function was to annoy and frighten the tenants. He purposely made a great deal of mess, splashing paint in all directions and he brought a great deal of rubbish into the house, most of which was put into the bathroom. This effectively prevented its use by the tenants. Then he introduced 26 rusty e
bedsteads which, with the help of Mr George, were piled up in such a position that it left a space of only about six inches through which the tenants had to squeeze in order to reach the only door by which they could get out of the house. They felt that they were being barricaded. f

Disgusting and alarming slogans were painted on the walls, strongly suggesting to the tenants that they must get out. The tenants’ rooms were entered with a pass-key and furniture left disturbed and windows opened so that the tenants should know that their privacy had been invaded. On one occasion an apparently sound but broken chair was substituted for a good one. When the tenant stood on it to shut the window which the intruder had left open, the chair collapsed and the tenant suffered quite a nasty injury. One of the tenants had kept a cat to which she was much attached for 3½ years. No one had ever complained. The defendant told her to get rid of it and in the most menacing tones suggested that unless she did so, she, the defendant, would attend to it herself. The tenant had her cat painlessly destroyed lest it should suffer a worse fate at the defendant’s hands. She told the defendant what she had done in case the defendant killed some other cat by mistake. g

Finally, on 14th July some of the tenants discussed what they should do about the back door. It was then about midnight and as usual the door had been left unlocked. h
j

a They decided to bolt it, having first taken all reasonable steps to make sure that Mr George was in his bedroom asleep. Apparently, however, he was out, for soon afterwards there was a loud hammering on the door. Obviously at least two men were kicking and banging the door very hard and at the same time using disgusting and threatening language. The tenants were terrified. Eventually Mr George and another powerfully built man kicked in the door, and ran upstairs screaming insults at the top of their voices. They then shook their fists in the tenants' faces shouting 'Come on we want you out' and 'You'll all have to get out'. The tenants were in a state of terror. They drank a little brandy to steady their nerves and locked themselves in their rooms until morning. And in the morning all but one of them left. Two days later the last remaining tenant's nerve failed and she left also.

b What occurred at 105 Sutherland Avenue was by no means unique. In two other houses close by with which the defendant was intimately associated, either as the landlord or manageress for her husband, a similar policy of persecution and terrorism was adopted for the purpose of evicting the tenants. Indeed, the same props were used—Mr George, the all-in wrestler, and even the rusty bedsteads. The policy was equally successful and those houses were emptied. This evidence was properly allowed by the learned county court judge as relevant to counter the suggested defence that what was being done at 105 Sutherland Avenue was not done with the knowledge or authority of the defendant nor with the intention of evicting her tenants.

c On 9th August an application was made for an order of attachment committing the defendant to prison for having disobeyed the county court order of 30th June. This application was supported by a number of affidavits. I have outlined the salient facts to which they deposed. The application came on for hearing on 13th August before his Honour Judge Curtis-Raleigh. The defendant asked for an adjournment for the purpose of answering these affidavits. The learned county court judge granted the adjournment and, no doubt in order to give the defendant plenty of time to prepare her evidence and to save the parties the costs of two hearings, ordered that the application should be heard at the same time as the trial of the action. The hearing commenced on 20th September and occupied six days between that date and 20th October when judgment was given. The learned county court judge found that the facts to which the plaintiffs had deposed had been proved. Accordingly, he gave judgment for the plaintiffs awarding them damages, and he also ordered that the defendant should be committed to prison for contempt.

f On 29th October his Honour Judge Leslie dismissed the defendant's application for an immediate discharge from custody but directed that she should be discharged from custody on 12th November. The defendant now appeals from the orders of his Honour Judge Curtis-Raleigh and his Honour Judge Leslie on the ground that, in the circumstances, his Honour Judge Curtis-Raleigh had no jurisdiction to make an order of attachment committing her to prison and that, accordingly, his Honour Judge Leslie should have immediately discharged her from custody.

g The question for this court is whether his Honour Judge Curtis-Raleigh had jurisdiction to make the order of attachment which he made on 20th October. The inherent power of the judges of the High Court to commit for contempt of court has existed from time immemorial. 'Contempt of court' is an unfortunate and misleading phrase. It suggests that it exists to protect the dignity of the judges. Nothing could be further from the truth. The power exists to ensure that justice shall be done. And solely to this end it prohibits acts and words tending to obstruct the administration of justice. The public at large, no less than the individual litigant, have an interest, and a very real interest, in justice being effectively administered. Unless it is so administered, the rights, and indeed the liberty, of the individual will perish. Contempt of court may take many forms. It may consist of what is somewhat archaically called contempt in the face of the court, e.g. by disrupting the proceedings

of a court in session or by improperly refusing to answer questions when giving evidence. It may, in a criminal case, consist of prejudicing a fair trial by publishing material likely to influence a jury. It may, as in the present case, consist of refusing to obey an order of the court. These are only a few of the many examples that could be given of contempt. Contempts have sometimes been classified as criminal and civil contempts. I think that, at any rate today, this is an unhelpful and almost meaningless classification. a

The judges of the Supreme Court undoubtedly have an inherent power to deal with any kind of contempt. The judges of the county court, on the other hand, have only such powers as are conferred on them by statute. There can be no question but that a county court judge has, for example, no power to deal with a contempt of court consisting of an attack out of court on his integrity, nor with contempt committed by a person who has acted as a solicitor in the county court without being qualified. In cases such as these, the contempt may be dealt with in the Queen's Bench Division of the High Court of Justice: see RSC Ord 52, r 1 (2) (a) (iii); *R v Lefroy*¹; *R v Brompton County Court Judge*². It should be noted that such contempts have nothing to do with the disobedience of orders made by the county court judge himself. b

We have to decide whether the learned county court judge had jurisdiction to commit the defendant to prison for the serious contempt of court of which he found her to be guilty in flagrantly defying an order which he had made. This question depends on the true construction of s 74 of the County Courts Act 1959, which, insofar as it is material, provides: c

'Every county court, as regards any cause of action for the time being within its jurisdiction, shall in any proceedings before it—(a) grant such relief, redress or remedy . . . as ought to be granted or given in the like case by the High Court and in as full and ample a manner.' d

We have very properly had our attention drawn to a number of county court rules and orders, but I am not proposing to refer to them because they deal only with practice and procedure. They cannot confer jurisdiction if none exists under the statute. e

Counsel for the defendant in the course of his powerful argument conceded that, if this had been a High Court action, the High Court judge would have had power to commit, and indeed that, in this very case, the Divisional Court of the Queen's Bench Division could have committed the defendant if an application had been made to that court. He also conceded that, if the defendant had stopped short at attempting to evict the plaintiffs in defiance of the injunction, the county court judge would have had power to commit her for contempt. He argues however that, as the defendant's attempts succeeded in effecting an eviction and so well that the plaintiffs can no longer bear the thought of returning to 105 Sutherland Avenue, the county court judge had no power to commit her for her contempt. Counsel contends that a county court judge has jurisdiction to commit to prison (which ex hypothesi is a punishment) for a breach of an injunction which he has granted, providing that it is still effectively in existence but not otherwise. This is because, although in the first case the committal would be a punishment, it would still be a deterrent to protect the plaintiff from further breaches of the injunction, whereas in the second case it would be only a punishment. Although the argument has been brilliantly developed and support for it most ingeniously conjured from Blackstone's Commentaries and Wilmut CJ's celebrated undelivered judgment in *R v Almon*³, it really comes to this—that if the defendant had behaved a little less outrageously, so that she had failed to f

¹ (1873) LR 8 QB 134

² [1893] 2 QB 195

³ (1765) Wilm 243

a evict the tenants, the learned county court judge would have had jurisdiction to commit her but that, because she behaved as outrageously as she did, the county court judge is deprived of jurisdiction. Accordingly, unless (which is most unlikely) the plaintiffs were prepared to go to the considerable extra expense of applying to the High Court for a committal which could bring them no material benefit, the defendant would escape triumphantly from the consequences of her defiance of the county court order. If this is the correct view of the law, it follows that the law can be flouted and brought into disrepute by the defendant with impunity. Moreover, the granting of an interim injunction in the county court would, in many cases, be completely ineffectual as a remedy for the plaintiff.

b For my part, I refuse to give the Act a meaning which leads to such an impractical, unfortunate and ridiculous result unless compelled to do so by the language of the Act itself or by clear authority which is binding on this court. I can find nothing in the Act which supports the argument on behalf of the defendant. The old authorities all date from a time when the county court, as it has existed since the early part of the nineteenth century, had not even been thought of. The only authority which seems to me to be at all in point is *Martin v Bannister*⁴; and this authority, in my view, by no means supports the defendant's contention but tends strongly to negate it. I recognise that in *Martin v Bannister*⁴ an order for attachment in respect of a breach of an injunction was being sought in the county court when the injunction itself was still in force and capable of being obeyed. Accordingly, the courts in that case were not called on to consider what would have been the position in a case such as the present. The question was simply had the county court any jurisdiction to commit a defendant to prison for breach of an injunction which the county court had granted. They unhesitatingly answered that question in the affirmative. The question turned on the true construction of s 89 of the Supreme Court of Judicature Act 1873, which was in much the same terms as s 74 of the County Courts Act 1959. Bramwell LJ stated⁵:

f 'As to attachment, it is only necessary to shew that an injunction may be granted, to prove that an attachment may also be granted. It is said an attachment is not part of the remedy given by the Court, but a punishment inflicted for disobedience to an injunction, but that is not really so; it is part of the remedy, which consists of an injunction and consequent attachment. The remedy is, in fact, an injunction enforceable by attachment.'

g In the present case the remedy granted to each of the plaintiffs was an injunction against the defendant, enforceable by attachment, not to evict or attempt to evict the plaintiff. In my view, it follows from Bramwell LJ's judgment⁵ that, as the defendant did evict the plaintiffs, the county court had jurisdiction to attach the defendant. It cannot, in my view, assist the defendant or deprive the court of jurisdiction that she used such unpleasant methods in effecting the eviction that the plaintiffs have lost all desire to return.

h Clearly a bare order not to evict would not have afforded the plaintiffs a 'full and ample' remedy. The fact that the defendant was liable to be attached for its breach was an essential part of the remedy granted. Nor in my view would the remedy have been 'full and ample' unless the order for attachment could be made in the county court in which the injunction had been granted. I say this for two reasons: (1) It would be absurdly inconvenient and expensive for a plaintiff if he had to claim damages for the eviction in the county court and apply for an order of attachment in the Queen's Bench Division. (2) A defendant served with a copy of such an injunction would be encouraged to ignore the notice endorsed on its back

4 (1879) 4 QBD 212, 491

5 (1879) 4 QBD at 492

to the effect that unless he obeyed it he would be liable to be committed to prison if he knew, as he would, that it was most unlikely that the plaintiff would go to the expense of taking him to the Queen's Bench Division—the only court which would have power (if the defendant's contention is right) of sending him to prison for evicting the plaintiff in defiance of the injunction. a

The defendant's liability to punishment by the county court for breach of the injunctions is, therefore, an essential part of the remedy granted to the plaintiffs by the county court. Were it otherwise the 'remedy' would be virtually worthless. It is the deterrent effect of an injunction plus the liability to imprisonment for its breach which is the remedy. It is the remedy as a whole which normally deters the defendant from evicting the plaintiffs. If the effect of serving the order for an interim injunction were that the defendant could not be imprisoned by the county court judge for evicting the plaintiffs, the order would lose its deterrent effect and cease to be a 'full and ample' or indeed any remedy. In my judgment there is nothing in *Seaward v Paterson*⁶ (properly understood) which is inimical to this view. Counsel for the defendant relies on a passage from the judgment in that case of Lindley LJ where he said⁷: b

'... the party who is bound by the injunction is proceeded against [for contempt] for the purpose of enforcing the order of the Court for the benefit of the person who got it.' c

In that case the injunction took the form of an order for the benefit of the plaintiff not to allow certain premises to be used for boxing coupled with a notice that if the defendant disobeyed the injunction it could be enforced by sending him to prison. He did break the injunction and it was so enforced. None of the judges in this court nor in the court below suggested that this was merely to deter the defendant from committing further breaches. d

Of course an injunction is granted and enforced for the protection of the plaintiff. The defendant who breaches it is sent to prison for contempt with the object of vindicating (a) the rights of plaintiffs (especially the plaintiff in the action) and (b) the authority of the court. The two objects are, in my view, inextricably intermixed. Rigby LJ in *Seaward's* case⁸ pointed out that the court might well send the defendant to prison even if the plaintiff, having applied for attachment, relented and asked that the order in his favour should not be so enforced. The plaintiff cannot waive the order, but, as a rule, the court will pay attention to his wishes. A stranger who helps the defendant to breach the injunction is sent to prison, no doubt as a punishment for contempt but the effect of sending him to prison is also an indirect enforcement of the order which benefits the plaintiff. Whether this particular attribute of an injunction can be regarded as part of the remedy which it affords a plaintiff does not arise for decision in the present case. Nor did it in *Seaward's* case⁶. e

Let us suppose that an elderly spinster plaintiff had a cat to which she was so attached that, to her, its value was beyond price. The defendant who hated the plaintiff and her cat injured the cat and threatened to kill it. The plaintiff brought an action in the county court claiming damages and an injunction to restrain the defendant from killing or injuring the cat. The plaintiff applied for, and was granted, an interim injunction. In granting that injunction, the county court judge said to the defendant 'I am ordering you not to kill or injure the plaintiff's cat. Remember, if you disobey this order I shall enforce it against you by sending you to prison'. Without the built-in sanction the order would be useless as a remedy. With it, however, in 99 cases out of 100, the order would afford the plaintiff a 'full and ample' remedy. Nevertheless, the particular defendant in the case I have supposed, in f

6 [1897] 1 Ch 545, [1895-99] All ER Rep 1127

7 [1897] 1 Ch at 555, 556, [1895-99] All ER Rep at 1131

8 [1897] 1 Ch at 558, [1895-99] All ER Rep at 1134 g

- a contumacious disregard of the order, brutally kills the cat before the plaintiff's eyes. The plaintiff then applies for an order of attachment. The judge says to the defendant 'I warned you that I should enforce my order by sending you to prison if you disregarded it. I now commit you to prison'. Could the defendant plausibly reply 'Look at what Lindley LJ said in 1897⁹. You have no power to enforce the order in this way, unless you can first bring the cat back to life; and this is impossible'?
- b I think that Lindley LJ would have been very surprised and perturbed had it been suggested to him that what he said in *Seaward's* case⁹ could be successfully used in support of such an argument.

When *Martin v Bannister*¹⁰ was in the Queen's Bench Division, Pollock B (whose judgment Bramwell LJ¹¹ expressly approved) said¹²:

- c 'It was contended that the language of this section [i e s 89 of the 1873 Act] was not so strong or comprehensive as the language of the Act of 1865, 28 & 29 Vict. c. 99, s. 1, sub-s. 8, which gave the county court "all the power and authority of the High Court of Chancery" in cases of which the present is not one; but though the language differs, it does not differ so much as to lead me to think that a different result was intended by the legislature; and the Act of 1865 shews that there was no jealousy in granting to county courts a power of attachment.'

- d It is worth noting that s 2 of the 1865 Act enacted that:

'In all such Suits or Matters the Judge of a County Court shall, in addition to the Powers and Authorities now possessed by him, have all the Powers and Authorities, for the Purposes of this Act, of a Judge of the High Court of Chancery
...

- e If the language of s 89 of the 1873 Act and its successor, s 74 of the 1959 Act, as Pollock B suggests, and I respectfully agree, confers the same sort of power and authority on the county court judges as did the 1865 Act, it seems to follow that, so far as orders made by county court judges are concerned, the county court judges have the same power and authority to commit for their breach as a High Court judge would have in respect of the breach of any order made by him. It has often been said that the power to commit must be used sparingly and with the greatest caution. I respectfully agree. There is no reason to suppose, however, that county court judges would be any less conscious of this principle than are judges of the High Court.
- f For these reasons I would hold that the learned county court judge had jurisdiction to make the order of attachment which he made on 20th October committing the defendant to prison.

- g

- EDMUND DAVIES LJ. If ever a case gave rise to what may be described as a cold question of law, totally devoid of all merits, this is that case. The narrative of events related by Salmon LJ fortunately relieves me of the necessity of describing in any detail the odious behaviour of the defendant. It is sufficient to state that, in answer to a question put to him at an early stage during the hearing of the appeal, counsel for the defendant accepted (a) that in deliberate defiance of the interim injunction granted against her by his Honour Judge Curtis-Raleigh on 30th June, the defendant used every means she could think of to drive all tenants out of 105 Sutherland Avenue, and (b) that by those means she succeeded in gaining vacant possession of the entire house by 17th July. And not until *after* her committal for contempt did the defendant utter one word of regret to the plaintiffs or apology to the court.
- j A more gross contempt is not easily conjured up. If the orders of the court can

9 [1897] 1 Ch at 555, 556, [1895-99] All ER Rep at 1131

10 (1879) 4 QBD 212

11 (1879) 4 QBD 491

12 (1879) 4 QBD at 216

deliberately be set at nought by a litigant employing for her own personal advantage such means as were here resorted to, and if indeed it be the case that she has to go unpunished for her contumacy, justice vanishes over the horizon and the law is brought into disrepute. Yet such was the broad submission made by counsel for the defendant at an early stage of what was to develop into as splendid an address as I have listened to for many years. Indeed, at that stage he went so far as to submit that by 20th September 1971, when the county court trial was opened, even the High Court would have been powerless to commit the defendant for her undoubted defiance of the interim injunction, because the supervening events had produced such a situation that committal was unnecessary for the due administration of justice. But counsel had second (and, I think, wiser) thoughts about this, and he later conceded that, whether the proceedings were instituted in the High Court or (as here) in the county court, the Divisional Court would have power in such circumstances as the present to commit the defendant for her undoubted contempt of an order made by either court.

The one question that now arises is whether the county court judge was empowered to commit the defendant, so that, in the memorable words of his Honour Judge Curtis-Raleigh:

'The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope.'

It is common ground that the answer to that question must be sought and found in the provisions of the County Courts Act 1959, and the rules made thereunder. That this is so emerges clearly from *R v Lefroy*¹³, decided under the statute 9 & 10 Vict, c 95¹⁴, which established county courts and made them courts of record. Section 113 empowered judges of the new courts to impose a fine not exceeding £5 or to imprison for a period not exceeding seven days for any contempt committed in court. Holding that a county court judge had no power to proceed against a person for a contempt committed out of court, Cockburn CJ said¹⁵:

'The legislature had anticipated the probability of contempts and the necessity of giving power to the courts of repressing these contempts when occurring in the court itself. [He then set out the provisions of s 113 and thereafter continued:] But it is said that, although the legislature has thus limited the power to contempt in court, that was not intended to alter the law as to the general jurisdiction of a court of record, as it is possessed by inferior courts, of fine or imprisoning to any extent at their discretion. This would lead to a singular inconsistency. If a contempt were committed in the face of the Court, the judge could only imprison the offender for seven days or fine him 5*l.*, while for a contempt out of court he might fine him several hundreds, or commit him for months, or even years. We therefore must understand the legislature to have confined the power to the instances given and to the extent limited.'

Had the law been left as it was at the time of *Lefroy's* case¹³, counsel for the defendant's submission would have been well founded. But, being clearly unsatisfactory, it was not.

Before turning to the later legislation, reference should here be made to the form of the interim injunction granted in the present case. It reads in this way:

'It is ordered that the Defendant S. M. Baker (married woman) by herself, her servants or agents or otherwise, be restrained from evicting or attempting to evict the Plaintiff without due process of law from the premises occupied by the Plaintiff in the dwellinghouse situate at and known as 105, Sutherland

¹³ (1873) LR 8 QB 134

¹⁵ (1873) LR 8 QB at 138

¹⁴ I.e. the County Courts Act 1846

- a Avenue, London, W.9, or from interfering with the Plaintiff's reasonable enjoyment of the same, until after the trial of this action or until further order.'

On the back of that order was this pro forma printed endorsement:

'Take Notice that unless you obey the directions contained in this Order you will be guilty of Contempt of Court and will be liable to be committed to prison.'

- b But so badly had the defendant behaved that, when the application for her committal was first made on 13th August, plaintiffs' counsel made it clear to the judge that they would never return to no 105 in view of what had happened, and that intimation was repeated when the trial opened on 20th September. Nevertheless, the first head of relief sought in the particulars of claim continued to be an injunction—

- c 'restraining the defendant . . . from evicting or from attempting to evict the plaintiff from the said furnished room without due process of law . . .'

While there was no formal abandonment of that request, it was not in fact pursued at the trial and no injunction was granted. Instead, the learned judge awarded each plaintiff exemplary damages, assessed by reference to the indignity and cruelty to which they had been subjected by the defendant, and committed her to prison. d 'For her contempt of Court in deliberately breaching the injunctions', meaning thereby the interim orders made on 30th June.

- e Before indicating my conclusions regarding his jurisdiction to make such an order, I must complete the legislative history. The County Courts Act 1865, s 1 (8), empowered those courts to grant injunctions in certain circumstances, but not in cases of nuisance. Then came the Supreme Court of Judicature Act 1873, s 25 (8) of which conferred on the High Court power to grant injunctions—

'in all cases in which it shall appear to the Court to be just or convenient that such an Order should be made . . .'

Furthermore, s 89 provided:

- f 'Every inferior Court . . . shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies . . . in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice.'

- g In *Martin v Bannister*¹⁶ it was held in the Queen's Bench Division (and later in the Court of Appeal¹⁷) that this legislation empowered a county court judge to grant an injunction in nuisance and to enforce it by attachment, Kelly CB saying¹⁸—

- h 'The powers of every inferior Court have been enlarged by s. 89 . . . If a Court has power to prohibit a wrong it ought also to have power to enforce its prohibition . . . It is unreasonable to suppose the power to grant injunctions was meant to be nothing but a bare power, with no means of compelling obedience. Otherwise the nuisance may be continued for ever, and the plaintiff put to the necessity of bringing action after action for damages . . .'

The plaintiff understandably places reliance on the judgment of the Court of Appeal, where Bramwell LJ observed¹⁹:

- j 'It is said an attachment is not part of the remedy given by the Court, but a punishment inflicted for disobedience to an injunction, but that is not really so; it is part of the remedy, which consists of an injunction and consequent attachment. The remedy is, in fact, an injunction enforceable by attachment.'

¹⁶ (1879) 4 QBD 212

¹⁷ (1879) 4 QBD 491

¹⁸ (1879) 4 QBD at 214

¹⁹ (1879) 4 QBD at 492

Counsel for the defendant stressed that the injunction there granted was against the continuation of a nuisance and that, at the time of the application for committal, the nuisance remained and was likely to continue. The order for committal was therefore not simply a punishment for the past breach but a means whereby future obedience to the injunction might be promptly and permanently secured. Whether that distinction from the facts of the present case necessitates a different conclusion must hereafter be considered. a

And finally to the County Courts Act 1959. Section 74 (marginally entitled 'General ancillary jurisdiction') corresponds with s 89 of the Supreme Court of Judicature Act 1873, and has already been quoted verbatim by Salmon LJ. Our particular concern is, of course, the connotation of the words— b

'such relief, redress or remedy or combination of remedies . . . as ought to be granted or given in the like case by the High Court and in as full and ample a manner.' c

Counsel for the defendant has drawn attention to certain of its sections (such as s 30 and s 127) which expressly confer on the county court powers which the High Court inherently possesses. He has understandably dwelt on s 157, recalling as it does s 113 of the statute 9 & 10 Vict c 95, the ambit of which was considered in *Lefroy's case*²⁰. In effect, it provides that, in the case of certain contempts in the face of the court, the judge may commit for a period not exceeding one month. Counsel has questioned the necessity for any such provision if s 74 is to be given the wide interpretation here contended for by the plaintiff. At first sight, this question appeared both difficult and important, but I think the answer to it is this: s 157 confers on the court simply a power to punish; it grants a remedy to no party and it redresses no complaint; its sole purpose is to provide easily activated machinery whereby the court of its own volition can ensure that justice shall be administered fully, fairly and swiftly. But when the county court judge commits under s 74 is he not simply punishing? This question was, as we have seen, considered by Bramwell LJ in *Martin v Bannister*¹, and the answer is that he is not, for— d

'punishment . . . is part of the remedy, which consists of an injunction and consequent attachment. The remedy is, in fact, an injunction enforceable by attachment.' e

The comment of counsel for the defendant is that this is not so where the nuisance complained of has been terminated and there is no likelihood of its committal. Or, to take the facts of the present case, the misconduct of the defendant having driven the tenants permanently out of their homes, he says that for that wrong the judge granted each of them 'redress' by an award of exemplary damages, and therefore to commit the defendant for breach of the interim injunction would be punishment alone and, as such, beyond the jurisdiction of the county court. With this I do not agree. It is beyond doubt that on the facts of the present case the Divisional Court could have committed the defendant—see, for example, *R v Davies*² and *R v Edwards, ex parte Welsh Church Temporalities Comrs*³. In *Phonographic Performance Ltd v Amusement Caterers (Peckham) Ltd*⁴ the defendants had wilfully disobeyed the court's order, but later complied with it, and the question at issue was whether the court was nevertheless empowered to commit for the past disobedience. Cross J dealt with the matter by saying⁵: f

²⁰ (1873) LR 8 QB 134

¹ (1879) 4 QBD at 492

² [1906] 1 KB 32

³ (1933) 49 TLR 383

⁴ [1963] 3 All ER 493, [1964] 1 Ch 195

⁵ [1964] 1 Ch at 198, 199, cf [1963] 3 All ER at 496 g

a 'There is no doubt that the order of the court was wilfully disobeyed. There is no question here of unintentional disobedience of the order, because the company and the directors never tried to obey the order or thought of obeying it until they instructed solicitors. On the other hand, the order has now been complied with. What, in those circumstances, is the position of the court in a case of civil contempt? As is pointed out in Halsbury's Laws of England, 3rd ed., vol. 8, p. 20, where there has been wilful disobedience to an order of the court and a measure of contumacy on the part of the defendants, then civil contempt, what is called contempt in procedure, "bears a two-fold character, implying as between the parties to the proceedings merely a right to exercise and a liability to submit to a form of civil execution, but as between the party in default and the state, a penal or disciplinary jurisdiction to be exercised by the court in the public interest." Civil contempt bears much the same character as criminal contempt. That is brought out very clearly by Rigby L.J. in his judgment in *Seaward v. Paterson*⁶, where in reference to an argument addressed to him by counsel, he says: "Unless I entirely misapprehended that argument, it went so far as this, that the court has no jurisdiction to commit for contempt by way of punishment; but that the jurisdiction is an ancillary or subsidiary jurisdiction in order to secure that the plaintiff in a suit shall have his rights. I do not think that that can be for a moment maintained". Later he says: "That there is a jurisdiction to punish for contempt of court is undoubted." I think he is talking here of civil contempt, not only of criminal contempt. "It has been exercised for a very long time—for longer than any of us can remember—and it is punitive jurisdiction founded upon this, that it is for the good, not of the plaintiff or of any party to the action, but of the public, that the orders of court should not be disregarded."

Then Cross J added⁷:

f 'I think, therefore, that although the order has now been complied with, I must consider whether it can be said in this case that the directors of the company were deliberately setting the court at defiance and were really treating the order of the court as not worthy of notice. If that is the true view, then notwithstanding that the order has now been complied with, it may well be that a punishment ought to be inflicted on them.'

It is worthy of note, that subject to certain conditions, an order for their committal was made by the learned judge in that case.

g I respectfully adopt this passage as accurately setting out what the High Court can do in the case of past disobedience to its orders. Then, since under s 74 the county court may—

'grant such relief, redress or remedy . . . as ought to be granted or given in the like case by the High Court and in as full and ample a manner',

h why was his Honour Judge Curtis-Raleigh not free to commit the defendant as he did? The grotesque implications of holding that he had no such power have already been illustrated by Salmon L.J. The case of the cat is particularly apt, for the defendant and her husband threatened to kill a cat whose companionship one of the tenants had enjoyed for several years before their arrival. Nevertheless, the answer proffered by counsel for the defendant is that by doing so the county court judge conferred on the plaintiffs no such 'relief, redress or remedy' as at the date of the committal they were still seeking; instead, they were relying on the defendant's misconduct simply as a reason for seeking exemplary damages, and those they were awarded;

6 [1897] 1 Ch at 558, [1895-99] All ER Rep at 1134

7 [1963] 3 All ER at 496, [1964] 1 Ch at 199

more than that they did not seek. The point raised and brilliantly developed by counsel for the defendant is an important one, for, as Pollock B said in *Martin v Bannister*⁸, 'where the liberty of the subject is affected the language must be very clear and explicit to justify imprisonment'. But I hope that I have already sufficiently indicated the manner in which, as I think, it should be dealt with. If in circumstances such as those we are here dealing with, the county court judge had no power to commit, it would be an empty boast were he to claim that his power was 'as full and ample' as that of the Divisional Court. Yet that is exactly what s 74 of the 1959 Act conferred on him. It is on these grounds that I concur with Salmon LJ in holding that his Honour Judge Curtis-Raleigh had jurisdiction to commit the defendant as he did.

STAMP LJ. I agree and have only to add my own appreciation of the clear, powerful and altogether admirable argument of counsel for the defendant.

[Counsel for the defendant addressed further argument to the court.]

SALMON LJ. On 1st November this court ordered that the defendant should be allowed out on bail pending the hearing of the appeal. On that date, according to the order of his Honour Judge Leslie, she had a further 12 days to serve in prison. When we granted the application for bail we did so because, if the point of law which had been taken on her behalf had turned out to be a good one, she would have completed her sentence before the appeal had been heard and that would have been most unfortunate. I did say on that occasion as clearly as I could that, if it should turn out that the point of law taken on her behalf was a bad one and that the county court judge had jurisdiction to send her to prison, the strong probability was that, in that event, this court would order her to be returned to prison to complete her sentence. I also said that it was most important that this should be made plain to her; and I have no doubt that this was done. This morning the point of law was decided against her. We had no doubt that the county court judge had jurisdiction to commit to prison for the contempt of which the county court judge found the defendant had been guilty.

Counsel for the defendant has made an eloquent plea to this court asking us to show mercy and basing that plea on an affidavit which the defendant swore on 30th October. In that affidavit she says, in effect, that, although she accepts legal responsibility for what was done, since she was the landlord of the premises, nevertheless she was not personally responsible for what was done. She very much regrets any inconvenience that may have been caused to the tenants; it certainly was not her intention to evict them.

The learned county court judge found that this defendant, who was a university graduate, was an intelligent, competent and resourceful woman. She conducted her own defence in the county court. She knew that the application to commit her was being made on the basis that she had deliberately embarked on a policy of terrorising her tenants in defiance of the court's order for the purpose of evicting them from their homes. She never suggested in addressing the county court that she was acting under her husband's or anybody else's domination. She never put forward, as the learned county court judge pointed out, that she was in any ignorance of what was going on in the house. Having listened day after day to tenant after tenant giving evidence of the fear and misery which they had suffered at her hands, she did not express one word of regret or apology to them or (which is perhaps not so important) to the court for disobeying the court's order.

If what she is now putting forward in the affidavit of 30th October is a genuine explanation of what occurred, it seems to me quite incredible that she did not go into the witness box to offer that explanation in the county court. A woman as intelligent and highly educated and resourceful as the defendant showed herself

a to be must have realised that if she went into the witness box and told this story she would be subjected to cross-examination and that her story was unlikely to stand up. She heard the witnesses whom she did call cross-examined with devastating effect.

b I have already set out the facts which the learned judge found. There was abundant and compelling evidence that she was responsible for the persecution which these tenants endured. I do not refer, and the learned judge did not refer, merely to legal responsibility. What he meant and said was that she was one of the persons at any rate who initiated and carried out this policy of terrorisation for the purpose of getting rid of the tenants. The story told in her affidavit that she did not really intend to evict them and that she was hoping to live in the house might have been very difficult to support in light of the circumstances that she had similarly persecuted the tenants of two other houses close by in order to evict them and had succeeded in doing so. After all is said and done, this is about as serious a case of contempt of court as it is possible to imagine. This defendant's guilt consists not merely in disobeying an order of the court, which could certainly easily be overlooked; she disobeyed an order of the court which was clearly designed to protect the liberty of the individual and the right of humble tenants to be left in peaceful possession of their own homes. She did this for money, because if she could get these tenants out she would be able to relet the rooms for very much more money than they were paying. For that sordid purpose this policy of persecution and terrorisation was employed in defiance of the court's order.

c In spite of all that has been so eloquently said on her behalf and bearing in mind that the power to commit for contempt should be exercised sparingly and with the greatest caution, I am convinced that we should be doing much less than our duty if we did not order that this defendant should return to prison and serve the remainder of her sentence. We should be doing less than our duty, because not only does she richly deserve the punishment which has been meted out to her, but there are many other unscrupulous landlords who might be tempted to follow her example and many other humble decent tenants who might be subjected to the same beastly methods of terrorisation and persecution were we to allow the defendant to go free. To my mind it would be a real encouragement to landlords such as her to act as she did and it would be exposing the tenants to a real danger should the law (as the learned judge below put it) sit limply by. It is no pleasure for this court ever to order that a woman shall return to prison. In my view, in this case we have no reasonable choice other than to make that order and I would make it.

d **EDMUND DAVIES LJ.** Salmon LJ has entirely expressed my views and I agree entirely in the order he proposes.

STAMP LJ. I entirely agree with everything that Salmon LJ has said and I agree with the order that he proposes.

e *Appeal dismissed. Ordered that the defendant be returned to prison for a further 12 days in accordance with the order of his Honour Judge Leslie.*

f Solicitors: Lovegrove & Durant, Slough (for the defendant); L Bingham & Co (for the plaintiff).

j F A Amies Esq Barrister.

Bland v Archdeacon of Cheltenham

COURT OF ARCHES

DEPUTY DEAN SIR CECIL HAVERS, CANON F C TINDALL, PREBENDARY F A PIACHAUD,
ANTHONY CRIPPS QC AND MICHAEL ARGYLE QC

20th, 21st, 22nd, 23rd JANUARY, 3rd, 16th, 17th FEBRUARY, 6th APRIL 1970

Ecclesiastical law – Consistory court – Jurisdiction – Jurisdiction where offence charged not involving matter of doctrine, ritual or ceremonial – Charge of serious neglect of duty – Refusal to baptise a child – Whether refusal to baptise a child offence involving matter of doctrine – Ecclesiastical Jurisdiction Measure 1963, s 6 (1) (a).

Ecclesiastical law – Clergyman – Offence – Neglect of duty – Analogy with common law negligence – False analogy – Neglect of duty failure to perform ecclesiastical duty without due cause – Ecclesiastical Jurisdiction Measure 1963, s 14.

Ecclesiastical law – Limitation of action – Conduct occurring within ‘period of three years ending with the day on which the proceedings are instituted’ – Offence – Conduct unbecoming office and work of clerk in Holy Orders – Offence charged comprising series of acts – Number of specified acts occurring outside limitation period – Appropriate direction to be made in circumstances – Ecclesiastical Jurisdiction Measure 1963, s 16.

Ecclesiastical law – Censure – Factors to be considered – Paramount consideration gravity of offence – Censure of deprivation only to be pronounced where offence merits severe punishment.

Ecclesiastical law – Consistory court – Proceedings against priest or deacon – Chancellor sitting with assessors – Questions by assessors – Discretion of chancellor.

The appellant rector of a parish was convicted at a consistory court before the chancellor and assessors of three offences of serious neglect of duty and four offences of conduct unbecoming the office and work of a clerk in Holy Orders, under s 14^a of the Ecclesiastical Jurisdiction Measure 1963. The chancellor, considering it his duty to pass sentence *pro salute animarum* and deeming it necessary to part the appellant and his cure for ever, had pronounced a censure of deprivation in respect of each of the seven offences. One of the three offences of serious neglect of duty was in respect of a refusal to baptise a child. Each of the offences of conduct unbecoming consisted of a series of acts specified in a number of particulars and all but one of them specified a number of particulars which occurred outside the three year limitation period imposed by s 16^b of the 1963 Measure. On appeal against conviction and censure, the appellant, *inter alia*, contended that a consistory court was not competent under the 1963 Measure to try a charge relating to refusal to baptise a child.

Held – (i) A consistory court had under s 6 (1) (a)^c of the Measure jurisdiction to try the charge relating to baptism since the act of refusing to baptise a child did not fall within the jurisdiction of the Court of Ecclesiastical Causes Reserved as an offence ‘involving matter of doctrine’ (see p 1017 c to e, post).

(ii) The appeal against the convictions on the three charges of serious neglect of duty would be allowed because (a) the chancellor had, in his summing-up, misdirected

^a Section 14, so far as material, provides: ‘(1) Proceedings may be instituted under this Measure against any of the persons specified ... charging ... (b) ... any ... offence against the laws ecclesiastical, including—(i) conduct unbecoming the office and work of a clerk in Holy Orders, or (ii) serious ... neglect of duty ...’

^b Section 16, so far as material, is set out at p 1019 c, post

^c Section 6 (1), so far as material, provides: ‘... the consistory court of a diocese has original jurisdiction to hear and determine—(a) proceedings upon articles charging an offence ... not being an offence involving matter of doctrine, ritual or ceremonial ...’

a the assessors by likening 'neglect of duty' to common law negligence; there was no analogy for on the true construction of s 14 of the Measure 'neglect of duty' meant failure to perform an ecclesiastical duty without due cause, and (b) the court was not satisfied that, if properly directed as to the meaning of those words, the assessors would inevitably have come to the same conclusion (see p 1015 b and j to p 1016 b and p 1018 j to p 1019 a, post).

b (iii) In relation to the four charges of conduct unbecoming, the chancellor had misdirected the assessors by informing them that, in relation to each charge if they found only one of the particulars which occurred within the limitation period proved they could convict of the offence if they were satisfied that it constituted conduct unbecoming, and stating that they should not specify which of the particulars they found proved. Since in relation to one of those charges there was no doubt that if properly directed the assessors would have come to the same conclusion the appeal c against conviction on that charge would be dismissed, but in respect of the other three charges the appeals would be allowed (see p 1020 g h and j to p 1021 b, post).

d (iv) In determining the appropriate censure to be pronounced on a person convicted of an offence under the Measure the paramount consideration was the gravity of the offence; a censure of deprivation should not be pronounced in respect of an offence which did not merit such severe punishment merely on the ground that such a sentence was in the interests of the parish. Since a censure of deprivation would be wholly out of proportion to the gravity of the offence in respect of which the appellant's conviction had been confirmed, that censure would accordingly be varied by substituting a censure of rebuke (see p 1021 j to p 1022 a and p 1023 a, post).

e Per Curiam. (i) In future, if the articles contain a charge of 'unbecoming conduct' which consists of a series of acts specified in a number of particulars within the limitation period the chancellor should (a) ask the assessors to state which of the particulars they find proved and (b) direct the assessors that they cannot convict unless they find more than one of the particulars proved and moreover in respect of the particulars which they find proved the accused has been found guilty of 'unbecoming conduct' (see p 1020 j, post).

f (ii) There is no obligation on the chancellor to invite assessors to put questions. If an assessor wishes to put a question, the chancellor has a discretion whether to put the question himself if he thinks it is a proper one or allow the assessor to do so (see p 1021 d, post).

Notes

g For the jurisdiction of a consistory court, see Supplement to 13 Halsbury's Laws (3rd Edn) para 1070A; and for proceedings under the Ecclesiastical Jurisdiction Measure 1963, see *ibid*, para 1106A-E.

For the Ecclesiastical Jurisdiction Measure 1963, ss 6, 14, 16, see 10 Halsbury's Statutes (3rd Edn) 250, 256, 258.

Cases referred to in judgment

h *Banister v Thompson* [1908] P 362, 24 TLR 841, 19 Digest (Repl) 484, 3138.

Combe v De la Bere (1881) 6 PD 157, 45 JP 342, 19 Digest (Repl) 331, 1123.

Rice v Bishop of Oxford [1917] P 181, 117 LT 383, 33 TLR 421, 19 Digest (Repl) 337, 1169.

Watkins-Grubb v Hilder (1965) unreported.

Appeal

j This was an appeal by the Reverend Michael Bland, rector of Buckland with Laverton and Stanton with Snowhill, in the diocese of Gloucester, against his conviction at Gloucester consistory court before the chancellor (the Reverend E Garth Moore) and assessors of three offences of serious neglect of duty and four offences of conduct unbecoming the office and work of a clerk in Holy Orders, and the censure of deprivation pronounced against him in respect of each of the seven offences under the Ecclesiastical Jurisdiction Measure 1963. The appellant had been charged with

eight offences under the Measure but he was acquitted on the first. The second, third and fourth charges alleged serious neglect of duty in that he refused to baptise a child (charge 2); he prevented a father from entering the church to declare publicly his dissent to the marriage of his son at the time of the publication of his son's banns of marriage (charge 3); and he repelled a man from Holy Communion without lawful cause (charge 4). Charges 5-8 alleged conduct unbecoming the office and work of a clerk in Holy Orders in that he wrote rude letters to parishioners and other persons and in particular eight letters were specified (charge 5); he made offensive and hurtful remarks to parishioners and in particular five instances were specified (charge 6); he indulged in fits of temper in church and in particular four occasions were specified (charge 7); he indulged in fits of temper in the course of his dealings with parishioners and in particular three occasions were specified (charge 8). The respondent to the appeal was the Archdeacon of Cheltenham who had been nominated as promoter under s 25 of the Ecclesiastical Jurisdiction Measure 1963. The facts are set out in the judgment of the court.

Geoffrey Howe QC and Quentin Edwards for the appellant.
Hugh Forbes QC and Sheila Cameron for the respondent.

Cur adv vult

6th April 1970. **THE DEPUTY DEAN** read the following judgment of the court. This is an appeal by the Rev Michael Bland from the judgment of the Gloucester Consistory Court so far as it relates to the convictions and several censures pronounced against him. The appellant was charged with four offences of serious neglect of duty and four offences of conduct unbecoming the office and work of a clerk in Holy Orders. He was found not guilty on the first charge and guilty on the second to the eighth charges inclusive. Censure of deprivation was pronounced against him on each of the seven charges on which he was convicted.

The appellant was ordained a deacon in 1952 and a priest in 1953. He was instituted as rector of Buckland with Laverton and Stanton with Snowhill in the diocese of Gloucester on 16th June 1958. The respondent is the Archdeacon of Cheltenham, who was nominated as promoter under s 25 of the Ecclesiastical Jurisdiction Measure 1963 (hereinafter called 'the Measure').

At the hearing, we allowed the appellant to amend the notice of appeal by adding fresh grounds in relation to the second, third and fourth charges. In the amended notice of appeal a further point was raised with regard to the second, third and fourth charges, namely that each of the acts with which the said three charges was concerned was in itself an ecclesiastical offence and should not have been charged in the articles as, in each case, serious neglect of duty. We agree with the view expressed by the chancellor that if the act or omission complained of is in itself an ecclesiastical offence, it should be charged as such rather than as serious neglect of duty or conduct unbecoming the office and work of a clerk in Holy Orders. In some cases, however, while an act or omission is in itself an ecclesiastical offence, it can also fall within the ambit of 'neglect of duty' or 'conduct unbecoming' within the meaning of s 14 of the Measure. On this ground the chancellor declined to strike out these charges and we agree with his decision.

Second, third and fourth charges

A further ground raised by the amended notice of appeal was that the chancellor misdirected the assessors by introducing into his summing-up the concept of the duty of care and negligence, so confusing neglect of ecclesiastical duty (or rather the ecclesiastical offence concerned with the duty in question) with the negligent performance of such duty which was not alleged or proved against the appellant in respect of any of the above offences. The appellant was convicted on each of the second, third

a and fourth charges of serious neglect of duty under s 14 of the Measure. Similar words first appeared in s 2 of the Incumbents (Discipline) Measure 1947. There were only a few proceedings instituted under that Measure, one case being *Watkins-Grubb v Hilder*¹—an appeal to the provincial court of the Province of Canterbury in 1965. There does not appear, however, to have been any argument over the meaning of these words and there is nothing in the judgment to indicate that the court was asked to make a judicial determination on them.

b We have been told that these proceedings were the first to be instituted under the Measure. The chancellor, therefore, in directing the assessors as to the true interpretation of 'neglect of duty' in the Measure was unaided by authority. We interpret these words as meaning the failure to perform an ecclesiastical duty without due cause. A clerk who holds ecclesiastical preferment is guilty of neglect of duty if he fails to perform the duties attending to that preferment without due cause. Proceedings may be instituted under this section against an archbishop, any diocesan bishop or any suffragan bishop commissioned by a diocesan bishop or any other bishop or a priest or deacon. Each of these has ecclesiastical duties to perform although varying widely in their nature according to their respective offices and preferments. Failure to perform such duty without due cause is neglect of duty and if it is serious, constitutes an offence under the Measure. These words do not seem to us to require any elaboration and could be explained to the assessors in simple terms.

d The chancellor, however, in directing the assessors as to the meaning of these words, compared 'neglect' in the Measure with negligence at common law. He said:

'Now, neglect is obviously, as the word implies, closely associated with something with which perhaps we are more familiar, namely, negligence. Negligence, though often used as synonymous with carelessness, in law means something more than carelessness. It means the breach of a duty to take care. You can be careless when you do not owe a duty. But if you are careless when you do owe a duty, then you become guilty of negligence. If I may give you a very simple example; if in my own room I trip over my own hearthrug, I may well be careless and I may well suffer for it. But I am not negligent, because at that point I am not owing anybody the duty of care. But, if I am carrying your teapot when I trip over the hearthrug, assuming that I am careless in tripping over the hearthrug, inasmuch as I owe you a duty to take care of your teapot, I am being negligent. And the standard of care which is expected of me is normally the sort of care which the average person, the person whom lawyers have described for a great many years now as the man on top of the Clapham omnibus, would display. I am not expected to display an excessive amount of care. I am expected to display merely the care which an ordinary, reasonable, normal person would display, and it is if I fall below that on an occasion when I owe a duty of care that I am said to be negligent. By the same token, if a man sets himself up as having a special expertise—if, for example, he is a doctor—he is expected to show both the care and skill and knowledge which the ordinary medical practitioner has. He is not expected to perform as brilliantly as that brilliant man up in London; but he is not expected, equally, to fall below the standard of an ordinary, normal practitioner. And, if a man is a Clerk in Holy Orders, the care which he is expected to display on the occasions when he owes a duty of a professional sort, if I may so put it, is the care which you would ordinarily expect from the ordinary average run of parsons, if I may use such an expression. Now, neglect is very like negligence.'

j This comparison of 'neglect of duty' with negligence at common law was unnecessary and irrelevant and was likely to confuse and mislead the assessors. A duty to take reasonable care was not the duty which the appellant had to perform and failure to perform that duty was not the offence charged. We have, of course, to

consider the summing-up as a whole. Although the later directions by the chancellor might well, if they had stood alone, have been adequate, we cannot escape the conclusion that whenever the chancellor referred to neglect, the assessors would associate it in their minds with failure by the appellant of the duty to take reasonable care. We were reminded by counsel for the respondent that the assessors were not a common jury but were a select panel of experienced and intelligent persons. It was argued, therefore, that the assessors would not be so likely to be confused or misled. We find this argument untenable, as the assessors are bound to accept the directions of the chancellor on the law and are not entitled to form their own opinions about it. We are driven to the conclusion that the chancellor misdirected the assessors on the meaning of 'neglect of duty' in respect of each of these three charges.

As the appellant has established that there was a misdirection as to the law on a fundamental question, we have to consider what is the proper course for this court to take. Under the Ecclesiastical Jurisdiction (Discipline) Rules 1964² (hereinafter called 'the Rules'), this court has very wide powers. The court under r 43 in determining the question or questions raised by the appeal has power to confirm, reverse or vary any finding of the consistory court against which the appeal is brought. Under r 42 the court may require or allow any witness who gave evidence for the purpose of the trial to give evidence for the purposes of the appeal. If either party proposes to apply to the court to exercise this power he should, if practicable, give notice in writing to the other party and to the registrar of the appellate court, but without prejudice to the exercise of the powers without notice. Neither party has given such notice or asked us at the hearing to exercise this power. Although the court would not hesitate to use this power if it considered it necessary, as a general rule the court would use the power sparingly, and does not consider it right to do so in this case. This court has to consider whether, notwithstanding the fact that the appellant has established misdirection on the law, a substantial miscarriage of justice has actually occurred. The test we apply is, whether on a right direction, a reasonable panel of assessors would inevitably have come to the same conclusion. We give our decision after we have considered the other grounds of appeal raised by the appellant.

Second charge

The second alleged offence was serious neglect of duty in October 1966 in refusing to baptise a daughter of Mr and Mrs Haynes of Cornisk Cottage, Laverton. This court agrees with the chancellor's view that this should have been charged not as serious neglect of duty, but as an ecclesiastical offence of refusing to baptise.

The appellant in his answer to the consistory court said that 'he demurred at baptising the child on grounds of doctrine and conscience', these grounds being: (a) Neither of the parents were regular communicants. The father was not a believer and declined to attend church. (b) There was no reasonable prospect that the child would be given a Christian upbringing or instruction, or any encouragement in the Christian faith. (c) To administer the sacrament of baptism in this case would have been an instance of indiscriminate infant baptism which the appellant holds to be contrary to the true doctrine of the Christian faith and to Holy Scripture.

The appellant contended before us, as he had before the consistory court, that the offence charged was an offence against the laws ecclesiastical, involving matters of doctrine, and the consistory court was not competent under the provisions of the Measure to try the same. In his final speech, counsel for the appellant abandoned this contention. As, however, the attention of the court has been called to the question of jurisdiction, the court must decide the question. We note four relevant references in the Measure: (1) According to s 6 (1) (a), the consistory court has original jurisdiction to hear and determine 'proceedings upon articles charging an offence . . . not being an offence involving matter of doctrine, ritual or ceremonial'. (2) By s 10 (1):

a 'The Court of Ecclesiastical Causes Reserved has original jurisdiction to hear and determine—(a) proceedings upon articles charging an offence against the laws ecclesiastical involving matter of doctrine, ritual or ceremonial . . .'

(3) Section 14 (1) (a) specifically distinguishes from other offences, such as unbecoming conduct or neglect of duty, an offence against the laws ecclesiastical involving matter of doctrine, ritual or ceremonial. (4) Part VI provides for an alleged offence involving matter of doctrine, ritual or ceremonial to be dealt with by the Court of Ecclesiastical Causes Reserved.

b This court has, therefore, to consider the significance of the phrase 'involving matter of doctrine'. The phrase in s 2 of the Incumbents (Discipline) Measure 1947 was slightly different, namely 'in respect of any question of doctrine, ritual or ceremonial'. The definition of offences as to doctrine in Halsburys Laws of England³ referred to this phrase but not to the phrase which is used in the Measure. We do not think it would be wise to attempt an exhaustive definition. Certain offences clearly involve a matter of doctrine, e.g a public statement (as in a sermon or a book) denying the doctrine of the Trinity or of the deity of Christ. These offences would be charged as such and would be referred without hesitation to the Court of Ecclesiastical Causes Reserved. This alleged offence is of a different nature. The act of refusal to baptise a child is not a doctrinal offence as such and is not charged as such. It is concerned with pastoral work and activity. The motive behind the refusal might be partly connected with a doctrinal view held by the person refusing but the act of refusing to baptise cannot be called an offence against doctrine nor was it in this case charged as such. Moreover, as was pointed out in *Watkins-Grubb v Hilder*⁴:

c ' . . . it is clear beyond question that when offences are proved it is no defence to allege that the offence was caused by a conscientious objection to the performance of statutory duties or other lawful requirements.'

It is enough for us to say that on this question we agree with the decision of the chancellor and hold that the consistory court had jurisdiction to try this charge.

d The appellant further contended that the chancellor misdirected the assessors 'that in deciding whether or not the [appellant] had failed or refused to baptise the child in question they were not concerned with his theological views'. At the time of the alleged offence (October 1966), the strict law was as stated in canon 68 of the Canons of 1604, that to refuse or delay to baptise 'any child brought to the Church' to be baptised would incur a penalty of three months suspension by the bishop. And the chancellor referred also to 'the jus commune, the Common Law of the

e Church', as being the source of the canon. Further, in the Book of Common Prayer of 1662, the third rubric in the service for the public baptism of infants prescribes that the parents should give notice of a baptism 'over night or in the morning before the beginning of Morning Prayer', and the first rubric for the service of private baptism of children expects people to arrange for the baptism of their children within a fortnight of birth 'unless upon a great and reasonable cause, to be approved

f by the Curate' (i.e. the incumbent). It was argued by counsel for the appellant that the alleged offence was not crystallised, in that the child was not 'brought to the Church' to be baptised as stated in canon 68, and the baptism then refused. That may be technically correct, so far as canon 68 is concerned; but the prayer book rubric ensures that no child should be 'brought to the Church' as stated in canon 68 without prior notice, and indeed since 1939 at any rate the Canterbury Convocation

g has required that at least a week's notice of baptism should be given. Mr Haynes, the father of the child, came to give such notice, although no day for the baptism was given and the appellant was charged with then refusing to baptise the child, although he said that he was thinking in terms of delay. We hold, however, that if at the interview with Mr Haynes, the appellant evinced a clear and final intention

not to baptise the child if and when brought to the church for baptism, it would constitute a refusal: see *Banister v Thompson*⁵, where a letter by the priest announcing his definite intention not to administer the sacrament to a person was held to be a refusal. a

The chancellor, although asked to do so, declined to leave for the consideration of the assessors the question whether the duty to baptise had crystallised. In our view he should have done so and directed the assessors more clearly than he did that they could not find a refusal unless what was said at the interview by the appellant evinced a clear and final intention not to baptise the child when brought to the church. b

It should, indeed, be noted that in 1939 the Canterbury Convocation put out certain recommendations as a guide to bishops in their dioceses and the clergy in their parishes with regard to the administration of baptism in these modern days and in the modern situation in the parishes. These were widely acted on. But an even more important step on the same lines was taken in 1957, to provide some relief from the strict letter of the law as in canon 68. In that year an Act of Convocation, solemnly promulgated by the then archbishop, laid down the principles which should now be followed pastorally regarding baptism, godparents, confirmation and the communicant life. These recommendations did not have the force of statute law, but they had great moral force as the considered judgment of the highest and ancient synod of the Province. They were guidelines for pastoral work, based on sound Anglican doctrine. They have subsequently been incorporated in canons B 22, 23, 24 and 27 of the new Canon Law of 1969. These canons have statutory authority through a Church Assembly Measure passed through Parliament. They have tried to avoid any indiscriminate baptism of infants, without going to the opposite more rigorous extreme. It is clear that between 1957 and the legalising of the new canons in 1969, priests could not be regarded as worthy of censure if they followed the 1957 Convocation recommendations; indeed, they were urged to adopt them and follow them, by the archbishops, bishops and others of the clergy in both Convocations. In this particular case, therefore, the appellant would have been quite justified, *not* in a blunt refusal to baptise the child but in asking for some delay so that he could instruct the parents further and consider with them all that is involved in the solemn rite of baptism, for the child, for the parents and the godparents, and for the church community. In his evidence he maintained that he was thinking of delay rather than complete refusal, and if that had been accepted, the alleged offence could not be sustained. c
d
e

In fairness to the chancellor, it should be said that he had not been able to get a copy of the 1969 canons and it may well be that these official documents and decisions were not present to his mind. If they had been we feel sure that he would, as he should, have called the attention of the assessors to the modified position, certainly since the 1957 Act of Convocation and to some extent since the Convocation recommendations of 1939. If he had, the assessors might well have been disposed to take the view that although the appellant was muddled in his statements and in expressing his views, he was influenced by high ideals of the importance of baptism, which are generally consistent with those expressed in several official reports and decisions of the Convocations and in the report and resolutions of the Anglican bishops at the 1948 Lambeth Conference. This would have been highly relevant on the issue whether the neglect of duty (if any) was serious. f
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We have now to decide whether, notwithstanding the misdirection by the chancellor, there has been any substantial miscarriage of justice. We are by no means satisfied that if there had been a proper direction, the assessors would inevitably have come to the conclusion which they did. We, therefore, allow the appeal against conviction on the second charge. i

a [The Deputy Dean then dealt with the third and fourth charges. The appeals against conviction on both charges were allowed on the grounds that the court was not satisfied that if the assessors had been properly directed on the meaning of the words 'neglect of duty' they would inevitably come to the conclusion that the appellant was guilty.]

b *Fifth, sixth, seventh and eighth charges*

Charges five, six, seven and eight each charged the appellant with conduct unbecoming the office and work of a clerk in Holy Orders. Each of these offences consisted of a series of acts specified in a number of particulars. Moreover each of them, except charge seven, specified a number of particulars which occurred outside the period of three years ending with the day on which the proceedings were instituted, namely, 16th May 1968. Section 16 of the Measure provides:

c 'No proceedings under this Measure shall be instituted unless the act or omission constituting the offence, or the last of them if the offence consists of a series of acts or omissions, occurred within the period of three years ending with the day on which proceedings are instituted . . .'

d At the hearing, counsel for the appellant contended that each of these counts was bad for duplicity and applied to the chancellor to strike out each of these charges on the grounds of duplicity, and alternatively, to strike out each of the particulars in charges five, six and eight which were outside the limitation period. The chancellor dismissed these applications. The appellant now contends (1) that the chancellor should have upheld the objection that each of these charges was bad for duplicity and should have required the amendment of the articles so as to strike out the particulars which were outside the limitation period, as barred by s 16 of the Measure and so as to allege every other particular as itself amounting to conduct unbecoming the office and work of a clerk in Holy Orders; (2) that there was a misdirection by the chancellor in that he directed the assessors that they might convict the appellant of each of such charges although they found only one of the particulars relating to a matter occurring after 17th May 1965 proved, and (3) that in returning their verdict they should not specify which of the particulars they found proved.

e Counsel for the appellant contended that this court should follow the practice in the criminal courts under which a count in an indictment containing more than one criminal offence is held to be bad for duplicity. Counsel for the respondent, in a careful and reasoned argument, contended that apart from s 28 (a) and (c) of the Measure, proceedings instituted under s 28 of the Measure were not wholly in the nature of criminal proceedings at an assize court and that the Indictments Act 1915, r 4, Sch 1, had no application. He contended that there was no such thing as duplicity relating to articles under the Measure. We do not find it necessary to decide this question. The form of pleading is governed by the Measure and the rules made under it. It is clear that where more than one offence is charged, each offence must be separately stated. Form 11 in the Appendix to the rules is a specimen form of articles (similar in form to a complaint):

g 'Articles
Statement of Offence
e.g. conduct unbecoming the office and work of a clerk in Holy Orders.

i 'Particulars of Offence
(Here set out in numbered Articles the alleged acts or omissions constituting the offence, giving dates and places where possible. If more than one offence is charged, state each offence separately under the heading "Statement of First Offence", "Statement of Second Offence", etc., followed by the Articles containing the particulars of that offence.)'

Rule 65 provides that:

'Non-compliance with any of these rules shall not render any proceedings void unless the court or commission before whom the proceedings are pending when the irregularity is discovered so directs, but the proceedings may be set aside, either wholly or in part, as irregular, or may be amended or otherwise dealt with in such manner and upon such terms as the court thinks fit . . .'

The Measure and the rules, therefore, clearly prescribe that both in the complaint and articles, each offence should be charged separately and the consistory court has full powers to deal with any non-compliance of the rules. If, therefore, the consistory court was satisfied that there had been non-compliance with the rules, it could and should have dealt with it in one of the ways provided in r 65. In future, any accused who objects to the articles on the grounds that each offence is not charged separately should object to them as not complying with the rules and there is no need to resort to an objection on the ground of duplicity. In our judgment, the chancellor came to a correct conclusion in refusing to strike out the particulars of offence of each of these four charges inasmuch as no single particular alleged an offence in itself and each of the offences charged consisted of a series of acts or omissions.

A single act or omission cannot constitute a series of acts or omissions and, indeed, the particulars of each offence showed that the offence charged consisted of more than one act. Moreover the only ground on which the particulars of incidents which were outside the limitation rule could properly be included was that they did not constitute separate offences simpliciter but were part of a series of acts or omissions constituting an offence.

In charge five, the respondent did not choose to rely on each of the six letters as in itself constituting an offence. If he had they would have been separately stated as six different offences. Instead he chose to rely on one offence which constituted a series of acts. Further, the respondent introduced into charges five, six and eight, acts which were outside the limitation period and could only be taken into consideration in accordance with s 16 of the Measure. This rather complicated situation necessitated a careful and accurate direction of the chancellor. The direction of the chancellor with regard to the particulars outside the limitation period was clear and satisfactory. However, he fell into error in another respect. He directed the assessors in relation to each of these offences, five, six, seven and eight, that if they found only one of the particulars which occurred within the limitation period proved they could convict of the offence if they considered it could properly be termed conduct unbecoming the office and work of a clerk in Holy Orders. We are driven reluctantly to the conclusion that this was a misdirection in respect of each of these charges. The result is that it is impossible to be sure whether the assessors found only one of the particulars proved and convicted the appellant in respect of the one particular proved. Moreover the appellant does not know which or how many of the particulars were found to be proved against him by the assessors.

The chancellor is in the same position and when considering sentence does not know, for instance, whether he is sentencing the accused for unbecoming conduct which consisted of writing one rude letter, or six rude letters under charge five, or for indulging in one fit of temper in church or four fits of temper in church under charge seven. In future, if the articles contain a charge of 'unbecoming conduct' which consists of a series of acts specified in a number of particulars within the limitation period the chancellor should (a) ask the assessors to state which of the particulars they find proved and (b) direct the assessors that they cannot convict unless they find more than one of the particulars proved and moreover that in respect of the particulars which they find proved the accused had been found guilty of 'unbecoming conduct'.

We have now to consider whether, notwithstanding the misdirection, there has been any substantial miscarriage of justice. As regards the fifth charge we are not

a left in any doubt. We have seen the letters which the appellant admits writing and we have read his evidence about them. We are satisfied that if the assessors had been properly directed they would have inevitably come to the same conclusion. We, therefore, dismiss the appeal against conviction on the fifth charge.

b As regards the sixth, seventh and eighth charges (on which there was a conflict of evidence on many issues of fact) we are not satisfied that if the assessors had been properly directed they would have inevitably come to the same conclusion. We, therefore, allow the appeal against conviction in respect of the sixth, seventh and eighth charges.

c Counsel for the appellant also contended (although he did not press his contention) that the conduct of the trial was irregular in that the chancellor declined to allow the assessors to put such questions to the appellant as they might wish, notwithstanding the application on that behalf by counsel for the appellant. None of the assessors had in fact asked the chancellor for leave to put a question. Counsel for the appellant had asked the chancellor to invite the assessors to put questions if they wished to do so, but the chancellor had refused. In our judgment there was no obligation on the chancellor to invite the assessors to put questions. If an assessor wishes to put a question, the chancellor has a discretion whether to put the question d himself if he thinks it is a proper one or allow the assessor to do so. In an assize court, the judge usually asks the juror to put his question in writing and if he considers it admissible and relevant the judge usually puts the question himself. We think this is a practice which should normally be followed by the chancellor. We hold that there is no substance in this case in the contention that the trial was irregular on this ground.

e *Censure*

It remains to consider the censures pronounced by the chancellor. Section 49 of the Measure provides five different kinds of censure which may be pronounced on a person found guilty of an offence under the Measure. They vary in their severity from deprivation to rebuke.

f Deprivation is the most severe. It involves removal from any preferment which the person then holds and disqualification from holding any other preferment (except any preferment to which the bishop of the diocese shall appoint him). Moreover, by s 50 of the Measure when a censure of deprivation is pronounced on any priest or deacon the bishop of the diocese may by sentence without any further legal proceedings depose him from Holy Orders.

g When pronouncing censure, the chancellor explained his approach to the selection of the censure which he should impose as follows:

h 'When it comes to selecting the sentence or censure which I should impose in this case, I remind myself that it has long been the practice of the courts spiritual to pass sentence *pro salute animae*—for the good of the soul—and I give that a wider interpretation, and say that I think it is my duty to pass sentence *pro salute animarum*—for the good of souls, which includes both the [appellant], the convicted clerk himself, and the souls of those who were committed to his care. I am quite convinced that I should be failing in my duty if I did not do all that lies in my power to ensure that the convicted clerk and the cures where he was working part company now for ever. I know of no way in which I can ensure this except by the censure or sentence of deprivation.'

j It is clear that the chancellor considered it to be his duty to part the appellant and his cure for ever and the only way he could do that was to pronounce a censure of deprivation. In our judgment this was a wholly wrong approach. The paramount consideration in selecting the appropriate sentence for an offence under the Measure should be the gravity of the offence. Censure of deprivation should never be pronounced unless the gravity of the offence or of the totality of the offences of which

the person has been convicted merit such sentence. It should never be pronounced in respect of an offence which does not merit such censure merely because it is highly desirable to part an incumbent from his parish and there is no other administrative method of removing him from his benefice. a

There is no indication that the chancellor after having made up his mind to do all that lay in his power to part the appellant from his cures for ever, addressed his mind to the gravity of each particular offence. Indeed, he pronounced the same sentence of deprivation in respect of each of the seven offences although they varied widely in their gravity. b

It was contended on behalf of the respondent that in selecting the appropriate censure, the chancellor as vicar general and official principal, exercising part of the cure of the bishop, should act in his pastoral capacity and not in his judicial capacity. Counsel for the respondent referred to earlier statutes in which censure was always pronounced by the bishop and particularly to s 6 of the Clergy Discipline Act 1892 which provided that when a clergyman was under that Act adjudged guilty of an offence regard should be had in considering the sentence to the interests of the ecclesiastical parish or place concerned and not to precedents of punishment. This Act was chiefly concerned with acts of immorality. Moreover it has been wholly repealed by the Measure. c

Counsel for the respondent also cited *Rice v Bishop of Oxford*⁶, a decision on the Benefices Act 1898 in which the Archbishop of Canterbury in pronouncing censure said: d

‘The interests of parishioners—that is to say, the religious well-being of the parish as a whole—ought to be, in all cases, the paramount consideration . . .’ e

That Act, however, is wholly different in its object and scope from the Measure. The preamble to the Measure is:

‘A Measure passed by The National Assembly of the Church of England to reform and reconstruct the system of ecclesiastical courts of the Church of England, to replace with new provisions the existing enactments relating to ecclesiastical discipline . . .’ f

Under s 28 of the Measure it is the duty of the chancellor if the accused is found guilty of an offence, to decide such censure, therefore, as is warranted by the Measure. We can find nothing in the Measure to support the contentions of counsel for the respondent. If these contentions mean that the chancellor in his pastoral capacity is entitled to and should pronounce sentence of deprivation in the interests of the parish in respect of an offence under this Measure or the totality of offences which does not merit this severe punishment, we are unable to accept these contentions. g

In *Combe v De la Bere*⁸ Lord Penzance said:

‘. . . it is not the particular character of an ecclesiastical offence which alone warrants the application of the censure [i.e. of deprivation], but the gravity of the offence in each particular case taken in connection with its attendant circumstances and carefully weighed in the estimation of the Court.’ h

We agree that if an offence or the totality of the offences by its gravity merits deprivation, the chancellor may in deciding whether to pronounce this sentence, properly take into consideration the interests of the parish together with the other relevant circumstances. j

⁶ [1917] P 181

⁷ [1917] P at 193

⁸ (1881) 6 PD 157 at 169, 170

As we have confirmed the conviction on the fifth offence only, we are concerned solely with the sentence of deprivation pronounced in respect of this offence. Censure of deprivation is wholly out of proportion to the gravity of this offence and we vary this censure by substituting a censure of rebuke.

Appeal allowed in part; censure varied.

Solicitors: Winckworth & Pemberton (for the appellant); Lee, Bolton & Lee (for the respondent).

Mary Rose Plummer Barrister.

Hubbard and another v Vosper and another

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, MEGAW AND STEPHENSON LJJ

17th, 18th, 19th NOVEMBER 1971

Copyright – Fair dealing – Literary, dramatic and musical works – Fair dealing for purposes of criticism or review – Scope of defence – Not limited to criticism of literary style – Defence extending to criticism of doctrine or philosophy expounded in work – Work not published to world at large – Defence available where unpublished work has had wide circulation – Copyright Act 1956, s 6 (2).

Equity – Confidence – Breach of confidence – Defence – Public interest in publication – Scientology – Courses of instruction in cult of Scientology – Undertaking not to impart information acquired on course – Courses containing material of such a nature that desirable in public interest that information should be made public.

Injunction – Interlocutory – Principle governing grant – Copyright – Claim for infringement – Defence of fair dealing – Plaintiff having arguable case not sufficient to justify grant where defence of fair dealing raised.

H was the founder of the Church of Scientology of California and was the author of a number of books which expounded the doctrines of the cult of Scientology. He had also written numerous bulletins and letters on the subject which had been circulated to members of the cult. V, who had been a member of the Church of Scientology for many years, enrolled for an advanced course on Scientology which the cult's authorities regarded as confidential. They required V to sign an undertaking (a) to use the knowledge acquired on the course for Scientology purposes only, and (b) to refrain from divulging information received to those not entitled to receive it. V did not, however, complete the course. He became disillusioned with Scientology. The cult's authorities thought that he was actively seeking to suppress or damage Scientology, and so, in accordance with the cult's practice, they declared him to be a 'suppressive person' and to be in a condition of 'enemy'. The effect of this was that in the eyes of Scientologists V had no right to 'self, possessions or position' and any Scientologist could take any action against him with impunity. V left the organisation and wrote a book about Scientology, which was stated on the jacket to be 'The first ever investigation into the cult of Scientology by an ex-Scientologist of 14 years' service'. The book was highly critical of Scientology and contained many extracts from the books and other writings of H. H and the Church of Scientology brought an action against V claiming infringement of copyright and breach of confidence and sought an interlocutory injunction restraining publication.

Held – The plaintiffs were not entitled to an interlocutory injunction for the following reasons—

(i) V had shown that he might have a good defence of 'fair dealing' under s 6 (2)^a of the Copyright Act 1956; whether the use of extensive quotations from H's works constituted 'fair dealing' was a question to be decided by the tribunal of fact, and there was material on which the tribunal of fact could find that there was 'fair dealing'; further the defence of fair dealing covered criticism not only of a plaintiff's literary style but also of the doctrine or philosophy expounded in his works and extended not only to those of the plaintiff's works which had been published to the world at large but also to those which had been so widely circulated that it would be fair to subject them to public criticism (see p 1027 f to h, p 1028 a d and e, p 1031 d g and h and p 1033 f, post); dictum of Romer J in *British Oxygen Co Ltd v Liquid Air Ltd* [1925] Ch at 393 disapproved:

(ii) although V may have made use of information which he knew that the plaintiffs claimed to be confidential, there were, nevertheless, grounds for thinking that the courses of the Church of Scientology contained such dangerous material that it was in the public interest that it should be made known; furthermore (per Megaw LJ) there was evidence that the plaintiffs had been protecting their secrets by deplorable means, such as was evidenced by their code of ethics, and therefore did not come to the court with clean hands in seeking to protect those secrets by the equitable remedy of an injunction (see p 1028 j, p 1029 c and p 1033 d e and f, post); dictum of Lord Denning MR in *Fraser v Evans* [1969] 1 All ER at 11 applied;

(iii) the defences raised by V to the claims for breach of copyright and breach of confidence were such that V should be permitted to go ahead with publication; to justify the grant of an interlocutory injunction it was not sufficient that, having established a strong prima facie case that he owned the copyright, a plaintiff need only show that he had an arguable case that the defendant had infringed it or was about to infringe it; each case was to be decided on a basis of fairness, justice and common sense in relation to the whole of the issues of fact and law relevant to the particular case; V had reasonable defences to the plaintiffs' claims; if those defences were valid he was entitled to publish his book and the law would not intervene to suppress freedom of speech except when it was abused (see p 1029 g to p 1030 b and j to p 1031 a and p 1033 e and f, post); *Donmar Productions Ltd v Bart* [1967] 2 All ER 338 and *Harman Pictures NV v Osborne* [1967] 2 All ER 324 disapproved.

Per Megaw LJ. The fact that a quotation contains every single word of the work criticised or reviewed does not necessarily preclude a defendant from relying on the defence of fair dealing under s 6 (2) of the Copyright Act 1956 (see p 1031 e, post).

Notes

For fair dealing in copyright, see 8 Halsbury's Laws (3rd Edn) 435, 436, para 788, and for cases on the infringement of literary work by quotations and extracts, see 13 Digest (Repl) 105-107, 468-487.

For restraining breach of confidence, see 21 Halsbury's Laws (3rd Edn) 395, 396, para 825, and for cases on the subject, see 28 (2) Digest (Reissue) 1081-1090, 868-917.

For the remedy of an interlocutory injunction to protect copyright, see 8 Halsbury's Laws (3rd Edn) 445, 446, para 809, and for cases on the subject, see 13 Digest (Repl) 130-132, 715-737.

For the Copyright Act 1956, s 6, see 7 Halsbury's Statutes (3rd Edn) 141-143.

Cases referred to in judgments

British Oxygen Co Ltd v Liquid Air Ltd [1925] Ch 383, 95 LJCh 8q, 133 LT 282, 13 Digest (Repl) 55, 55.

Donmar Productions Ltd v Bart [1967] 2 All ER 338n, [1967] 1 WLR 740n, Digest (Cont Vol C) 174, 731a.

Fraser v Evans [1969] 1 All ER 8, [1969] 1 QB 349, [1968] 3 WLR 1172, 28 (2) Digest (Reissue) 1090, 917.

^a Section 6 (2) is set out at p 1026 f, post

- a *Harman Pictures NV v Osborne* [1967] 2 All ER 324, [1967] 1 WLR 723, Digest (Cont Vol C) 174, 731b.
Hawkes & Son (London) Ltd v Paramount Film Service Ltd [1934] Ch 593, 103 LJCh 281, 151 LT 294, 13 Digest (Repl) 116, 574.
Seager v Copydex Ltd [1967] 2 All ER 415, [1967] 1 WLR 923, 28 (2) Digest (Reissue) 1019, 453.
- b *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, 86 LJCh 107, 115 LT 301, 13 Digest (Repl) 55, 53.
Walter v Steinkopff [1892] 3 Ch 489, 61 LJCh 521, 67 LT 184, 13 Digest (Repl) 52, 22.

Interlocutory appeal

- This was an appeal by the defendants, Cyril Ronald Vosper and Neville Spearman Ltd, from the order of Kilner Brown J made on 4th October 1971, on the application of the plaintiffs, Lafayette Ronald Hubbard and the Church of Scientology of California, whereby it was ordered that the injunction granted on 9th September 1971 by Griffiths J on an ex parte application by the plaintiffs restraining the first defendant by himself, his servants or agents or howsoever otherwise and the second defendant by their officers, servants or agents or howsoever otherwise from distributing, disseminating, selling or parting with the book 'The Mind Benders' and further restraining
- d ing the first defendant by himself, his agents or servants from further imparting any information, the subject of confidence between the plaintiffs and the first defendant to any party whomsoever without the plaintiffs' express consent, be continued for a period not exceeding 28 days or further order. The facts are set out in the judgment of Lord Denning MR.
- e *Leonard Caplan QC and M Levene* for the defendants.
Peter Pain QC and Alan Newman for the plaintiffs.

- LORD DENNING MR.** On 9th September a book was published called 'The Mind Benders'. It was written by Mr Cyril Vosper, the first defendant, and published by Neville Spearman Ltd, the second defendant. It was very critical of the cult of Scientology. On the same day the Church of Scientology of California issued a writ. They went to the judge and obtained ex parte an interim injunction to restrain the publication of the book. Later on Mr Lafayette Ronald Hubbard was added as plaintiff. After hearing both sides, Kilner Brown J continued the injunction but, as the matter involved the public interest, he hoped it would be taken to appeal.
- f 'Scientology' is a word invented by Mr Hubbard himself. He has invented a lot of other words too which he has set out in a Dictionary of Scientology. He defines
- g it in this way:

'SCIENTOLOGY: An applied religious philosophy dealing with the study of knowledge, which, through the application of its technology can bring about desirable changes in the conditions of life.'

- h In addition to the dictionary, he has written many books about this philosophy or cult. They include 'Axioms and Logics', 'Introduction to Scientology Ethics', 'Scientology 8-80', 'Scientology 8-8008', and 'Scientology—A History of Man'. All of them contain a large number of his invented words. They cannot be understood by anyone who is not versed in the cult. In addition, Mr Hubbard has written numerous bulletins and letters which have been circulated to members of the cult.
- i These give many descriptions of the workings of Scientology.
- Mr Hubbard and his adherents occupy a big house near East Grinstead called Saint Hill Manor. They hold courses for those who wish to study Scientology and to acquire proficiency in it. Some of these courses, on their own admission, 'can be dangerous in untrained hands'.

Mr Vosper was a member of the Church of Scientology for 14 years. He worked at Saint Hill Manor as secretary, and such like. In 1967 he put his name down for

a a course which the authorities regarded as confidential. It was called the Saint Hill Special Briefing Course. He paid a fee of £150 and signed an undertaking 'relating to higher levels of knowledge'. He undertook (a) to use this knowledge for Scientology purposes only; (b) to refrain from divulging level VI materials to those not entitled to receive them or to discuss them within the hearing of such persons. Mr Vosper did not, however, complete the course. He became disillusioned with Scientology. Those in authority thought that he was actively seeking to suppress or damage Scientology. So in September 1968 they declared him to be a 'suppressive person', which meant that he was considered 'fair game', and they declared him to be in a condition of 'enemy'. In order to understand what that means, you have to look at the books. It means that in the eyes of Scientologists, Mr Vosper had no right 'to self, possessions or position', and that any Scientologist could take any action against him with impunity.

c So Mr Vosper left Saint Hill Manor. He wrote 'The Mind Benders'. It said on the jacket that it was 'The first ever investigation into the cult of Scientology by an ex-Scientologist of 14 years' service'. It is this book of which the plaintiffs now seek to prevent publication. They do it on two grounds: first, infringement of copyright; secondly, breach of confidence.

1 *Infringement of copyright*

d Whatever one may think of Mr Hubbard's books, letters and bulletins, they are the subject of literary copyright. His name appears as author on every book, letter and bulletin. So he is presumed to be the owner of the copyright in them. In writing 'The Mind Benders' Mr Vosper has made free use of Mr Hubbard's books, letters and bulletins. He has taken very little from some, but from others he has taken very substantial parts. For instance, he has taken quite big extracts from the 'Introduction to Scientology Ethics', and put them into his book. He has also taken substantial parts of the letters and bulletins. The parts taken are so substantial that Mr Vosper will be guilty of infringement of copyright unless he can make good his defence. And his defence is that his use of them is fair dealing within s 6 (2) of the Copyright Act 1956. This provides:

f 'No fair dealing with literary, dramatic or musical work shall constitute an infringement of the copyright in the work if it is for purposes of criticism or review, whether of that work or of another work, and is accompanied by a sufficient acknowledgment.'

The last words of the section are satisfied. At the end of his book, Mr Vosper said: 'Criticisms are used from the following books by L Ron Hubbard'—setting them out.

g The question is, therefore, whether Mr Vosper's treatment of Mr Hubbard's books was a 'fair dealing' with them 'for the purposes of criticism or review'. There is very little in our law books to help on this. Some cases can be used to illustrate what is not 'fair dealing'. It is not fair dealing for a rival in the trade to take copyright material and use it for his own benefit. Such as when the Times published a letter on America by Rudyard Kipling. The St James Gazette took out half-a-dozen passages and published them as extracts. This was held to be an infringement: see *Walter v Steinkopff*¹. So also when the University of London published examination papers. The Tutorial Press took several of the papers and published them in their own publication for the use of students. It was held to be an infringement: see *University of London Press Ltd v University Tutorial Press Ltd*². Likewise when a band played 20 bars of 'Colonel Bogey'—to entertain hearers—it was not fair dealing: see *Hawkes & Son (London) Ltd v Paramount Film Service Ltd*³.

1 [1892] 3 Ch 489

2 [1916] 2 Ch 601

3 [1934] Ch 593

a In this case Mr Vosper has taken considerable extracts from Mr Hubbard's work and has commented freely on them. I will give some illustrations. On p 28 of Mr Vosper's book, he gives a quotation from Mr Hubbard's 'Axioms and Logics'. I will emphasise the words taken:

b 'Scientology Axiom One is the assumption upon which the rest of the subject stands. "Life is basically a static, [and this is further defined] a Life Static has no mass, no motion, no wavelength, no location in space or in time. It has the ability to postulate and to perceive."

'Hubbard has redefined in modern, scientific-sounding terms the ancient Hindu Vedanta concept of a soul or spirit that, whilst appearing to inhabit the physical universe is of a distinctly separate order.'

c Another illustration is on p 141 of Mr Vosper's book:

'Hubbard in his book "Introduction to Scientology Ethics, 1968" states: "A Suppressive Person or Group becomes 'Fair Game'. By Fair Game is meant, without right for self, possessions or position, and no Scientologist may be brought before a Committee of Evidence or punished for any action taken against a Suppressive Person or Group during the period that person or group is 'fair game'."

d 'Would a Scientologist who takes it into his head to murder a declared Suppressive Person be regarded by Scientologists as fully within his rights? That murder has not occurred as far as is known, is not to the credit of L. Ron Hubbard's Ethics but more to the credit of police and courts of the old-fashioned, repressive type.'

e Those illustrations enable me to state the conflicting arguments. Counsel for the plaintiffs says that what Mr Vosper has done is to take important parts of Mr Hubbard's book and explain them and amplify them. That, he says, is not fair dealing. Counsel for the defendants says that Mr Vosper has, indeed, taken important parts of Mr Hubbard's book, but he has done it so so as to expose them to the public, and to criticise them and to condemn them. That, he says, is fair dealing.

f It is impossible to define what is 'fair dealing'. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions.

g To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide. In the present case, there is material on which the tribunal of fact could find this to be fair dealing.

h Counsel for the plaintiffs took, however, another point. He said that the defence of 'fair dealing' only avails a defendant when he is criticising or reviewing the plaintiff's literary work. It does not avail a defendant, said counsel, when he is criticising or reviewing the doctrine or philosophy underlying the plaintiff's work. In support of this proposition, counsel for the plaintiffs relied on the words of Romer J in *British Oxygen Co Ltd v Liquid Air Ltd*⁴:

i 'I am inclined to agree with [counsel for the plaintiffs] that, in this proviso [as to "fair dealing"] the word "criticism" means a criticism of a work as such.'

But, when you refer back to counsel for the plaintiffs' arguments, you will see that all he means is that the criticism must be a criticism of the plaintiff's work, and not

of the plaintiff's conduct. I do not think that this proviso is confined as narrowly as counsel for the plaintiffs submits. A literary work consists not only of the literary style, but also of the thoughts underlying it, as expressed in the words. Under the defence of 'fair dealing' both can be criticised. Mr Vosper is entitled to criticise not only the literary style, but also the doctrine or philosophy of Mr Hubbard as expounded in the books. a

Counsel for the plaintiffs took yet another point. This was on the bulletins and letters. These, he said, were not published to the world at large, but only to a limited number of people and, in particular, to those who took classes in Scientology. He said that, whilst it might be 'fair dealing' to criticise the books, it was not 'fair dealing' to take extracts from these bulletins and letters and criticise them. He quoted again the words of Romer J in the *British Oxygen* case⁵: b

'... it would be manifestly unfair that an unpublished literary work should, without the consent of the author, be the subject of public criticism, review or newspaper summary. Any such dealing with an unpublished literary work would not, therefore, in my opinion, be a "fair dealing" with the work.'

c

I am afraid I cannot go all the way with those words of Romer J. Although a literary work may not be published to the world at large, it may, however, be circulated to such a wide circle that it is 'fair dealing' to criticise it publicly in a newspaper, or elsewhere. This happens sometimes when a company sends a circular to the whole body of shareholders. It may be of such general interest that it is quite legitimate for a newspaper to make quotations from it, and to criticise them—or review them—without thereby being guilty of infringing copyright. The newspaper must, of course, be careful not to fall foul of the law of libel. So also here these bulletins and letters may have been so widely circulated that it was perfectly 'fair dealing' for Mr Vosper to take extracts from them and criticise them in his book. d

It seems to me, therefore, that Mr Vosper may have a good defence of 'fair dealing' to raise at the trial. e

2 Breach of confidence f

Counsel for the plaintiffs claimed that Mr Vosper in the book was using information obtained in confidence and should be restrained from so doing. During the first part of the argument, I felt there was very little evidence to show that Mr Vosper was using any confidential information. But counsel pointed out that, in 'The Mind Benders' there is a passage from which it can be inferred. In the book, Mr Vosper says at p 119: g

'Owing to the restimulative nature of the materials comprising the Solo-Audit and Clearing Courses, there is a heavy security clamp on it. When a student enrolls on these courses, he signs a declaration not to divulge to any non-Clear [that is one of Mr Hubbard's invented words meaning someone who is not a Scientologist] any of the data which is given to him. Insanity, severe illness and possible death is foretold for anyone who is not yet ready for it, who happens to even glance at the Solo-Audit or Clearing Course worksheets.'

h

In view of this, I think there is ground for thinking that Mr Vosper may have used information knowing that Mr Hubbard claimed it to be confidential. Nevertheless, he may have a good answer. We have had several cases in this court recently about confidential information. The law will, in a proper case, intervene to restrain a defendant from revealing information or other material obtained in confidence, such as trade secrets, and the like. This depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage i

a of it: see *Seager v Copydex*⁶. But the information must be such that it is a proper subject for protection. As I said in *Fraser v Evans*⁷:

'There are some things which may be required to be disclosed in the public interest, in which event no confidence can be prayed in aid to keep them secret.'

b In this case counsel for the defendants has drawn our attention to the nature of these courses for which confidence is claimed. The plaintiffs themselves say that: 'the material contained in these courses can be dangerous in untrained hands'. Counsel for the defendants took us through the books and said that they indicate medical quackeries of a sort which may be dangerous if practised behind closed doors. They are so dangerous, he said that it is in the public interest that these goings-on should be made known. The closed doors should be opened for all to see. We cannot decide on it today, as this is only an interlocutory application. But, I think that, even on what we have heard so far, there is good ground for thinking c that these courses contain such dangerous material that it is in the public interest that it should be made known.

3 Remedies

d The judge fully appreciated that Mr Vosper might well have good defences; but, nevertheless, he granted an injunction to prevent him publishing the book. The reason was because of two decisions by judges of first instance. *Donmar Productions Ltd v Bart*⁸ decided in 1964 but reported in 1967 and *Harman Pictures N V v Osborne*⁹. Those cases do seem to suggest that, in an action for infringement of copyright (and also it would appear in any other action for the infringement of a right) when a plaintiff seeks an interlocutory injunction, he has to do two things: first, e he must establish a strong prima facie case that he owns the copyright or other right; but, secondly, having done that, he need only show an *arguable* case that the defendant has infringed it or is about to infringe it. In the words of Goff J in *Harman's* case¹⁰, the plaintiff—

f 'does not have to show that he is likely to be successful or more likely to be so than the defendant, but only that he has a case reasonably capable of succeeding.'

We are told that practitioners have been treating these cases as deciding that, if the plaintiff has an arguable case, an injunction should be granted so that the status quo may be maintained. The judge was so told in the present case, and that is why he granted the injunction.

g I would like to say at once that I cannot accept the propositions stated in those two cases. In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint on the defendant but leave him free to go ahead. For instance, in *Fraser v Evans*¹¹, although the plaintiff h owned the copyright, we did not grant an injunction, because the defendant might have a defence of fair dealing. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules.

i But here, although Mr Hubbard owns the copyright, nevertheless, Mr Vosper

6 [1967] 2 All ER 415, [1967] 1 WLR 923

7 [1969] 1 All ER 8 at 11, [1969] 1 QB 349 at 362

8 [1967] 2 All ER 338n, [1967] 1 WLR 740n

9 [1967] 2 All ER 324, [1967] 1 WLR 723

10 [1967] 2 All ER at 336, [1967] 1 WLR at 738

11 [1969] 1 All ER 8, [1969] 1 QB 349

has a defence of fair dealing, and, although Mr Hubbard may possess confidential information, nevertheless, Mr Vosper has a defence of public interest. These defences are such that he should be permitted to go ahead with the publication. If what he says is true, it is only right that the dangers of this cult should be exposed. We never restrain a defendant in a libel action who says he is going to justify. So in a copy-right action, we ought not to restrain a defendant who has a reasonable defence of fair dealing. Nor in an action for breach of confidence, if the defendant has a reasonable defence of public interest. The reason is because the defendant, if he is right, is entitled to publish it; and the law will not intervene to suppress freedom of speech except when it is abused.

I would, therefore, allow this appeal and remove the injunction.

MEGAW LJ. I agree. There are a few matters to which I wish to add some observations. First, I wish to say something with regard to the matter with which Lord Denning MR has dealt at the end of his judgment, in relation to interlocutory injunctions. I very much doubt whether the passage in Halsbury's Laws of England¹², cited by Ungood-Thomas J in his judgment in *Donmar Productions Ltd v Bart*¹³, was intended to state as a general proposition that different standards of proof are to be applied when the court considers, first, the question whether the plaintiff has a right, and, secondly, the question whether, if the plaintiff does have the right, that right has been infringed. It is true that in certain special cases one can approach the matter in that way. Suppose, for example, the plaintiff's claim for an interlocutory injunction is based on his contentions that he is the owner of a piece of land and that the defendant has trespassed on it. If the defendant does not dispute that the piece of land belongs to the plaintiff, then it may, in some cases, require only the slightest evidence on the part of the plaintiff of the fact that the defendant has gone on that land to entitle the plaintiff to an injunction. The defendant in those circumstances, if he has a defence at all, has a defence to the action only on the basis: 'I have not gone on that land.' In those circumstances there is no reason why an interlocutory injunction should not normally be granted against him if there is some evidence that he has in fact done so. But, to change the example, if the plaintiff's case is: 'You, the defendant, trespassed on my land', and the defendant's defence is 'True, you are the owner of that land, but you gave me a licence to walk over that land'—then, although the plaintiff's right in one sense is not disputed, in that he is the owner of the land, the question, and the whole question is: is there a licence? It may be that the onus of establishing that is on the defendant; but this is not a question of onus of proof. In such circumstances in my judgment it could not rightly be said that, once the plaintiff has established that he is the owner of the land, it only needs a mere possibility of success in connection with the assertion of the absence of a licence to entitle him as of right to an interlocutory injunction. It must be looked at on the whole of the case; the existence of the right and of any defences that are asserted in relation to the admitted existence of that right. In addition, one has to take into account the evidence of the alleged breach, the facts relating to the alleged breach, and even then there is no firm and invariable criterion which can be laid down on the basis of the prospects of success in the action because frequently one has to consider also the balance of convenience, as well as the status quo. One can readily imagine a case in which the plaintiff appears to have a 75 per cent chance of establishing his claim, but in which the damage to the defendant from the granting of the interlocutory injunction, if the 25 per cent defence proved to be right, would be so great compared with the triviality of the damage to the plaintiff if he is refused the injunction, that an interlocutory injunction should be refused. To my mind it is impossible and unworkable to lay

12 21 Halsbury's Laws (3rd Edn) 365, 366, paras 765, 766

13 [1967] 2 All ER at 338, 339, [1967] 1 WLR at 741

a down different standards in relation to different issues which fall to be considered in an application for an interlocutory injunction. Each case must be decided on a basis of fairness, justice and common sense in relation to the whole of the issues of fact and law which are relevant to the particular case.

b Now I come to the first of the main issues in the present appeal; that is the question of the copyright. The principal submission by counsel for the plaintiffs, related to the construction of s 6 (2) of the Copyright Act 1956. As I understand his argument, it was that criticism 'whether of that work of or another work' (words used in that subsection) cannot be taken to apply to criticism which is criticism of something other than the work itself. That may be an acceptable proposition, but it is only an acceptable proposition when one has defined with reasonable clarity what is meant by 'criticism of something other than the work itself'. Counsel for the plaintiffs did not suggest that 'criticism' in this subsection was confined to what I would call literary criticism; that is to say, criticism of the style—the literary style—of the work in question. But if it is not confined to that, it must surely then cover criticism of the ideas, the thoughts, expressed by the work in question—the subject-matter of the work. What is the subject-matter of the works which are relevant in this appeal? The subject-matter of each of them is some facet of the doctrine, the practice, the training, and the code of ethics or discipline of this organisation, the Church of Scientology of California. To my mind there can be no doubt that the criticism contained in the book, 'The Mind Benders', is, on a fair reading, a criticism of that subject-matter by reference, in part at least, to its exposition in those works. It is in that context that the quotations from those works are used.

e It is then said that the passages which have been taken from these various works—in particular, from the one of them described as 'Introduction to Scientology Ethics'—are so substantial, quantitatively so great in relation to the respective works from which the citations are taken, that they fall outside the scope of 'fair dealing'. To my mind this question of substantiality is a question of degree. It may well be that it does not prevent the quotation of a work from being within the fair dealing subsection even though the quotation may be of every single word of the work. Let me give an example. Suppose that there is on a tombstone in a churchyard an epitaph consisting of a dozen or of 20 words. A parishioner of the church thinks that this sort of epitaph is out of place on a tombstone. He writes a letter to the parish magazine setting out the words of the epitaph. Could it be suggested that that citation is so substantial, consisting of 100 per cent of the 'work' in question, that it must necessarily be outside the scope of the fair dealing provision? To my mind it could not validly be so suggested. In this present case, having considered what we have been shown of the passages taken from the various works in relation (because I think this test must also be applied) to the nature and purpose of the individual quotations, I find myself unable to say that the plaintiffs have made out a case that the quotations are so substantial that this does not fall within the fair dealing provision. To my mind the plaintiffs have failed to establish to the required degree, in relation to an application of this sort and in relation to all the other factors that have to be taken into account, that they ought to be granted an interlocutory injunction in relation to the alleged breach of copyright.

h I turn to the question of confidentiality. Lord Denning MR has referred to one passage which occurred in some of the documents put before us in relation to 'fair game'. I think it is right, in fairness to the plaintiffs, that it should be said that it would seem that that particular provision has disappeared from the latest, or 1970, edition of the book 'Introduction to Scientology Ethics'. It is right in these circumstances that something should be said about the history of that provision. So far as the documents before us are concerned, it appears chronologically for the first time in what is described as the 'Hubbard Communications Office Policy Letter of March 1, 1965', under the heading, 'Justice. Suppressive Acts. Suppression of Scientology and Scientologists. The Fair Game Law'. That document defined 'Potential Trouble Sources'. They

were persons who were active in Scientology, or persons known as 'preclears', who remained 'connected to a person or group that is a suppressive person or group'. A 'suppressive person or group' is then defined in the document as 'one that actively seeks to suppress or damage Scientology or a Scientologist by Suppressive Acts'. 'Suppressive acts' are then defined as 'acts calculated to impede or destroy Scientology or a Scientologist and which are listed at length in this policy letter'. I should refer to some of these 'suppressive acts', the carrying out of which turns a person, for the purpose of this document, into a 'suppressive person or group'. 'Suppressive acts' include 'proposing, advising or voting for legislation or ordinances, rules or laws directed toward the Suppression of Scientology . . .' So that if a voter in this country were to have the temerity to cast a vote in a Parliamentary election for a candidate who had indicated that he was minded to propose legislation which would 'suppress' Scientology, that person would be guilty in the eyes of this organisation of having committed 'a suppressive act'. Again, 'testifying hostilely before state or public enquiries into Scientology to suppress it'; 'reporting or threatening to report Scientology or Scientologists to civil authorities in an effort to suppress Scientology or Scientologists from practising or receiving standard Scientology'; 'bringing civil suit against any Scientology organisation or Scientologist including the non-payment of bills or failure to refund without first calling the matter to the attention of the Chairman . . .'; 'writing anti-Scientology letters to the press or giving anti-Scientology or anti-Scientologist evidence to the press'; 'testifying as a hostile witness against Scientology in public'. If words mean anything, that meant that in the eyes of this organisation a person became 'a suppressive person'—'a suppressive person' guilty of a suppressive act—if, however truthful, however much compelled by process of law, he should give evidence in a court of law hostile to the organisation of Scientology. And this is the organisation which is seeking to have its documents treated as confidential by the order of the court. It went on to include among 'suppressive acts': '1st degree murder, arson, disintegration of persons or belongings not guilty of suppressive acts'. There can be no doubt that the last five words relate to the preceding word 'persons'. What does that mean? That it was, in the eyes of this organisation in 1965, 'a suppressive act' to be guilty of 'first degree murder', provided that the person you murdered had not been guilty of suppressive acts. The implication is obvious. Yet another 'suppressive act' is, 'delivering up the person of a Scientologist without defense or protest to the demands of civil or criminal law'.

In the 1968 edition of 'Scientology Ethics' those provisions remain substantially the same, and they continue at that date to include the 'fair game' provisions which I have mentioned as having been included in the 'Justice policy' document of 1965. In those years it was provided that suppressive persons or groups became 'Fair Game':

' . . . by Fair Game is meant, without rights for self, possessions or position, and no Scientologist may be brought before a Committee of Evidence or punished for any action taken against a Suppressive Person or Group during the period that person or group is "fair game" '.

Well, it may be that there is or was some explanation of that general provision, as of the related 'first degree murder' provision, which will take away from it the meaning which to any ordinary person it would carry; namely, that here was an organisation which had laid down a criminal code of its own and by that criminal code it treated and required its adherents to treat, persons as outlaws deprived of any protection or sanction so far as the Scientological organisation was concerned if they had been guilty of 'suppressive acts', and no Scientologist was to be condemned, under the ethical code of Scientology, for any action—I repeat *any* action—which he might take against such 'fair game'. It is right that this should be mentioned: in the latest edition of the Scientology Ethics, which appears to have been published in the year 1970, the provisions as to 'fair game' have now been removed from its code of ethics,

a Most of the matters which I have mentioned earlier, as being examples of 'suppressive acts' still remain as 'suppressive acts'. They come under the heading: 'High Crimes (Suppressive Acts)'; but the provisions as to 'fair game' have disappeared from the code. One other respect in which 'suppressive acts' have changed since the original policy document is this; the last five words have disappeared from that extraordinary example of a 'suppressive act': '1st degree murder, arson, disintegration of persons or belongings not guilty of suppressive acts'. So that the Scientology organisation has now changed its provisions, from those that previously prevailed, in such a way that 'first degree murder' may now apparently be regarded as a crime within this organisation, even though the murderer is a Scientologist, and even though the victim is one who, in the eyes of the organisation, has committed a 'suppressive act', such as having written a letter to a newspaper adversely criticising Scientology.

c Having regard to the matters which we have seen and, bearing in mind counsel for the plaintiffs' observations that he came to this court unprepared to deal with matters of that sort, to my mind it is here sufficiently clear that, whatever explanations may be given, assuming that the words used in relation to 'suppressive acts' mean what they on their face appear to mean, counsel for the defendants is more than abundantly justified in his proposition that there is here evidence that the plaintiffs are or have been protecting their secrets by deplorable means such as is evidenced by this code of ethics; and, that being so, they do not come with clean hands to this court in asking the court to protect those secrets by the equitable remedy of an injunction.

e For the reasons which I have given and for the reasons which have been given by Lord Denning MR, I agree that this appeal should be allowed.

f **STEPHENSON LJ.** I entirely agree. I would only add one further consideration in favour of refusing the plaintiffs the injunction which the judge granted. Damages appear to me to be an adequate remedy for any breach of copyright or confidence which may be proved at the trial; indeed any damage which the publication of Mr Vosper's book may cause to the plaintiffs is less likely to result from what he quotes from their literature or discloses from their material than from the criticism which Mr Vosper makes of them and of their cult of Scientology as a whole.

Appeal allowed; injunction removed. Leave to appeal refused.

g 9th February 1972. *The Appeal Committee of the House of Lords dismissed a petition for leave to appeal.*

Solicitors: Davidson, Doughty & Co (for the defendants); Lawrence Alkin & Co (for the plaintiffs).

L J Kovats Esq Barrister.

R v Criminal Injuries Compensation Board, ex parte Staten

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, MELFORD STEVENSON AND CANTLEY JJ

2nd FEBRUARY 1972

Compensation – Criminal injuries – Criminal Injuries Compensation Board – Entitlement to compensation – Victim and offender living together as members of the same family – No right to compensation – Husband and wife living in same house – Sleeping in different rooms – Wife not cooking or cleaning for husband – Wife attacked by husband – Whether living together – Whether wife entitled to compensation for injuries – Compensation for Victims of Crimes of Violence Scheme 1964 (1969 revision), para 5 (a).

The applicant and her husband lived with their children in two council flats knocked into one. Relations between them had not been good for a long time. Proceedings for persistent cruelty were taken against the husband and after a time he went to prison. On his release he returned to the matrimonial home. The applicant was reluctant to see him, being frightened for her own safety. She slept in a bedroom with one of her two daughters while he slept on a sofa in the living room; there were no sexual relations between them and the applicant did not clean or cook for him. Some days later they quarrelled and the husband criminally attacked the applicant. She claimed compensation under the Criminal Injuries Compensation Scheme^a. The Criminal Injuries Compensation Board refused her claim finding that, since she and her husband were living together with the children as members of the same family in the same house at the time when she was attacked, she was not entitled to make a claim by virtue of para 7^b of the scheme. On an application for certiorari to quash the board's decision, the applicant contended that, applying the principles of divorce law, she and her husband were living apart at the relevant time.

Held – The phrase 'living together . . . as members of the same family' in para 7 of the scheme should be given its ordinary, natural meaning and should not be made to conform with matrimonial law; the question whether a husband and wife were living together as members of the same family would normally be a question of fact; in the present case the question was one of fact and there was no justification for alleging that the board had erred in law; accordingly the application would be refused (see p 1036 e to h, post).

Notes

For compensation for victims of crimes of violence, see Supplement to 10 Halsbury's Laws (3rd Edn) para 1020A, and for a case on the subject, see Digest (Cont Vol C) 282, 2557c.

Cases cited

Hopes v Hopes [1948] 2 All ER 920, [1949] P 227.

R v Criminal Injuries Compensation Board, ex parte Schofield [1971] 2 All ER 1011, [1971] 1 WLR 926.

Smith v Smith [1939] 4 All ER 533, [1940] P 49.

Motions for certiorari and mandamus

This was an application by way of motion by Mrs Rita Marjorie Staten for an order

^a The scheme was set out in a White Paper (Cmnd 2323) which, as amended, was announced in Parliament on 24th June 1964; further amendments were made on 3rd August 1965 and on 21st May 1969

^b Paragraph 7, so far as material, is set out at p 1035 j, post

a of certiorari to bring up and quash a decision of the respondents, the Criminal Injuries Compensation Board, made on 9th March 1971 whereby they refused her claim for compensation in respect of injuries received by her on 23rd May 1970 and inflicted by her husband. The applicant also applied for an order of mandamus directing the respondent board to award her compensation for her injuries. The facts are set out in the judgment of Lord Widgery CJ.

b *Lionel Scott* for the applicant.
Gordon Slynn for the respondent board.

LORD WIDGERY CJ. In these proceedings counsel moves on behalf of the applicant, Mrs Rita Marjorie Staten, for an order of certiorari to remove into this court and quash a decision of the Criminal Injuries Compensation Board made on 9th March 1971, whereby compensation to the applicant in respect of injuries received by her on 23rd May 1970 was refused under para 7 of the Criminal Injuries Compensation Scheme, in that it was said that the applicant and her husband who inflicted the injuries were living together at the time as members of the same family.

The findings of the respondent board in this case, so far as the facts of this matter are concerned, were these. The applicant was the wife of the person who inflicted the relevant injuries on her. They had a number of children. Their domestic base, as it were, consisted of two council flats which had been knocked into one. They thus had two bedrooms, two kitchens, two bathrooms and a living room. Relations between the applicant and her husband had not been good for a long time. Proceedings for persistent cruelty were taken, and after a time the applicant's husband went to prison. He came back from prison on 12th May 1970 and, as the respondent board find, returned to live in the matrimonial home. He stayed there for 11 days which took him up to the occasion when this injury was inflicted on his wife, giving rise to the present proceedings.

The applicant was reluctant to see her husband come home on 12th May 1970. She said she was terrified for her own safety, and the evidence before the respondent board was to the effect that following 12th May the applicant slept in a bedroom with one of her two daughters whilst her husband slept on a sofa in the adjoining living room. There were no sexual relations between the husband and the applicant and she did not clean or cook for him. The respondent board saw no sufficient reason to disbelieve that evidence and accepted it.

So we have here a situation where as a matter of fact the husband and wife and the children were living in one home, but with the degree of discord between the husband and wife which is reflected in the paragraph which I have just read. They slept in different rooms and the wife did not cook or clean for the husband. But that in many other respects this was a family living as a family is apparent from the next paragraph in the respondent board's decision, because the respondent board deal in some detail with the incident giving rise to the injury suffered by the applicant on 23rd May 1970. They find that the husband had gone out and he had been drinking heavily, he came back, there was an argument in the matrimonial home relative to one of the children, the argument continued in the living room for some time until the wife eventually withdrew herself to her bedroom, and the husband followed her to the bedroom and attacked her, giving rise to the present claim.

That is the factual background on which the case is to be determined, and the short issue which we have to decide is whether in those circumstances the applicant, who undoubtedly suffered injuries in consequence of a criminal attack on her by her husband, is deprived of any claim for compensation under the terms of para 7 of the scheme which reads as follows:

'Where the victim who suffered injuries and the offender who inflicted them were living together at the time as members of the same family no compensation will be payable . . .'

The question therefore ultimately for the respondent board to determine is whether the applicant was deprived of her right to compensation because it was the husband who inflicted the damage and they were living together at the time as members of the same family.

Counsel for the applicant has approached this case by first of all examining the phrase 'living together'. He says that here one should ignore the children and other factors of that kind and examine the relationship between husband and wife. He says that if one examines that relationship it is such that in the divorce law it might well be held, or I think he would say it would be held, that they were living apart or that one has deserted the other. He says that if the conclusion by applying the principles of divorce law is that they are not living together in that sense, then one need look no further and questions of the 'same family' do not in those circumstances arise. He invites us really to treat this case as though there were no children involved, as though the husband and the wife were the only persons living in the flat, and to approach it on the lines which the divorce law approaches what is, to my mind, a wholly different question, namely whether one party in a marriage has deserted another.

Counsel on behalf of the respondent board maintains the correctness of the board's decision refusing compensation, and says that here when one looks at the decision as a whole—and I have read most of it—it is abundantly clear that there was one family occupying this accommodation. He says that at the very least it is clear that there was evidence which the respondent board could adopt to reach that conclusion, but I think he would choose to go even further and to say that the conclusion that there was one family here, living together, is really inescapable. The applicant cannot succeed unless she shows an error of law on the face of the order or that there was no evidence to support it, and counsel for the applicant has in my judgment found it quite impossible to define the law on this subject in such a way as to show that what is involved here is an error of law. In my judgment, this is a new code intended to be set out in simple language and a phrase such as 'living together as members of the same family' ought to be given its ordinary straightforward normal meaning. I deprecate the complication which would result if the whole of the mass of learning in the divorce laws were introduced into this phrase so as to make it conform with the matrimonial law itself. I think the court should look at these words and give them their ordinary sensible meaning, and very often the question of whether the parties are living together as members of the same family will be a pure question of fact. Indeed I think this is a pure question of fact in this case. I am quite satisfied there is no possible justification for saying that the respondent board erred in law. Indeed, so far as it is of any value to add it, I think they were entirely right and I would accordingly refuse the application.

MELFORD STEVENSON J. I agree.

CANTLEY J. I agree.

Orders for certiorari and mandamus refused.

Solicitors: *Sidney Torrance & Co*, agents for *J Levi & Co*, Leeds; *Treasury Solicitor*.

N P Metcalfe Esq Barrister.

a

Higgins v Bernard

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, MELFORD STEVENSON AND FORBES JJ

7th FEBRUARY 1972

b

Road traffic – Motorway – Restrictions on stopping – Vehicle stopping on verge – Stopping by reason of any accident, illness or other emergency – Meaning of emergency – Sudden occurrence not essential – Necessity of showing that danger alleged to constitute emergency not foreseeable before proceeding on to motorway – Driver overcome by drowsiness – Motorways Traffic Regulations 1959 (SI 1959 No 1147), regs 7 (2), 9.

c

The respondent was discovered by a police officer sitting in a motor car which was stationary on the hard shoulder of the slip road of the M62 motorway, about 50 yards from the main carriageway and about a quarter of a mile from the junction of the entrance to the slip road from the A672 road. The respondent's explanation was that he had had little sleep the previous night and that a feeling of drowsiness had

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come over him. Being concerned for his safety, he had been looking for a place to stop and rest but had not been able to find a suitable place on the A672. Having entered the slip road he decided that he was not fit to drive the ten miles to the next turn-off from the motorway and so pulled aside and stopped for a rest. He was charged with stopping on the verge of a motorway contrary to reg 9^a of the Motorways Traffic Regulations 1959 but was acquitted by the justices on the ground that

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he had stopped by reason of an emergency within reg 7 (2)^b of the 1959 regulations. On appeal,

Held – (i) Although an element of suddenness was not essential for the existence of an emergency, it was necessary to show (a) that the driver had proceeded on to the motorway in circumstances in which the danger alleged to constitute the emergency was not apparent to him at all, and (b) that thereafter something, not necessarily some sudden exigency, had supervened which rendered it unsafe for him to proceed to the next turn-off point (see p 1040 g and h and p 1041 b, post).

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(ii) It followed that the respondent could not plead an emergency as a ground for stopping on the verge since his drowsiness, and hence the potential danger of continuing to drive, was clearly apparent to him before he embarked on the motorway at all; accordingly the appeal would be allowed (see p 1040 j to p 1041 a and b, post).

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Notes

For motorways and provisions relating thereto, see Supplement to 19 Halsbury's Laws (3rd Edn) para 641A.

For the Motorways Traffic Regulations 1959, reg 7, 9, see 10 Halsbury's Statutory Instruments (2nd Reissue) 77, 79.

h

Case referred to in judgment

Larchbank (Owners) v British Petrol (Owners), The Larchbank [1943] AC 299, 168 LT 161, 112 LJ P 10, 42 Digest (Repl) 833, 6093.

Case stated

i

This was an appeal by way of case stated by justices for the West Riding of the county of York acting in and for the petty sessional division of Calder in respect of their adjudication as a magistrates' court sitting at Halifax.

a Regulation 9 is set out at p 1039 j, post

b Regulation 7 (2), so far as material, is set out at p 1040 a and b, post

On 20th May 1971 an information was preferred by the appellant, John Paton Higgins, against the respondent, Arthur Bernard, charging that he on 27th April 1971 at Windy Hill in the West Riding of the county of York did cause a certain motor vehicle to stop on the verge of the M62 motorway otherwise than in accordance with paras (2) and (3) of reg 7 of the Motorways Traffic Regulations 1959, contrary to reg 9 of the regulations and s 13 (4) of the Road Traffic (Regulation) Act 1967. The justices heard and adjudicated on the information, which they dismissed, on 11th August 1971. a
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The justices found the following facts proved or admitted. (a) At 5.45 pm on 27th April 1971 Pc James Barry Coulson of the West Yorkshire Police was on duty in a police patrol car, when he saw a Ford Escort motor car stationary on the verge of the slip road of the M62 motorway about 50 yards from the main motorway carriageway and about one quarter of a mile from the junction of the entrance slip road and the A672 Oldham Road. (b) The respondent was awake and sitting in the driving seat of the vehicle and was alone. When asked why he had stopped, the respondent said, 'For a rest'. The officer pointed out that he could have stopped a quarter of a mile away and the respondent replied, 'I didn't feel too bad then'. The offence of stopping on a motorway otherwise than in accordance with the regulations was pointed out to the respondent, who said, 'I appreciate it's not an emergency but I felt I had to have a rest'. When told that he would be reported with a view to prosecution, the respondent said, 'You are right, I didn't feel like driving to Huddersfield'. (c) The respondent then drove off in an orderly manner. (d) The respondent gave evidence on oath and stated that for the two days prior to 27th April 1971 he had covered a lot of mileage and had covered 110 miles the previous day. He said that he had been to visit his mother and went to bed at 12.30 a.m. or 12.40 a.m. on 27th April and arose at 6.30 a.m. He said that he had travelled this section of the motorway on the outward journey and was returning from Cheshire. He said that for the last mile of the journey he was beginning to feel extremely drowsy and was concerned for his safety and was looking for a place to stop. He said that the A672 was covered for the most part by single white lines and he could not find room to park. He stated that he was unaware that he was so close to the motorway and, having reached the motorway, he decided that it was foolish to stop on the approach road because of traffic and decided to stop on the slip road near the motorway. He stated that he was drowsy, that it was dangerous to continue driving and that he could have fallen asleep at the wheel. He stated that he believed that the only possible intersection was ten miles further on at the end of the motorway. (e) Having stopped, the respondent wound his window down, opened his door and got as much air as he could without getting out of the car. He then wound his window halfway up and closed his eyes, having in mind to stop for five or ten minutes when the police constable arrived. c
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On behalf of the respondent it was submitted, having regard to the facts stated in (d) above, that the respondent had stopped by reason of an emergency within the meaning of reg 7 (1) (b) of the 1959 regulations. The attention of the justices was drawn to an article entitled 'Motorway Emergency' which had appeared in the Justice of the Peace and Local Government Review^c. On behalf of the respondent it was submitted that the facts of the case referred to in the article were on all fours with the facts of the case before us. h

On behalf of the appellant it was submitted that in the circumstances disclosed no such emergency existed within the meaning of reg 7 (1) (b) of the 1959 regulations.

The justices were of opinion that, having regard to their findings, in particular having accepted that the respondent was beginning to feel drowsy and was concerned for his safety, there was a likelihood that the respondent would fall asleep at the wheel and he was correct to attempt to avert this danger by stopping on the verge of i

- a the motorway, and that, therefore, the circumstances constituted an emergency within the meaning of reg 7 (1) (b) of the 1959 regulations.

R A R Stroyan for the appellant.

N E Beddard for the respondent.

- b **LORD WIDGERY CJ.** This is an appeal by case stated by justices for the West Riding of Yorkshire in respect of their adjudication as a magistrates' court sitting at Halifax on 11th August 1971. On that date they dismissed an information laid by the appellant against the respondent alleging that the respondent on 27th April 1971 at an address given did cause a certain motor vehicle, namely a motor car, to stop on the verge of a motorway, namely the M62 motorway, otherwise than in accordance with paras (2) and (3) of reg 7 of the Motorways Traffic Regulations 1951¹.

- c The facts of the case were briefly these. On the day in question at about 5.45 p.m., a police officer on duty in a police patrol car saw the respondent sitting in a Ford Escort motor car which was stationary on what is described in the case as the verge of the slip road of the M62 motorway about 50 yards from the main motorway carriage-way and about a quarter of a mile from the junction of the entrance to the slip road and the A672 Oldham Road. That, we are told, can be expressed in another way in
d this form, by saying that he had entered the slip road leading from the A672 on to the motorway, he had proceeded about a quarter of a mile down the slip road, and when still 50 yards short of the main motorway itself he had pulled off on to what is commonly called the hard shoulder or the verge, and stopped his car there.

- e When the police officer approached, the respondent was awake, sitting in the driving seat. He was asked why he had stopped. He replied, 'For a rest'. The officer pointed out that if he wanted to stop for a rest, he could have stopped a quarter of a mile earlier without impinging on the motorway or its regulations at all, to which the respondent replied: 'I didn't feel too bad then'. The officer pointed out that stopping on the motorway was only permitted in an emergency, and the respondent said: 'I appreciate it's not an emergency but I felt I had to have a rest'.

- f When he gave his own account of the circumstances in evidence, he said that he had driven on the previous day, he had been on a visit to his mother, and went to bed at about 12.30 a.m., but got up again at 6.30 a.m. the same day. We do not know much about his movements after his rising that morning, but in regard to the last part of his journey, he said in evidence that for the last mile of the journey he was beginning to feel extremely drowsy and was concerned for his safety and was looking for a
g place to stop. It is clear to my mind that that shows the consciousness that he was drowsy and the consciousness that it was necessary for him to stop was something which came to him before he left the ordinary A class road and before he turned on to the motorway slip road at all. He said there were difficulties about parking on the A672, and having got into the slip road he realised he was drowsy and that he was not fit to drive for the ten miles which lay between him and the next turn-off from the
h motorway. Accordingly he pulled aside and had a rest with the door of the car open.

The justices clearly treated him as a witness of truth; they accepted his account, and they decided as a matter of law that what he had done was within the exempting words of the Motorway Regulations as being in an emergency. The question for us is whether that was a correct view in law of the terms of those regulations.

Regulation 9 of the Motorways Traffic Regulations 1951¹ provides:

- i 'No vehicle shall be driven or moved or stop or remain at rest on any verge except in accordance with paragraphs (2) and (3) of Regulation 7.'

When one gets back to reg 7 (2), it reads thus:

¹ SI 1959 No 1147

'Where it is necessary for a vehicle which is being driven on a carriageway to be stopped while it is on a motorway [and I go to (b):] by reason of any accident, illness or other emergency; or (c) to permit any person carried in or on the vehicle to recover or move any object which has fallen on a motorway; or (d) to permit any person carried in or on the vehicle to give help which is required by any other person in any of the circumstances specified in the foregoing provisions of this paragraph, the vehicle shall, as soon and in so far as is reasonably practicable, be driven or moved off the carriageway on to, and may stop and remain at rest on, the verge which lies on the left-hand or near side of that vehicle ...'

So that the exemption permitting the respondent to do what he did, if there was an emergency at all, requires as its essentials that the vehicle shall have been driven on a carriageway of a motorway, and that it shall thereafter become necessary for the vehicle to stop by reason of an emergency.

The justices, and I have every sympathy with them, thought that those requirements had been satisfied here. There is no previous authority, we are told, on the meaning of the word 'emergency' in this context. One comes to the dictionary and the first meaning given in the Shorter Oxford Dictionary is: 'The sudden or unexpected occurrence of a state of things'; the alternative is 'a sudden occurrence'.

Too much stress, however, in my judgment, must not be attached to the word 'sudden' because in a somewhat different context, although a context which I find valuable, the meaning of an emergency has been considered by the House of Lords. The case is *Larchbank v British Petrol*² and I take the extract from the speech of Lord Atkin. He said³:

"'Emergency' can be used to describe a state of things which is not the result of a sudden occurrence. A condition of things causing a reasonable apprehension of the near approach of danger would, I think, constitute an emergency. The gradual approach of a hostile invader might well at some time or other constitute an emergency. So might the position arising from the presence of a large hostile force encamped near the frontier and only awaiting favourable conditions for an advance.'

I am indebted to Lord Atkin for that guidance, and perhaps for preventing me from falling into the error of thinking that an element of suddenness is essential for the existence of an emergency in the present legislation. I think that it is not, but in my judgment in this context an essential which has to be shown is that the driver in question was on the carriageway of the motorway and got himself on to the carriageway in circumstances in which the danger alleged to constitute an emergency was not apparent to him at all. In other words, that he got on to the carriageway at a time when, as far as he could see, it was safe and lawful for him to proceed along the motorway, at all events to the next turn-off point which might appear. It having been shown that he got himself on to the carriageway in that state of affairs, the next thing to show is that something supervened, not necessarily some sudden exigency at the moment, but something intervened which rendered it unsafe for him to proceed to the next turn-off point. Given those facts it seems to me that a man should be able to plead emergency as a ground for stopping on the verge.

The only remaining question is whether this motorist qualified on the test so described, and in my judgment I think he clearly did not, because if one thing is clear in this case it is that the drowsiness and the potential danger if he continued to drive was clearly apparent to this driver before he embarked on the motorway at all. Accordingly, it cannot be said that he got on to the carriageway of the motorway in

² [1943] AC 299

³ [1943] AC at 304

circumstances in which the danger was not apparent, and that the danger thereafter supervened. The danger was clear to him before he elected to go on to the motorway, and he cannot plead its recognition as an emergency for present purposes. I would allow the appeal and send the case back with a direction to convict.

MELFORD STEVENSON J. I agree.

FORBES J. I agree.

Appeal allowed.

Solicitors: *Hewitt, Woollacott & Chown* (for the appellant); *J B Izod* (for the respondent).

Gillian Whitear Barrister.

R v Banks

COURT OF APPEAL, CRIMINAL DIVISION

LORD WIDGERY CJ, PHILLIMORE LJ AND LAWSON J

13th, 21st JANUARY 1972

Road traffic – Driving while unfit through drink – Driving with blood-alcohol proportion above prescribed limit – Specimen of blood or urine – Analyst's certificate as to proportion of alcohol in specimen – Certificate as evidence of matters certified – Admissibility – Failure to serve copy on accused not less than seven days before hearing or trial – Waiver of objection to admission by accused – Failure by accused to object to admission before close of prosecution case constituting waiver – Road Traffic Act 1962, s 2 (2).

On a charge of driving etc under the influence of drink or drugs or with a blood-alcohol concentration above the prescribed limit, the requirement of s 2 (2)^a of the Road Traffic Act 1962 that an analyst's certificate of the proportion of alcohol in the defendant's blood must be served on the defendant not less than seven days before the hearing or trial, may be waived by the defendant, and will in fact have been waived if the defendant makes no objection to the evidence to which that certificate relates prior to the close of the prosecution's case. If at the hearing the defendant wishes to complain that he is ignorant of what is alleged in the certificate to be the alcohol content of his specimen or that he has had an insufficient opportunity to challenge the contents of the certificate, he must object to the admission of the contents of the certificate before it is put in evidence (see p 1046 b to e, post).

Grimble & Co v Preston [1914] 1 KB 270 applied.

Notes

For the requirement of service of an analyst's certificate on the accused, see Supplement to 33 Halsbury's Laws (3rd Edn) para 1059.

For the Road Traffic Act 1962, s 2 (2), see 28 Halsbury's Statutes (3rd Edn) 408.

Cases referred to in judgment

Batt v Mattinson (1900) 82 LT 800, 64 JP 615, 25 Digest (Repl) 110, 307.

Cooper v Rowlands [1971] RTR 293.

Gill v Forster [1970] RTR 372.

Grimble & Co v Preston [1914] 1 KB 270, 83 LJKB 347, 110 LT 115, 78 JP 72, 25 Digest (Repl) 115, 365.

R v Mitten [1965] 2 All ER 59, [1966] 1 QB 10, [1965] 3 WLR 268, 129 JP 371, 49 Cr App Rep 216, Digest (Cont Vol B) 674, 322a.

Sayer v Johnson [1970] RTR 286.

^a Section 2 (2) is set out at p 1042 f to h, post

Appeal

This was an appeal by Jack Banks against his conviction at Lancashire County Quarter Sessions sitting at Preston on 2nd July 1971 before his Honour Judge Lawton, deputy chairman, and a jury of the offence of being in charge of a motor vehicle on a road having consumed alcohol in such quantity that the proportion thereof in his blood exceeded the prescribed limit at the time he provided the specimen contrary to the Road Safety Act 1967, s 1. The appellant was found guilty, fined £25 and disqualified from driving for 12 months. He appealed by leave of the single judge. The facts are set out in the judgment of the court.

A R D Stuttard for the appellant.

M J Haigh for the Crown.

Cur adv vult

21st January. **LAWSON J** read the following judgment of the court. Jack Banks, the appellant, a man aged 38, appeals by leave of the single judge against his conviction at Lancashire County Quarter Sessions on 2nd July 1971 on his trial on indictment for the offence of being in charge of a motor vehicle on a road having consumed alcohol in such quantity that the proportion thereof in his blood, as ascertained from a laboratory test for which he subsequently provided a specimen under s 3 of the Road Safety Act 1967, exceeded the prescribed limit (i.e. 80 milligrammes of alcohol in 100 millilitres of blood) at the time he provided the specimen. For this offence the appellant was fined £25, his licence was endorsed and he was disqualified for 12 months by the deputy chairman, his Honour Judge Lawton.

The grounds of the appellant's appeal are that the learned judge was wrong in rejecting the defence submission that there was no evidence of service of the analyst's certificate on the appellant as required by s 2 (2) of the Road Traffic Act 1962 and s 32 (1) of and Sch 1, para 21, to the Road Safety Act 1967.

Section 2 (2) of the Road Traffic Act 1962 provides:

'For the purposes of any such proceedings, a certificate purporting to be signed by an authorised analyst, and certifying the proportion of alcohol or any drug found in a specimen identified by the certificate and, in the case of a specimen not being a specimen of blood, the proportion of alcohol or of that drug in the blood which corresponds to the proportion found in the specimen, shall be evidence of the matters so certified and of the qualification of the analyst: Provided that the foregoing provision shall not apply to a certificate tendered on behalf of the prosecution unless a copy has been served on the accused not less than seven days before the hearing or trial, nor if the accused, not less than three days before the hearing or trial, or within such further time as the court may in special circumstances allow, has served notice on the prosecutor requiring the attendance at the hearing or trial of the person by whom the certificate was signed.'

When enacted this subsection was related to offences under s 6 of the Road Traffic Act 1960, namely, driving or attempting to drive or being in charge of a motor vehicle on a road or other public place when unfit to drive through drink or drugs. When the new offences of driving, attempting to drive, or being in charge of a motor vehicle having consumed in excess of the prescribed limit were enacted by s 1 of the Road Safety Act 1967, s 2 (2) of the 1962 Act was applied to them by s 32 (1) of and Sch 1, para 21, to the 1967 Act. Section 32 (1) provides:

'The enactments mentioned in Schedule 1 to this Act shall have effect subject to the amendments therein specified, being minor amendments and amendments consequential on the foregoing provisions of this Act.'

Schedule 1, para 21, provides:

'A copy of a certificate required by the proviso to section 2 (2) to be served on the accused or of a notice required by that proviso to be served on the prosecutor may either be personally served on the accused or the prosecutor (as the case may be) or sent to him by registered post or the recorded delivery service.'

It is necessary briefly to set out the history of this case. The appellant was committed for trial on written statements with exhibits which were tendered to the magistrates' court under s 1 of the Criminal Justice Act 1967. These included the statement of Pc Robinson which referred to and exhibited a copy of the analyst's certificate which showed that the analysis of the sample of blood provided by the appellant under s 3 of the 1967 Act contained 229 milligrammes of alcohol in 100 millilitres of blood—thus 149 milligrammes in excess of the prescribed limit.

The written statements and exhibits on which the appellant was committed for trial were supplied to him or his advisers prior to his trial in accordance with r 3 of the Magistrates' Courts Rules 1968¹ which provides as follows:

'This Rule applies to committal proceedings where the accused is represented by counsel or a solicitor and where the court has been informed that all the evidence for the prosecution is in the form of written statements copies of which have been given to the accused.'

On his arraignment the appellant pleaded not guilty to the charge on which he was indicted. The evidence led for the Crown at the trial included that of Pc Robinson who put the analyst's certificate in evidence. No objection was taken at that point, or until after the close of the Crown's evidence that the requirements of the proviso to s 2 (2) of the 1962 Act as to prior service of a copy of the certificate had not been complied with. At the close of the Crown's case it was submitted on behalf of the appellant that there was no case for him to answer since the requisite service of a copy of the analyst's certificate had not been proved.

After hearing argument, in the course of which no authority was cited, the deputy chairman ruled that the fact that the analyst's certificate was annexed as an exhibit to the statements tendered under s 1 of the Criminal Justice Act 1967 constituted service for the purposes of the proviso in question. Before so holding the deputy chairman referred to the fact that the certificate had in fact been put in without objection.

The defence submission having been overruled the defence did not seek to challenge the findings set out in the analyst's certificate but proceeded in an endeavour to defeat the prosecution on two grounds: (i) that it had not been proved to the requisite degree that the appellant was in charge of the motor vehicle on the occasion in question; and (ii) that there was no likelihood of the appellant driving the vehicle on that occasion because it was undriveable owing to a mechanical fault. The deputy chairman summed up the case to the jury dealing with these points and no objection is taken to his summing-up. The jury convicted the appellant.

It is clear that the Crown did not lead any evidence at the trial to show that the requirements of the proviso to s 2 (2) of the 1962 Act, as applied to the appellant's offence under s 1 (2) of the Road Safety Act 1967 by s 32 (1) of and Sch 1, para 21, to that Act, relating to prior service of a copy of the analyst's certificate, had been complied with. It is equally clear that counsel for the appellant at no time before the close of the Crown's case had indicated or made any objection to the production of that certificate in evidence. The question which the court had to decide is whether, in these circumstances, the deputy chairman's ruling was correct.

The Crown sought to support this ruling by reference to the case of *R v Mitten*²

¹ SI 1968 No 1920

² [1965] 2 All ER 59, [1966] 1 QB 10

where the defendant who had been charged with driving under the influence of drink under s 6 of the Road Traffic Act 1960 contended, on appeal, that an analyst's certificate as to the alcohol content of his urine had been wrongly admitted by the trial judge, on the ground that no offer had been made to him that he should be supplied with a part of the specimen taken of his urine until after he had provided that specimen. The relevant provision of the Road Traffic Act 1962 in this respect (namely s 2 (5)) requires, as the Court of Criminal Appeal held, that the offer to supply a part of the specimen must be made at or very shortly before the request for the specimen is made. The Court of Criminal Appeal held that failure in the respect mentioned did not make the evidence of the analyst inadmissible as a matter of law but required the trial judge to exclude that evidence in the exercise of his discretion unless he were satisfied that no prejudice was likely to result to the defendant by such failure. In the course of the court's judgment it was said that the practice with regard to disputes under s 2 (5) of the 1962 Act should be modelled on that which applies when the voluntary character of a confession is challenged. Counsel for the defence should inform counsel for the prosecution of his objection so that the disputed evidence is not mentioned in the opening and the judge will hear evidence on disputed facts and give his ruling in the absence of the jury, taking into account the discretion to which the court referred.

In our judgment the decision in *Mitten's* case³ that the trial judge has a discretion to admit an analyst's certificate, or his evidence, notwithstanding a failure to comply with the requirements of s 2 (5) as to the offer of a sample of the specimen requested, cannot be applied to a failure to comply with the requirements of s 1 (2) as to prior service of a copy of the analyst's certificate. That subsection is designed to allow evidence to be admitted which would otherwise, on the grounds of hearsay, be excluded, provided that the conditions of the proviso are satisfied. If those conditions are not adhered to, then *prima facie*, the analyst's certificate, as distinct from his oral evidence, is not evidence of the truth of its contents.

Furthermore, this court takes the view that there is no room in a case such as the present to apply the principle of presumed regularity. There are, of course, many cases where this presumption has been successfully relied on in cases under the road traffic legislation where the defendant has sought to raise, in the course of his defence, a question as to the validity of a breath test administered to him under s 3 of the Road Safety Act 1967 (see *Sayer v Johnson*⁴, *Gill v Forster*⁵, and *Cooper v Rowlands*⁶). But this line of cases is distinguishable from the present one, as the court is here concerned with a statutory condition for the admission of hearsay evidence.

In the course of the argument on the appellant's submission the deputy chairman referred to cases in which the prosecution had failed to prove service of notice of intended prosecution. But this, in our view, is unhelpful having regard to s 241 (3) of the Road Traffic Act 1960 which provides that such notice is to be presumed unless the contrary is proved by the defence.

In the course of the argument in the present appeal, the court drew counsel's attention to *Grimble & Co v Preston*⁷, a decision of the Divisional Court on a case stated where magistrates had convicted the appellants of an offence under the Sale of Food and Drugs Act 1899 (now replaced by the 1955 Act). The relevant ground of appeal was that the summons served on them was not accompanied by a copy of the analyst's certificate obtained on behalf of the prosecution. This requirement was imposed by s 19 (2) of the 1899 Act and is reproduced in s 108 (3) of the 1955 Act—which Act, unlike that of 1899, also contains a provision in s 110 to the effect that the production in proceedings of an analyst's certificate in the prescribed form (that

3 [1965] 2 All ER 59, [1966] 1 QB 10

4 [1970] RTR 286 at 288

5 [1970] RTR 372 at 375

6 [1971] RTR 293 at 294

7 (1914) 78 JP 72, cf [1914] 1 KB 270

a is the form prescribed by s 92 (5) of the 1955 Act) shall be sufficient evidence of its contents unless the other party to the proceedings requires the analyst to be called. In that case no objection was taken by the defendants that the summons served had not been accompanied by the analyst's certificate, until after the close of the prosecution's case. The analyst had in fact given oral evidence as to his findings, as the law then required. The magistrates overruled the objection and proceeded to convict on the evidence offered, including that of the analyst. The Divisional Court dismissed the appeal. In the course of their judgments the judges of the court dealt with the service point. Darling J said⁸:

c 'As to the second point I do not think that the objection that a copy of the analyst's certificate was not served with the summons goes to the jurisdiction of the justices. The service of the certificate is a matter of procedure, and if the objection that it had not been served was insisted upon, the court could not cure the defect, but the defect is one which the party entitled to have the certificate served upon him could waive either by words or conduct. In this case it is plain that the solicitor for the appellants waived the objection by his conduct.'

Rowlatt J said⁹:

d 'As to the second point, I think that the provision that a copy of the analyst's certificate must be served with the summons cannot be got over if the person entitled to have the certificate served upon him takes the objection in the proper way. The defect cannot be cured by amendment or adjournment because however often the case may be adjourned the certificate can no longer be served with the summons. All that could be done would be to withdraw the summons and if possible commence fresh proceedings. The provision merely prescribes a formality which is to accompany the service of the summons instituting the proceedings. If the defendant chooses to appear and by words or conduct declares that though he has not had the certificate served on him with the summons he prefers to go on with his defence, I think that he may do so and the jurisdiction of the justices is not affected by the omission of the formality, which f is prescribed for the protection of the defendant and which he has power to waive. The question remains whether what the appellants did amounted to a waiver. They appeared by an advocate, who did not take the objection at the commencement of the hearing but cross-examined the witnesses for the prosecution and did not take the objection until he was called upon to open his own case. In the case of *Batt v. Mattinson*¹⁰, it was pointed out, and I agree, though I g should be bound by it even if I did not agree, that the provision of the statute is imperative. In that case the objection was taken when the defendant appeared before the court and before the case was gone into, and no question of waiver such as we are considering arose, and the decision merely was that if the defendant takes the objection it cannot be got over. That case did not lay down a rule that the objection could not be waived.'

h Atkin J said¹¹:

i 'On the second point I also agree. The objection that the analyst's certificate was not served with the summons did not go to the jurisdiction of the justices. It was founded upon an informality which could not be cured by amendment (see *Batt v. Mattinson*¹²), and which was a breach of a condition precedent to the appellants being brought before the justices who had cognizance of the offence. In those circumstances a person, who knows of the existence

8 (1914) 78 JP at 74, cf [1914] 1 KB at 276

9 (1914) 78 JP at 74, cf [1914] 1 KB at 277

10 (1900) 82 LT 800

11 (1914) 78 JP at 74, cf [1914] 1 KB at 278

12 (1900) 82 LT 800

of the defect and does not take the objection at the commencement of the hearing but prefers to cross-examine the witnesses for the prosecution and defers the objection until the case for the prosecution has been completed can waive the objection just as any other condition precedent can be waived. It has been suggested to us that even after a formal refusal to take the objection and after evidence has been called for the defence and the magistrates have decided to convict, the objection can still be taken. But I do not agree with that contention.'

*Grimble's case*¹³ thus supports the view that a requirement that an analyst's certificate on which the prosecution proposes to rely should be served on the defendant not less than seven days before the hearing or trial, may be the subject of waiver and will in fact be waived if the defendant prior to the close of the prosecution's case makes no objection to the evidence to which that certificate relates. We think it important to observe that the object of the proviso to s 2 (2) of the 1962 Act is twofold, first, to let the defendant know precisely what is alleged as to the alcohol content of his specimen and secondly, to provide a sufficient opportunity to enable him, by requiring the analyst to be called, to challenge the relevant allegation. It is clear that if the defendant's complaint at the hearing is that he is ignorant of that aspect of the prosecution's case, or that he has had an insufficient opportunity to challenge the contents of the certificate, he is under an obligation to object to the admission of the contents of the certificate before it is put in evidence. If he does not do so there is no indication that he has been prejudiced by the prosecutor's failure to satisfy the requirements of the proviso to s 2 (2); and the absence of such prejudice is revealed in the present case.

It should be borne in mind that it was not disputed that the alcohol content of the appellant's specimen was some 200 per cent in excess of the prescribed level, and counsel for the applicant frankly concedes that his point is devoid of factual merits. It would seem ludicrous in such a case that an accused should be permitted to wait until after the analyst's certificate had been put in evidence and the case for the prosecution closed and then allowed to take a wholly unmeritorious point, hitherto kept up his sleeve, in order to secure an acquittal. Thus, equally frankly, this court is glad to have reached the decision that, for the reasons given, the appellant's appeal should be dismissed. The saving of time, expense and confusion which will result in future cases in no way endangers the rights of an accused charged with an offence under s 6 of the 1960 Act, or one under the Road Safety Act 1967, who wishes to challenge the contents of the analyst's certificate, or prejudices the fair trial of such offences where, for practical reasons, including the volume of these offences and the limited number of qualified analysts, the prosecution desires to rely on the contents of analysts' certificates, which are in fact rarely challenged. In the exceptional case of such a challenge, the accused person remains, in our view, amply protected by the law.

Appeal dismissed.

Solicitors: *Backhouse, Isherwood, Bennett & Scholes*, Blackburn (for the appellant); Registrar of Criminal Appeals.

Jacqueline Charles Barrister.

¹³ (1914) 78 JP 72, cf [1914] 1 KB 270

Woodhouse and another v Peter Brotherhood Ltd

NATIONAL INDUSTRIAL RELATIONS COURT

SIR JOHN DONALDSON P, MR J H ARKELL AND MR H BRIGGS

13th, 17th DECEMBER 1971

Employment – Period of continuous employment – Transfer of trade, business or undertaking – Change of employers consequent on sale of factory premises – Sale including neither transfer of goodwill nor restrictions on trading by vendors – Vendors transferring business elsewhere – Employees continuing to be engaged in same type of work at factory under new employers – ‘Business’ to be equated with production activity carried on and production unit situated at factory — ‘Business’ not referring to commercial activity — Production unit left intact at factory by vendors – Sale constituting a transfer of business – Contracts of Employment Act 1963, Sch 1, para 10 (2).

C Ltd were the owners and occupiers of an engineering factory in Derbyshire engaged mainly in the manufacture of large diesel engines. In 1965 they sold the factory together with certain property, plant, machinery and equipment to P B Ltd and transferred their own business to Manchester. The sale did not include a transfer of the goodwill or business name nor did it include any restrictions on trading by C Ltd. P B Ltd, who intended to use the factory and equipment for their own engineering business, wished to attract into it as many as possible of C Ltd's employees. In the result all but one of the employees ceased working for C Ltd on Saturday, 31st July 1965, and entered the employment of P B Ltd on the following Monday, their terms and conditions of employment remaining the same as they had been when they worked for C Ltd. As the result of an agreement between C Ltd and P B Ltd that P B Ltd would complete a number of C Ltd's diesel engines at the factory the employees were, for a period of several months, engaged on the same work as they had been doing for C Ltd; work which was specifically that of P B Ltd was gradually introduced as that of C Ltd was completed. W and S, who had worked first for C Ltd and then for P B Ltd for an aggregate period of more than 20 years, were dismissed for redundancy by P B Ltd in May 1971. W and S claimed redundancy payments under the Redundancy Payments Act 1965 on the basis of over 20 years' continuous service with C Ltd and P B Ltd. The Industrial Tribunal came to the conclusion that, although there were factors pointing both ways, the sale of the factory to P B Ltd had none of the hallmarks of the transfer of a business, e.g. a sale of goodwill and restrictions on trading by the vendor, and that it was impossible to say that there had been a transfer of a business, within para 10 (2)^a of Sch 1 to the Contracts of Employment Act 1963, so as to preserve the employees' continuity of employment since, following the sale of the factory, C Ltd continued to carry on their business elsewhere; consequently the tribunal held that the employees were only entitled to redundancy payments calculated on the basis of the period from August 1965 when they started to work for P B Ltd. On appeal,

Held – The sale of the factory to P B Ltd constituted a transfer of a business for the purposes of para 10 (2) of Sch 1 to the 1963 Act because—

(i) paragraph 10 (2) was not concerned with the sale of buildings or stock in trade or both, but with the transfer of ownership of a trade, business or undertaking in the sense of the whole working environment of the employees; the expression 'business' in para 10 (2) was to be equated not with the commercial activity in which C Ltd were formerly engaged in their Derbyshire factory but with the production activity carried on and the production unit situated there (see p 1054 b and c and p 1055 d and e, post);

^a Paragraph 10 (2) is set out at p 1049 c, post

(ii) on the evidence, nothing following the sale by C Ltd of their factory had affected the employees in their daily lives; the employees had continued to work as engineers; nothing had happened which was inconsistent with C Ltd having left a production unit behind them in Derbyshire and having formed a new one elsewhere (see p 1054 e and p 1055 a, post).

Per Curiam. In the context of the Contracts of Employment Act 1963 and of the Redundancy Payments Act 1965 there is no reason why an employee should be concerned with, and still less prejudiced by, changes in the ownership of the business or undertaking in which he is working (see p 1053 h, post).

Notes

For redundancy payments after a change of ownership of a business, see Supplement to 25 Halsbury's Laws (3rd Edn), para 945A, 7, and for cases on the subject, see Digest (Cont Vol C) 687-689, 816Aa-Adf.

For the Contracts of Employment Act 1963, Sch 1, para 10, see 12 Halsbury's Statutes (3rd Edn) 214.

Cases referred to in judgment

Ault (G D) (Isle of Wight) Ltd v Gregory (1967) 2 ITR 301.

Huggins v A & J Gordon (Aveley) Ltd, Huggins v C B R Jersey Mills Ltd (1971) 6 ITR 164.

Kenmir Ltd v Frizzell [1968] 1 All ER 414, [1968] 1 WLR 329, 3 ITR 159, Digest (Cont Vol C) 690, 816Aeb.

Lloyd v Brassey [1969] 1 All ER 382, [1969] 2 QB 98, [1969] 2 WLR 310, 4 ITR 100, Digest (Cont Vol C) 692, 816Afd.

Rencoule (H A) (Joiners and Shopfitters) Ltd v Hunt 1967 SC 131, 2 ITR 475, Digest (Cont Vol C) 692, *479Ab.

Appeal

This was an appeal by Alfred Woodhouse and Moss Staton ('the employees') from a decision of the industrial tribunal (chairman J M Coulson Esq) sitting at Nottingham on 27th August 1971 that the employees were not entitled to any further sums by way of redundancy payment from their former employers, Peter Brotherhood Ltd. The facts are set out in the judgment of the court.

Peter Pain QC and *L H C Lait* for the employees.

Raymond Kidwell QC and *P N Legh-Jones* for the employers.

Cur adv vult

17th December. **SIR JOHN DONALDSON P** read the following judgment of the court. This is an appeal from the industrial tribunal sitting in Nottingham which decided by a majority that the employees were not entitled to any further sums by way of redundancy payment. Both employees were dismissed by reason of redundancy within the meaning of the Redundancy Payments Act 1965 in May 1971 and both claimed payments on the basis of over 20 years' service. The respondent employers have admitted liability for payments based on service since 1965, but dispute any further liability. They submit, and the tribunal by a majority held, that there was a break in the continuity of the employees' employment when, in August 1965, the employers took over the factory at Sandiacre near Nottingham in which the employees had worked for many years.

Section 1 (1) of the Redundancy Payments Act 1965 provides:

'(1) Where on or after the appointed day an employee who has been continuously employed for the requisite period—(a) is dismissed by his employer by reason of redundancy . . . then, subject to the following provisions of this Part of this Act, the employer shall be liable to pay to him a sum (in this Act referred

a to as a "redundancy payment") calculated in accordance with Schedule 1 to this Act.'

Schedule 1, para 1, provides:

b '(1) The amount of a redundancy payment to which an employee is entitled in any case shall, subject to the following provisions of this Schedule, be calculated by reference to the period, ending with the relevant date, during which he has been continuously employed; and for the purposes of this Schedule that period shall be computed in accordance with Schedule 1 to the Contracts of Employment Act 1963 . . .'

c The relevant provision of Sch 1 to the Contracts of Employment Act 1963 (hereinafter called 'the code') is para 10 (2) which provides:

d 'If a trade or business or an undertaking (whether or not it be an undertaking established by or under an Act of Parliament) is transferred from one person to another, the period of employment of an employee in the trade or business or an undertaking at the time of the transfer shall count as a period of employment with the transferee, and the transfer shall not break the continuity of the period of employment.'

The background facts of this dispute were found by the Tribunal in the following passages from their written reasons:

e '5. . . . [Crossley Premier Engines Ltd ('Crossleys')] owned and occupied a factory at Sandiacre in Derbyshire, very close to the Nottingham boundary, where, as engineers, they were mainly engaged in the manufacture of large diesel engines. In the Summer of 1965 they sold that factory and adjoining property together with much but not all of the plant, machinery, equipment, fixtures and fittings which it contained to the [employers] whose headquarters is at Peterborough . . . The [employers] who intended to use the factory and the purchased equipment in their engineering business wished to attract into their employment as many as possible of Crossleys employees and, with that in mind, all or most of those employees were, in or about July 1965, addressed by representatives of the [employers] in the presence of representatives of Crossleys management at a specially called meeting in the works canteen. No record was kept so it is not possible to know exactly what was said at the meeting but the gist of it was that the [employers] hoped that Crossleys employees would come into their employment, that their pay and conditions would be much the same if not better and, as an inducement, "all the service they had at the works" would count towards their entitlements under a sick pay scheme operated by the [employers] and towards any eventual retirement pension that might be due to them.

h '6. All except one employee decided to come into the [employers'] employment. As a result they ceased working for Crossleys on Friday or Saturday the 30th or 31st July 1965 and, on the following Monday, the 2nd August, they became employees of the [employers] . . . From the 2nd August 1965 both the [appellant employees] remained employed by the [employers] until their eventual dismissal for redundancy in May 1971.

j '7. Although the [employers] wished eventually to turn the factory over to the manufacture of such things as spinning machines for synthetic fibres, compressors and steam turbines there were, at the time of their entry into occupation of the factory, four or five large diesel engines, the property of Crossleys, which still remained to be finished. As a result the [employers] agreed to complete these engines for Crossleys using certain plant and equipment which the latter had not sold to the [employers] but had left behind in the factory for this purpose. Work on these engines was not completed until about February 1966

when they were consigned to Crossleys instructions and accounts were rendered to them by the [employers] for the work expended on them. The plant and equipment left behind by Crossleys for use on these engines was then returned to them at Manchester. It is thus clear that, in the period immediately following the entry into possession of the factory, the employees were all employed on the same work as they had been before; work which was specifically [the employers'] work was being gradually introduced as the work for Crossleys was completed.'

The tribunal had earlier directed themselves in reliance on the judgment of Widgery J in *Kenmir Ltd v Frizzell*¹ that—

'In deciding whether a transaction amounted to the transfer of a business, regard must be had to its substance rather than its form, and consideration must be given to the whole of the circumstances, weighing the factors which point in one direction against those which point in another. In the end, the vital consideration is whether the effect of the transaction was to put the transferee in possession of a going concern, the activities of which he could carry on without interruption.'

The tribunal in its reasons continued:

'8. There are undoubtedly factors which point towards a transfer of the type envisaged by Paragraph 10 (2) and others which point the other way. A summary of those which we consider to be particularly relevant, starting with those in favour of such a transfer but not set out in any order of relative significance, is as follows:—(a) Although Crossleys, as we understand it, was mainly concerned with the manufacture of large diesel engines, whereas these were not products normally manufactured by the [employers], they were both carrying on the business of engineers, requiring much the same plant and equipment and much the same skills in their employees. (b) To the employees who continued to work at Sandiacre, such as the [appellant employees], there were very few outward signs of change. On Monday 2nd August they returned to the same work on which they had been engaged the previous week; largely due of course [to the need to complete manufacture of the diesel engines to which reference has already been made]. When that work ended they still, however, continued to work on the same machines as they had worked on before the sale, doing very similar types of work. (c) The pension, holiday and sickness schemes took account of service with Crossleys. This has already been referred to. (d) Virtually the whole labour force transferred, almost automatically, to work for the [employers], there being no formal dismissal of them by Crossleys. (e) The purchase of the factory and much of the plant and machinery put the [employers] in possession of assets which could be and were put immediately into production without any break. (f) It seems the case that by selling the factory and much of its contents as an equipped engineering factory, Crossleys got a higher price than would have been obtained by selling off the assets separately.'

'9. Factors suggesting no transfer within Paragraph 10 (2) are as follows:—(a) There was no sale or transfer of goodwill or business name. (b) There was no restriction on competition by Crossleys. (c) There was no transfer of customers or of the benefits of contracts with 3rd parties. (d) There was no provision with regard to any debts or liabilities of Crossleys. (e) [The sale agreement] makes no mention of a transfer of a business and seems on the face of it, to be concerned solely with the sale of assets. (f) That after the sale of the factory, Crossleys transferred their business activities to Manchester and ever since have carried on a business there as engineers, manufacturing heavy diesel engines.'

a Commenting on these factors the tribunal said:

'10. . . . None of the obvious hall marks of the transfer of a business seemed to be present, such as a sale of goodwill or a restriction on trading by the vendor. On the other hand the tribunal was impressed in particular by the transfer of almost the entire labour force and by the fact that after the 2nd August they were almost all engaged on exactly the same work as they had been engaged on for Crossleys. The tribunal felt that it was so much a question of fact depending on our view of the individual circumstances that very little guidance, except in a general way, could be derived from most of the reported cases.'

The dissenting member of the tribunal was of opinion that—

c 'the real effect of the transaction was . . . to put the [employers] in possession of a going concern which they could, if they wished, carry on without interruption. A "going concern" was in his view, formed by the factory, the equipment and the labour and [he] was of the opinion that there was still a transfer of a business in a broad sense, even though the actual business activities engaged in by [Crossleys] were transferred by them to Manchester.'

d The view of the majority emerges in the following paragraph of the reasons:

e '12. The other two members of the tribunal, although they had the greatest sympathy for the [appellant employees], felt obliged to take a different view. They felt it was really impossible to conclude that there had been a transfer of a business when the business carried on by Crossleys was, after the sale of their Sandiacre factory, carried on by them elsewhere. They took the view that Crossleys business as manufacturing engineers was in no way taken over by the [employers]. All that the [employers] did was to do work, as sub-contractors to Crossleys, on certain engines which it was uneconomic to move from the premises at their then current stage of manufacture and, when that work was finished, the equipment and plant which was needed for further manufacture of such engines and which had been loaned to the [employers] for the purpose, was returned to Crossleys.'

Appeals to the High Court were, and appeals to this court are, limited to questions of law (see s 114 of the Industrial Relations Act 1971). Accordingly it is not for this court to interfere merely because it is possible that if it had heard the evidence it might have agreed with the dissenting member. However, in the light of the excellent arguments which have been addressed to this court by counsel for the employees, and by counsel for the employers, we are satisfied that the real point of the appeal turns on the construction of the words 'If a trade or business or an undertaking . . . is transferred' in para 10 (2) of the code. Counsel for the employers submits that the commercial element in a business is all-important and that, while it is not necessary that the goodwill shall have been transferred expressly, any failure by the transferee to acquire that goodwill is fatal to a contention that there has been a transfer within the meaning of the paragraph. Counsel for the employees, on the other hand, submits that what matters is the productive unit in which the employee was employed. If that unit is transferred as a going concern there is a transfer within the meaning of the paragraph, whatever may happen to the transferor's goodwill. Although we do not think that the members of the tribunal analysed the matter in quite this way, no doubt because they did not have the benefit of the very full argument which we have heard, we consider that this in essence represents the division of opinion between the majority and the minority and that this difference is as to a question of law.

j Paragraph 10 (2) of the code has been considered by the Court of Session in *H A*

*Rencoule (Joiners and Shopfitters) Ltd v Hunt*², by the Divisional Court in *G D Ault (Isle of Wight) Ltd v Gregory*³, *Kenmir Ltd v Frizzell*⁴ and *Huggins v A & J Gordon (Aveley) Ltd*⁵ and by the Court of Appeal in *Lloyd v Brassey*⁶. None of these authorities is conclusive of the problem with which we are confronted.

Ault's case³ shows that there can be a transfer of part of a business including the goodwill attaching to that part without break in the continuity of service, if what is transferred is a separate and self-contained part. In the present case if a part was transferred, it was a separate and self-contained part and nothing turns on this aspect.

In *Rencoule's* case², the parties expressly agreed that the purchaser was not purchasing the business and should have no right to use the old firm name. The Court of Session, however, held that there was in fact a transfer of the goodwill of the business. As the Lord President (Lord Clyde) put it⁷:

'... the transfer of the work in progress coupled with the obligation to introduce the purchasers to customers of Mr Fraser involved a transfer of the goodwill of his business. The whole operation necessarily meant a smooth and unbroken continuity between what was happening before and after the transfer.'

In *Kenmir's* case⁴ goodwill was not expressly included, but the sale covered the benefit of trade agreements and the use of trade names and the vendors covenanted not to set up in competition in the area. In the circumstances it was clear that goodwill was in effect being transferred. However the court did consider the importance of the presence or absence of an express transfer of goodwill in general terms in the following passage⁸:

'... counsel for the [employers] contends that there can be no transfer of a business unless the transaction includes an assignment of the goodwill. An assignment of goodwill may be ineffective in itself, and is normally accompanied by a sale of the business premises, stock-in-trade and the like, but it is contended that a transaction which excludes the transfer of goodwill is deficient in the vital element which can make the subject-matter of the transfer a "business". If this argument is correct, it might provide a very simple solution to the problem in this case, but we think that it would be surprising in the context of this legislation if the presence or absence of a transfer of goodwill were conclusive. Schedule 1 to the Act of 1963 is concerned with continuity of employment, and uses the phrase "transfer of a business" to describe a situation in which a change of employer should not be regarded as a break in the continuity of the employees' engagements. If a business has no goodwill because it is at a low ebb, or because it sells all its production to an associated company, the factory premises might be sold and all the activities of production transferred to the new owner without interruption; yet, if counsel's argument is right the employees' accrued rights under the Acts of 1963 and 1965 would be lost unless the transfer included a formal and empty phrase purporting to include goodwill.'

Later in the judgment it was said⁹:

'In deciding whether a transaction amounted to the transfer of a business, regard must be had to its substance rather than its form, and consideration must be given to the whole of the circumstances, weighing the factors which point in

² 1967 SC 131

³ (1967) 2 ITR 301

⁴ [1968] 1 All ER 414, [1968] 1 WLR 329

⁵ (1971) 6 ITR 164

⁶ [1969] 1 All ER 382, [1969] 2 QB 98

⁷ 1967 SC at 136

⁸ [1968] 1 All ER at 417, [1968] 1 WLR at 335

⁹ [1968] 1 All ER at 418, [1968] 1 WLR at 335

a one direction against those which point in another. In the end, the vital consideration is whether the effect of the transaction was to put the transferee in possession of a going concern, the activities of which he could carry on without interruption.'

This is the passage in the judgment which has been approved by the Court of Appeal in *Lloyd v Brassey*¹⁰ and applied in other cases. The judgment in *Kenmir*'s¹¹ case continued:

b 'Many factors may be relevant to this decision though few will be conclusive in themselves. Thus, if the new employer carries on business in the same manner as before, this will point to the existence of a transfer, but the converse is not necessarily true, because a transfer may be complete even though the transferee does not choose to avail himself of all the rights which he acquires thereunder. Similarly, an express assignment of goodwill is strong evidence of a transfer of the business, but the absence of such an assignment is not conclusive if the transferee has effectively deprived himself of the power to compete. The absence of an assignment of premises, stock-in-trade or outstanding contracts will likewise not be conclusive, if the particular circumstances of the transferee nevertheless enable him to carry on substantially the same business as before.'

c In *Huggins v A & J Gordon (Aveley) Ltd*¹² the Divisional Court was in the unusual position of hearing an appeal on a question of fact and deciding, by consent of the parties, between mutually inconsistent decisions of industrial tribunals. It applied the test of 'whether the effect of the transaction was to put the transferee in possession of a going concern the activities of which he could carry on without interruption'. The court held that there was a transfer, a factor which weighed heavily in reaching this decision being what had been described by counsel as 'the automatic transfer of the staff'. As Lord Widgery CJ said¹³:

d 'It was somewhat remarkable, and it can fairly be described as automatic. They all came back on Monday, they all settled down to their jobs, they all went ahead as though nothing had happened, and if one asks oneself the question which was asked in some of the other cases: is this the same business in different hands, I would have thought that almost anyone looking at the superficial signs at any rate would have said: yes, of course, the business is going on exactly as before although in different hands.'

e In *Lloyd v Brassey*¹⁴, the Court of Appeal affirmed that there need be no sale of goodwill as such, but on the facts of that case, which concerned a farm, a sale of the land and buildings automatically involved a transfer of the goodwill.

f In our judgment it is of the first importance to remember the context in which para 10 (2) of the code falls to be construed. The Redundancy Payments Act 1965 is concerned with payments related to continuity of work for an employer. Likewise the Contracts of Employment Act 1963 is concerned with minimum periods of notice required to terminate employment, again related to continuity of work for an employer. In this context there is no reason why an employee should be concerned with, and still less prejudiced by, changes in the ownership of the business or undertaking in which he works. Whether or not he is aware of them—and he may not be—he has little chance of exercising any control over them. Consistently with this approach, Parliament has decreed that a change of employer by Act of Parliament (para 10 (3) of the code), or by operation of law on the death of an employer (para

10 [1969] 1 All ER 382, [1969] 2 QB 98

11 [1968] 1 All ER at 418, [1961] 1 WLR at 335

12 (1971) 6 ITR 164

13 (1971) 6 ITR at 169

14 [1969] 1 All ER 382, [1969] 2 QB 98

10 (4) of the code), or consequent on a change in the identity of partners in an employing firm or of employing personal representatives or trustees (para 10 (5) of the code) or by transfer between associated companies (para 10A of the code) does not break the continuity of employment. In each case the change is, or may be, crucial to the employer, but to the employee it is, or is likely to be, largely immaterial.

Paragraph 10 (2) of the code falls to be construed as one with the other provisions of that paragraph and against the same background. The sub-paragraph is not concerned with a sale of buildings or stock-in-trade or both. It is concerned with the transfer of ownership of a trade or business or an undertaking in the sense of a sale of the whole working environment of the employees. This includes not only the place where the employee works, but the machine or bench at which he works and the sort of work which he does there. If the failure to include the goodwill of a business in the sale has the effect of changing this environment, there has been no transfer of the business. Rather the old business has been dismembered and a new business created, a fact which will at once be apparent to and affect the employees. This, we think, is the philosophy which underlies the stress made on the transfer of a going concern in circumstances which enable the purchaser to carry on substantially the same business as before (see *Kenmir Ltd v Frizzell*¹⁵ and *Lloyd v Brassey*¹⁶) and on the automatic transfer of staff with Monday's work appearing indistinguishable from Friday's work (see *Huggins v A & J Gordon (Aveley) Ltd*¹⁷).

Factors (a) to (d) in the tribunal's list of factors pointing to a transfer of the business or undertaking are all of a nature which could affect the employees in their daily lives. Nothing was changed. They continued to work as engineers using the same equipment and skills as theretofore. Certainly the changes amounted to no more than the evolutionary changes which take place in the life of any business without creating any break in the continuity of the life of that business. Even when the manufacture of the heavy diesel engines had been completed, they still worked on the same machines and did similar types of work. Previous service would count towards their entitlements in connection with pensions, holidays and sickness benefits. There was no material change in the labour force. Friends continued to work together and so did enemies. The consolations and irritations of daily life at work remained the same.

Factors (e) and (f), the sale of the factory and most of the plant as a complete unit capable of continuing in production without interruption, sold at an enhanced price because of this facility, did not directly affect the employees although these factors point to the fact that both parties to the sale intended and expected a continuance of the stable environment to which we have referred.

Turning now to the first four factors which are said to be contra-indicative of a transfer within the meaning of the sub-paragraph, neither the absence of a sale of Crossleys' name or goodwill, nor the failure to transfer customers or the benefit of contracts, nor the failure to transfer Crossleys' debts or liabilities would have any direct or necessary effect on the employees' working environment. Perhaps it is even more important that they might well be unknown to the employees. It would be strange indeed if, in deciding whether an employee has lost rights depending on the continuity of his employment, factors which are quite unknown to him should be taken into account, still less taken into account decisively.

There remain only two other such factors. First, the tribunal rightly points out that the sale agreement is in form concerned solely with assets. But that this is not the reality is clear from the attempts, which were successful, to retain the work force intact. Secondly, the so-called 'transfer' of Crossleys' business activities to Manchester did not involve any movement of employees, which is usually a vital factor in such a transfer, or of any significant part of the plant or equipment. Apart

15 [1968] 1 All ER 414, [1968] 1 WLR 329

17 (1971) 6 ITR 164

16 [1969] 1 All ER 382, [1969] 2 QB 98

a from the transfer of some specialised equipment at a later date nothing seems to have happened which is inconsistent with Crossleys leaving a production unit behind them at Sandiacre, moving to Manchester and forming a completely new unit there. Closing down in one place and setting up in another with new plant, new equipment, new buildings and new employees is not a transfer of a business in the sense contemplated by the code.

b The dissenting member of the tribunal considered that the real effect of the transaction was to put the employers in possession of a going concern, which they could and did carry on without interruption. We agree. But that is not enough if this is a mere difference of view on a pure question of fact and the majority view is tenable on the evidence. However, the majority view is expressly based, and is really only tenable, upon the acceptance of the proposition that—

c ‘it was really impossible to conclude that there had been a transfer of a business when the business carried on by Crossleys was, after the sale of their Sandiacre factory, carried on by them elsewhere.’

d This proposition reveals an approach which is erroneous in law, for the tribunal is equating ‘business’ with the species of commercial activity in which Crossleys were engaged and not with the production activity carried on and the production unit situated at Sandiacre. The latter is the ‘business’ with which the code is concerned. It never changed and was transferred by Crossleys to the employers. Crossleys for their part started a new production unit of a similar type in a different place to serve their unchanged commercial activity. That commercial activity is not the business with which the code is concerned in the context of this case, although it might have been otherwise if the employees had been employed in that commercial activity, e.g. as sales representatives.

e The appeal will accordingly be allowed and the case is remitted to the industrial tribunal for them to assess the redundancy payments due in the light of our decision.

Appeal allowed.

f Solicitors: *W H Thompson* (for the employees); *Linklaters & Paines* (for the employers).

Gordon H Scott Esq Barrister.

Practice Direction

g CHANCERY DIVISION

Practice – Chancery Division – Revenue list – Fixing dates for hearing cases in revenue list.

1. Each judge taking a revenue list in any sittings is in charge of his own list.
2. The registrar of revenue appeals will hold a meeting of clerks to counsel engaged in a sittings’ revenue paper at least 14 days before the paper is due to start, to enable h him to arrange the hearing dates of the cases in the paper.
3. Each clerk will submit at the meeting his counsel’s signed estimate of the length of hearing of the cases in which he is engaged.
4. The registrar of revenue appeals will immediately submit his arrangements to each judge taking a revenue list for his approval in respect of the cases in his list.
- i 5. The dates for hearing of the revenue paper in any sittings will be fixed so as to allow at least seven clear days between the conclusion of the revenue paper and the end of the sittings.

By the direction of the Vice-Chancellor.

8th March 1972

R E BALL
Chief Master

Practice Directions

FAMILY DIVISION

Child – Matrimonial causes – Applications relating to children – Reservation to judge who first deals with matter.

It has for some years been the practice to regard applications relating to children in High Court matrimonial proceedings as automatically reserved to the judge who first deals with the matter, unless in any particular case he indicates that he does not desire such applications to be reserved to him.

Solicitors attending at the Divorce Registry or Clerk of the Rules Office to issue any summons relating to children should therefore ensure that the application is returnable before the judge (if any) to whom the matter is reserved, by reference to the court file if necessary. Failure to state the reservation to a particular judge may result in the summons being adjourned until such judge is available.

This practice direction does not apply to applications in causes proceeding at the Divorce Registry as in a divorce county court. Applications relating to children in such causes are reserved to a particular judge only when he so directs.

COMPTON MILLER

8th March 1972 Senior Registrar

FAMILY DIVISION

Administration of estates – Grant of administration – Solicitor's office reference.

Probate – Grant – Solicitor's office reference.

If a solicitor includes his office reference immediately following his name at the head of the oath to lead a grant of probate or letters of administration, as in the following example:

'Extracted by A B and Company (ref WB) [address]',

the reference will be included, following the solicitor's name, at the foot of the grant, without any special request.

The registrar's direction¹ dated 1st August 1970 (and the establishment officer's notice dated 11th February 1971) are cancelled.

COMPTON MILLER

9th March 1972 Senior Registrar

FAMILY DIVISION

Child – Court proceedings in relation to children – Proceedings in private – Publication of information – Transcripts – Leave to obtain.

Although it is provided by s 12 of the Administration of Justice Act 1960 that no information regarding wardship and other proceedings in private relating to children may be published, it is considered by the President of the Family Division that the parties to such proceedings may obtain transcripts of the proceedings without the leave of the court.

Those who are not parties to the proceedings may obtain a transcript only in special circumstances and by leave of the judge.

COMPTON MILLER

10th March 1972 Senior Registrar

¹ See Practice Direction [1970] 3 All ER 176, [1970] 1 WLR 1251

a Rugby Joint Water Board v Foottit and another
Rugby Joint Water Board v Foottit and another
[second appeal]
b Rugby Joint Water Board v Shaw-Fox
and others
[consolidated appeals]

HOUSE OF LORDS

LORD PEARSON, LORD HODSON, LORD GARDINER, LORD SIMON OF GLAISDALE AND LORD

c CROSS OF CHELSEA

29th, 30th NOVEMBER, 2nd, 3rd, 6th, 7th DECEMBER 1971, 23rd FEBRUARY 1972

d *Compulsory purchase – Compensation – Assessment – Agricultural holding – Landlord's interest – Restriction on operation of notice to quit – Restriction not applicable where land 'required for a use, other than for agriculture, for which permission has been granted' – Power reserved in lease to give 12 months' notice – Water board obtaining planning permission for use of land as reservoir – Water board obtaining powers of compulsory acquisition – Notice to treat given to landlord – Whether land required for a use other than for agriculture – Whether compensation assessable on basis that vacant possession could be obtained by giving 12 months' notice – Agricultural Holdings Act 1948, ss 23 (1), 24 (1), (2) (b).*

e *Compulsory purchase – Development scheme – Compulsory purchase in pursuance of scheme – Increase in value of land due to existence of scheme – Interest in land – Alteration in nature of interest as a result of scheme – Landlord's interest – Reversionary interest to protected tenancy of indefinite duration – Agricultural holding – Land required by water board for purposes other than agriculture – Effect of water board's scheme that landlord's interest converted into a reversionary interest to an unprotected tenancy terminable by 12 months' notice – Whether alteration of landlord's interest due to existence of scheme to be disregarded*
f *in assessing compensation.*

g The first and second respondents were landlords of two separate farms both let on leases which were subject to the Agricultural Holdings Act 1948. Both respondents had reserved powers in their respective leases to determine the tenancies on giving 12 months' notice expiring on Lady Day in any year. The first respondent had also, by cl 1 (3) of his lease, reserved the right pursuant to s 23 (1)^a of the 1948 Act to resume possession of any part of the farm which 'the Landlords may from time to time require for . . . any . . . purpose (not being the use of the land for agriculture)' on giving 42 days' notice. In April 1966 the Minister of Housing and Local Government granted the appellants permission under the Town and Country Planning Act 1962 to construct a reservoir and, by an order which came into effect on 7th March, **h** gave the appellants power to purchase land for the purpose compulsorily. Thereupon, in exercise of those powers, the appellants gave notices to treat to each of the respondents, in respect of parts of both farms. On an application to determine the amount of compensation payable to the respondents the question arose whether compensation was to be assessed on the basis that each of the respondents had an interest in fee simple subject to an annual agricultural tenancy in respect of which, **j** by virtue of s 24 (1)^b of the 1948 Act, they had, at the date of the notice to treat, no right to give an effective notice to quit, or that the interest was one in fee simple subject to a tenancy in respect of which, by virtue of s 24 (2) (b)^c of the 1948 Act and

a Section 23 (1), so far as material, is set out at p 1075 d and e, post

b Section 24 (1) is set out at p 1075 g and h, post

c Section 24 (2) (b), so far as material, is set out at p 1065 e, post

the terms of the respective leases, the respondents were entitled to give an effective notice to quit expiring on Lady Day 1968. The further question arose, in relation to the first respondent, whether his interest was to be valued on the basis that it was subject to a tenancy in respect of which he was entitled, by virtue of s 23 (1) of the 1948 Act and cl 1 (3) of the lease, to give an effective notice to quit expiring not less than 42 days from the date of the notice.

Held – (i) (Lord Simon of Glaisdale dissenting) The respondents were entitled to compensation on the basis that their reversionary interests were, at the dates of the respective notices to treat, subject to tenancies which they could determine on 12 months' notice, for the following reasons—

(a) in view of the fact that the appellants had obtained planning permission for a reservoir for which they required the land in question, the respondents could, by virtue of s 24 (2) (b) of the 1948 Act, give an effective 12 month notice to quit, since the words 'required for a use, other than for agriculture' in s 24 (2) (b) did not refer exclusively to a requirement of the landlord in the sense that the land was needed by him for his own use or the use of some person to whom he could make a voluntary sale of his interest; the words referred to any person requiring the land including one who, having obtained planning permission, intended to make a compulsory purchase of the landlord's interest (see p 1061 a and b, p 1065 f and h, p 1067 f and p 1094 a c and f, post);

(b) although for the purpose of assessing compensation for land which had been compulsorily acquired no account was to be taken of an increase in value which was wholly due to the scheme underlying the acquisition, it did not follow that the nature of the interest to be acquired was to be disregarded merely because it had been altered as a result of the scheme; the respondents were entitled to compensation for the interest which they held at the date of the notice to treat; it was immaterial that that interest had been converted from a reversionary interest to a protected tenancy into a reversionary interest to an unprotected tenancy as a result of the appellants' scheme for the compulsory acquisition of the land (see p 1064 d and e, p 1066 h to p 1067 a c and f and p 1095 f and g, post); *Ministry of Transport v Pettitt* (1968) 20 P & CR 344 approved; *Penny v Penny* (1868) LR 5 Eq 227 and *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565 distinguished.

(ii) The first respondent was not entitled to compensation on the basis that, under cl 1 (3) of the lease, he was entitled to give 42 days' notice to quit to his tenant, since, on the true construction of cl 1 (3), it only enabled such a notice to be given where the first respondent required possession of the land so that it might be put to a non-agricultural use either by himself or by someone whom he put into possession of it (see p 1064 g, p 1067 e and f, p 1089 g and p 1095 h and j, post).

Decision of the Court of Appeal sub nom *Rugby Joint Water Board v Shaw-Fox* [1971] 1 All ER 373 affirmed in part, reversed in part.

Notes

For the valuation of freeholds and leaseholds for compensation purposes, see 10 Halsbury's Laws (3rd Edn) 113, 114, para 187, and for cases on the subject, see 11 Digest (Repl) 289-292, 1947-1977.

For the Agricultural Holdings Act 1948, ss 23 and 24, see 1 Halsbury's Statutes (3rd Edn) 705-707.

Cases referred to in opinions

Birmingham City Corpn v West Midland Baptist (Trust) Association (Inc) [1969] 3 All ER 172, [1970] AC 874, [1969] 3 WLR 389, 133 JP 524, Digest (Cont Vol C) 133, 192d.
Camrose (Viscount) v Basingstoke Corpn [1966] 3 All ER 161, [1966] 1 WLR 1100, 130 JP 368, Digest (Cont Vol B) 698, 176b.
Cedar Rapids Manufacturing and Power Co v Lacoste [1914] AC 569, [1914-15] All ER Rep 571, 83 LJPC 162, 110 LT 873, 11 Digest (Repl) 136, 200.

- a* *Davy v Leeds Corpn (or City Council), Central Freehold Estates (Leeds) Ltd v Leeds Corpn* [1965] 1 All ER 753, [1965] 1 WLR 445, 129 JP 308, Digest (Cont Vol B) 337, 111b.
Fraser v Fraserville City, Same v Same [1917] AC 187, 86 LJPC 91, 11 Digest (Repl) 128, *83.
- Gough and Aspatria, Silloth and District Joint Water Board, Re* [1904] 1 KB 417, [1904-7] All ER Rep 726, 73 LJBK 228, 90 LT 43, 68 JP 229, 11 Digest (Repl) 133, 181.
- b* *Horn v Sunderland Corpn* [1941] 1 All ER 480, [1941] 2 KB 26, 110 LJBK 353, 165 LT 298, 105 JP 223, 11 Digest (Repl) 127, 167.
- Lucas and Chesterfield Gas and Water Board, Re* [1909] 1 KB 16, [1908-10] All ER Rep 251, 77 LJBK 1009, 99 LT 767, 72 JP 437, 11 Digest (Repl) 133, 182.
- Minister of Transport v Pettitt* (1968) 20 P & CR 344, 67 LGR 449, [1969] RVR 26, Digest (Cont Vol C) 136, 1977a.
- c* *Morgan and the London and North Western Ry Co, Re* [1896] 2 QB 469, 66 LJQB 30, 75 LT 226, 11 Digest (Repl) 291, 1972.
- Ossalinsky (Countess) and Manchester Corpn, Re* (1883) Browne and Allan's Law of Compensation (2nd Edn, 1903) p 659, 11 Digest (Repl) 133, 179.
- Penny v Penny* (1868) LR 5 Eq 227, 37 LJCh 340, 18 LT 13, 11 Digest (Repl) 291, 1969.
- Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565, 11 Digest (Repl) 131, *149.
- d* *South Eastern Ry Co and London County Council's Contract, Re, South Eastern Ry Co v London County Council* [1915] 2 Ch 252, 84 LJCh 756, 113 LT 392, 79 JP 545, 11 Digest (Repl) 126, 164.
- Stebbing v Metropolitan Board of Works* (1870) LR 6 QB 37, 40 LJQB 1, 23 LT 530, 35 JP 437, 7 Digest (Repl) 583, 310.
- e* *Vyricherla Narayana Gajapatiraju (Raja) v Revenue Divisional Officer, Vizagapatam* [1939] 2 All ER 317, [1939] AC 302, 108 LJPC 51, 11 Digest (Repl) 132, 177.
- Wilson v Liverpool City Council* [1971] 1 All ER 628, [1971] 1 WLR 302.

Appeals

The Rugby Joint Water Board appealed against orders of the Court of Appeal (Lord Denning MR, Phillimore and Cairns LJ) dated 22nd October 1970 and reported

f [1971] 1 All ER 373 dismissing two appeals by the appellants from decisions of the Lands Tribunal (Sir Michael E Rowe QC, President), dated 27th November 1969, and allowing a cross-appeal by the respondents to the first and second appeals, Edward Hall Foottit and Zoe Ruth Foottit. The decisions of the Lands Tribunal were on preliminary points of law in references made to the tribunal (i) by the respondents to the third appeal, Jean Helen Shaw-Fox, P H V Twist and H A Sibley, the trustees of the will of James Frederick Shaw deceased, in respect of the compensation payable

g by the appellants on the compulsory acquisition in pursuance of the Rugby and South Warwickshire Water Order 1966^d of land described as 'Parts of Draycote Farm Draycote near Rugby Warwickshire containing about one hundred and twenty four acres', and (ii) by the respondents to the first and second appeals in respect of compensation payable by the appellants on the compulsory acquisition in pursuance of

h the 1966 order of land described as 'Part of the Dairy Farm, Thurlaston near Rugby Warwickshire containing about one hundred and thirty two acres'. The Lands Tribunal directed that the preliminary point of law in each of the two references should be argued and, as in substance the point of law in both was the same, the references were heard by the tribunal at the same time. The facts are set out in the opinion of Lord Hodson.

- j* *George Newson QC and Guy Seward* for the appellant water board.
W J Glover QC and J A R Grove for the respondents.

Their Lordships took time for consideration.

23rd February. The following opinions were delivered.

LORD PEARSON. My Lords, the appellants acquired certain lands under statutory powers for the purpose of making a reservoir. These lands included parts of farms of which the respondents were landlords, having fee simple reversions subject to agricultural tenancies from year to year. The present appeals are concerned with preliminary questions of law affecting the assessment of the compensation payable by the appellants to the respondents. It will be convenient to deal first with the Shaw-Fox appeal, which raises only the two main questions which are common to both appeals. The Footit case raises, in addition to those two main questions, a further question which is of less importance.

In the Shaw-Fox case the tenancy was according to the tenancy agreement terminable by a 12 months' notice to quit expiring on 25th March in any year. But prima facie the tenancy, being a tenancy of an agricultural holding, would be protected under s 24 (1) of the Agricultural Holdings Act 1948 whereby the notice to quit, if the tenant served a counter-notice, would not have effect unless the Agricultural Land Tribunal consented to its operation. The tenancy would, however, not enjoy this protection—the notice to quit could have effect without the consent of the tribunal—if the respondents as landlords could give their notice to quit on the ground referred to in s 24 (2) (b) of the Act. The first main question is whether the respondents were entitled to act under s 24 (2) (b) at the material time in the circumstances of this case. The respondents did not in fact serve any notice to quit. The question is whether they had a right to serve one under s 24 (2) (b). The practical point affecting the compensation is that a reversion to an unprotected tenancy is in this case worth considerably more than a reversion to a protected tenancy. Section 24 (2) (b), so far as it is material, for the present purpose, provides:

'The foregoing subsection shall not apply where . . . the notice to quit is given on the ground that the land is required for a use, other than for agriculture, for which permission has been granted on an application made under the enactments relating to town and country planning . . . and that fact is stated in the notice.'

The relevant facts can be shortly stated on the basis of the Lands Tribunal's findings. In response to an application by the appellants, the Minister of Housing and Local Government, on 6th April 1966, gave to the appellants planning permission to construct a water supply reservoir on lands which included the greater part of the Shaw-Fox farm. On 22nd August 1966 the Minister made the Rugby and South Warwickshire Water Order 1966¹ which, inter alia, authorised the compulsory acquisition by the appellants of the lands forming the site of the proposed reservoir. This order came into force on 7th March 1967. On 14th March 1967 the appellants served on the respondents a notice to treat in respect of such of the lands to be acquired as formed parts of the Shaw-Fox farm.

Those facts show that before and at and after the time of service of the notice to treat the relevant land was, according to the natural and ordinary meaning of the words—

'required for a use, other than for agriculture, for which permission [had] been granted on an application made under the enactments relating to town and country planning';

and, if the respondents had given a 12 months' notice to quit on that ground stating that fact, the notice would, notwithstanding any counter-notice given by the tenant, have had effect without the consent of the Agricultural Land Tribunal to its operation. It follows that the tenancy was not a protected tenancy, and the answer to the first main question is in favour of the respondents.

The argument for the appellants on this question was that the words 'required for a use, other than for agriculture' referred exclusively to a requirement of the landlord

a in the sense that the land was needed by him either for his own use or for use by some person to whom he would make a voluntary sale of his interest. But the wording affords no ground for importing such a limitation of the word 'required', and in the context the requirement of any person obtaining planning permission would naturally be included, whether such person was the landlord himself, or a person intending to negotiate for the purchase of the landlord's interest, or a person, as in the present case, intending to make a compulsory purchase of the landlord's interest. The underlying principle seems to be that a tenancy of agricultural land loses its statutory protection when the land loses its agricultural character by becoming destined for some non-agricultural use. Several other provisions of the Act—especially ss 23 (1) (b), 25 (1) (e) and (5), 31 (1) and (2) (g) and (h), 33 and 60—were referred to as throwing light on the construction of s 24 (2) (b), but I do not think they show that any limitation of the natural meaning of s 24 (2) (b) is to be implied.

c The second main question is this. Be it assumed that by reason of the appellants having obtained planning permission and requiring the land for the purpose of making the reservoir the respondents acquired the right to serve an effective notice to quit under s 24 (2) (b). Should that fact be disregarded in assessing the compensation? The appellants argue that it should, on the ground that the 'Pointe Gourde principle' applies to this case, because the landlord's right to serve an effective notice to quit was created by the appellants' scheme for acquiring the land and making the reservoir. The principle was stated in *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands*². That was a case where, in connection with the establishment of a United States naval base in Trinidad, the Crown compulsorily acquired quarry land owned by the company, and the value of the quarry land was increased by the construction of the naval base, which was in the vicinity of the quarry land and required a large quantity of stone. It was held by the Judicial Committee of the Privy Council that the compensation for the compulsory acquisition of the quarry land should not take into account this increase in value. Lord MacDermott said³:

f 'It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition.'

The principle has been applied and formulated in many cases: *Stebbing v Metropolitan Board of Works*⁴, *Re Countess Ossalinsky and Manchester Corpn*⁵; *Re Gough and Aspatria, Silloth and District Joint Water Board*⁶, in which Lord Alverstone CJ said⁷:

g 'It would be otherwise, no doubt, if there was no natural value in the place as a water site apart from the particular scheme or Act of Parliament, or, in other words, there is no value for which compensation ought to be given on this head if the value is created or enhanced simply by the Act or by the scheme of the promoters.'

h *Re Lucas and Chesterfield Gas and Water Board* in which Fletcher Moulton LJ said⁸:

'The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent, i.e., that which they were worth to him in money. His

i 2 [1947] AC 565

3 [1947] AC at 572

4 (1870) LR 6 QB 37

5 (1883) Browne and Allan's Law of Compensation (2nd Edn, 1903) p 659

6 [1904] 1 KB 417, [1904-7] All ER Rep 726

7 [1904] 1 KB 422, 423, citing the words of Wright J in the court below, [1903] 1 KB 574 at 576

8 [1909] 1 KB 16 at 29, 30, [1908-10] All ER Rep 231 at 255

property is therefore not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser, and hence it has from the first been recognized as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers. The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses.'

*Cedar Rapids Manufacturing and Power Co v Lacoste*⁹ per Lord Dunedin; *South Eastern Ry Co v London County Council*¹⁰ in which Eve J said:

'... increase in value consequent on the execution of the undertaking for or in connection with which the purchase is made must be disregarded ...'

*Fraser v Fraserville City*¹¹ in which Lord Buckmaster said:

'... the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case.'

*Siri Raja Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam*¹²; *Davey v Leeds Corp*¹³ per Viscount Dilhorne; *Viscount Camrose v Basingstoke Corp*¹⁴ in which Lord Denning MR said:

'The legislature was aware of the general principle that, in assessing compensation for compulsory acquisition of a defined parcel of land, you do not take into account an increase in value of that parcel of land if the increase is entirely due to the scheme involving the acquisition. That was settled by *Pointe Gourde Quarrying and Transport Co., Ltd. v. Sub-Intendent of Crown Lands*¹⁵ ...'

*Wilson v Liverpool City Council*¹⁶.

Those are the main authorities illustrating the application of the *Pointe Gourde*¹⁵ principle, and they show that it is a principle regulating the valuation of a defined parcel of land or a defined interest in a parcel of land. It was at one stage of the argument described as a 'common law principle', but I do not think it can be that, because compulsory acquisition and compensation for it are entirely creations of statute. The *Pointe Gourde*¹⁵ principle in my opinion involves an interpretation of the word 'value' in those statutory provisions which require the compensation for compulsory acquisition to include the value of the lands taken. Examples of such provisions are s 63 of the Lands Clauses Consolidation Act 1845, s 5 (2) of the Land Compensation Act 1961 and s 7 of the Compulsory Purchase Act 1965.

The question to be decided is, I think, whether the *Pointe Gourde*¹⁵ principle can be extended so as to apply not only to the ascertainment of the value of a defined parcel of land or a defined interest in land, but also to the ascertainment of the nature and extent of the interest to be valued in a case where the genesis or execution of the scheme has brought about an alteration of the interest itself. In the present case the interest of the respondents as landlords, before it was affected by the scheme, was a reversion to a protected tenancy. The scheme converted it into a reversion

9 [1914] AC 569 at 576, 579, [1914-15] All ER Rep 571 at 574, 575

10 [1915] 2 Ch 252 at 258

11 [1917] AC 187 at 194

12 [1939] 2 All ER 317 at 325, 326, [1939] AC 302 at 318, 319, 320

13 [1965] 1 All ER 753 at 760, [1965] 1 WLR 445 at 453

14 [1966] 3 All ER 161 at 164, [1966] 1 WLR 1100 at 1107

15 [1947] AC 565

16 [1971] 1 All ER 628 at 633, 634, 635, [1971] 1 WLR 302 at 308, 309, 310

a to an unprotected tenancy and thereby enhanced its value. Can it be said, in accordance with the appellants' proposition, that the change which the scheme has brought about in the nature of the reversion is to be disregarded in assessing the compensation?

If this proposition could be accepted, it would produce a fair result, which makes it attractive. There is an authority which gives it some general support but is distinguishable from the present case. In *Penny v Penny*¹⁷ the testator had a lease of the house in which the family business was carried on. Under his will two of his sons were entitled to occupy the house, during the subsistence of the lease, so long as they continued to carry on the business there, but if they ceased to carry on the business there the executor would be entitled to sell the leasehold interest. The Metropolitan Water Board served notices to treat on the executor and on the two sons of the testator. These notices to treat followed by the board's entry would terminate the sons' carrying on of the business in the house and so give the executor a right to sell the leasehold interest for the residue of the term. It was held that this right, created by the board's scheme, should not be taken into account in assessing the compensation. Page Wood V-C said¹⁸:

d '... I think the valuation ought to be made as at the time when the house was about to be taken, and should be made of the exact interest which the Plaintiff would at that moment have had, assuming that the house had not been taken ... As to the value of the interest, it appears to me clear that the Plaintiff's interest is not to be treated as having been increased through an act of the Board of Works ... The scheme of the Act I take to be this: that every man's interest shall be valued, *rebus sic stantibus*, just as it occurs at the very moment when the notice to treat was given. Any difference in the result which is due to the accident of the property being taken by a public body is not to be thrown into the compensation fund.'

f That case is distinguishable from the present case, because in that case the alteration of the interest was made only by the service of the notice to treat whereas in the present case the alteration was made (whether by the grant of the planning permission or by the making or the coming into force of the Minister's order) at some time before the service of the notice to treat.

g Another authority on this point, in which a different view was taken, is *Re Morgan and the London and North Western Ry Co*¹⁹. The claimants had granted an underlease of the land to the Swansea corporation at a low rent for the making of a public park. There was a proviso for re-entry if the land should be required or taken by a railway or other public company under the power or authority of an Act of Parliament. The railway company served the notice to treat and that brought the proviso into operation, so that the claimants were entitled to re-enter. It was held that this alteration of their interest should be taken into account in assessing the compensation. Day J said²⁰:

h 'The railway company did give notice to treat. No doubt the notice to treat at once puts an end to the right of the parties to interfere with the land or to add anything to its value. They must sell the land as of the value it was at the time the notice to treat was given, and the only question we have to determine is what was the value of the land at that time. When the notice to treat was given the effect of it was that the underlease ceased so far as the land which was comprised in the notice to treat was concerned ... What are they entitled to sell? Are they entitled to sell the land ... "as in hand and free from the underlease"? That is the very object of the provision in the underlease. To my mind,

17 (1868) LR 5 Eq 227

18 (1868) LR 5 Eq at 235, 236

19 [1896] 2 QB 469

20 [1896] 2 QB at 474

the condition is fulfilled. The land has become in hand and free from the underlease, and the claimants are the only persons who can make a title to the land and can sell the land to the railway company.'

It is not necessary to resolve what seems to be a conflict between *Penny v Penny*¹ and the *Morgan* case². One can take what is common ground, namely, the principle that the nature of the claimant's interest is to be ascertained at the time of (or immediately before or immediately after) the service of the notice to treat. As Lord Donovan said in *Birmingham City Corp'n v West Midland Baptist (Trust) Association (Inc)*³;

'In the words of the textbook writers the notice to treat fixes the interest which is to be acquired.'

This is borne out by s 5 (2) of the Compulsory Purchase Act 1965 which provides:

'Every notice to treat—(a) shall give particulars of the land to which the notice relates, (b) shall demand particulars of the recipient's estate and interest in the land, and of the claim made by him in respect of the land, and (c) shall state that the acquiring authority are willing to treat for the purchase of the land . . .'

It seems to me, therefore, that the respondents are entitled to compensation for the interest which they held in the land at the date of the notice to treat, even though the nature of this interest had been altered in their favour by the inception of the appellants' scheme. There is the possible argument that the respondents' reversionary interest remained the same although its value was increased by the appellants' scheme enabling the respondents to give an effective notice to quit. But I do not think that argument is right; I think the reversion to an unprotected tenancy is a different interest from a reversion to a protected tenancy. The respondents' interest to be valued is the reversion as it existed on the date of the notice to treat, when it was a reversion to an unprotected tenancy. That is what the respondents had to sell and what the appellants must pay for. I agree with the majority decision in *Minister of Transport v Pettitt*⁴.

That is the conclusion to which I have come on this difficult question, which is the second main question in both appeals. So far as the main questions are concerned the two cases are indistinguishable. It follows that the appeal in the Shaw-Fox case fails entirely and the appeal in the Foottit case fails so far as the main questions are concerned.

There remains the minor question in the Foottit case. On that I will say simply that I agree with the opinions of my noble and learned friends Lord Hodson and Lord Cross of Chelsea, and with their reasons for allowing the appeal in the Foottit case to that extent.

Accordingly I would affirm the orders appealed from insofar as they uphold the decision of the Lands Tribunal on the main questions, and would to that extent dismiss the appeals. But I would reverse the orders appealed from insofar as they set aside the decision of the Lands Tribunal on the minor question, and would to that extent allow the appeals and restore the said decision.

Notwithstanding the appellants' success on the minor question, as they have failed on the main questions I think that in the circumstances of these cases it would be right that they should pay the respondents' costs in this House.

LORD HODSON. My Lords, three points, two substantial and one subsidiary, arise on these appeals which arise out of compulsory powers obtained by the Rugby Joint Water Board to take farmland in order to construct a reservoir. The question is as to the measure of compensation to be paid by the board to the owners of parts

¹ (1868) LR 5 Eq 227

² [1896] 2 QB 469

³ [1969] 3 All ER 172 at 188, [1970] AC 874 at 909

⁴ (1968) 20 P & CR 344, [1969] RVR 26

a of two farms both of which are let to agricultural tenants. In each lease there was a power to determine the tenancy on 12 months' notice expiring on Lady Day. In one of the leases there was a clause giving the landlord power to resume possession on 42 days' notice when the land was required for special purposes. This raises the subsidiary point.

b On 6th April 1966 the board obtained planning permission to construct a reservoir on the farms. On 7th March 1967 the order of the Minister authorising compulsory acquisition of the lands came into force. The board then served notices to treat on the owners and occupiers of the farms. It is settled that service of notice to treat fixes the date at which the extent or quality of an interest to be compensated is fixed. As my noble and learned friend Lord Donovan said in *Birmingham City Corpn v West Midland Baptist (Trust) Association (Inc)*⁵:

c 'In the words of the textbook writers the notice to treat fixes the interest which is to be acquired.'

The owners accordingly claim compensation on the basis that each of them could turn his tenant out by a notice given on 25th March 1967 to expire on 25th March 1968. The owners would be entitled to possession in one year in each case. Section d 24 (1) of the Agricultural Holdings Act 1948 imposes restrictions on the operation of notices to quit but s 24 (2) (b) provides that the subsection previously mentioned shall not apply where—

'the notice to quit is given on the ground that the land is required for a use, other than for agriculture, for which permission has been granted on an application made under the enactments relating to town and country planning...'

e On the construction of this subsection the first point depends.

On behalf of the board it was submitted that the restrictions were not removed by the language of the subsection which I have just quoted since the whole structure of the Act compelled the requirement to be understood as meaning requirement by the landlord as opposed to requirement by a third party such as the board not claiming f through or under the landlord but acting independently as a compulsory purchaser. I agree with the Court of Appeal⁶ that there is nothing in the language of the Act to restrict the requirement to that of the landlord. This would involve writing in the word 'landlord' or implying its presence where it does not appear. Moreover there does not appear to be any sensible reason why a different result should follow when land is required for a non-agricultural use whether the requirement is that of g the landlord or a third party such as the board. Looking at the Act as a whole there are many sections where the landlord is identified by being described as such. In s 24 (2) (b) the requirement for use is not confined to use by the landlord and the object of the exception appears to be to exclude land which is required for a non-agricultural purpose from the statutory restrictions on the operation of notices to quit agricultural holdings, whether or not the requirement is that of the landlord or h someone claiming through him. I see no reason accordingly to regard the absence of the words 'by the landlord' after the word 'use' in the subsection as being *casus omissus* by the draftsman.

The second main contention of the board, which I will call the *Pointe Gourde*⁷ point, was concluded against them in the Court of Appeal by an earlier decision of the court in *Minister of Transport v Pettitt*⁸, but was pressed before your Lordships as the main ground of appeal. The argument was that to give compensation to the owners on the basis that each of them could turn his tenant out on a year's notice would be to enable the acquisition of land to be made at a price inflated by the

5 [1969] 3 All ER at 188, [1970] AC at 909

6 [1971] 1 All ER 373, [1971] 2 QB 14

7 [1947] AC 565

8 (1968) 20 P & CR 344, [1969] RVR 26

scheme giving rise to the acquisition for which the grant of planning permission was a necessary and integral part.

It is well established that the value to the owner and not the value to the purchaser is relevant in the case of the exercise of compulsory powers. Were it otherwise the use of compulsory powers would be largely frustrated. The cases on this topic are, I think, all consistent with one another. The earliest example to which your Lordships' attention was directed is reported in Notes of Cases on the Law of Compensation compiled by Balfour Browne and C E Allan in 1903. The case⁹ arose from an arbitration between the Countess Mary Ossalinsky and the corporation of Manchester in 1883 in which the question whether the 'adaptability' of the land value for the purposes for which it is to be used is to be taken into consideration, as an element of value in compensating the owner, is discussed. Powers had been conferred on the corporation by the Manchester Corporation Waterworks Act 1879 for the purposes of carrying out the objects of the Act. Grove J in his judgment¹⁰ said:

'... it has been the invariable practice sanctioned by the courts that arbitrators are not to value the land with reference to the particular purpose for which it is required, particularly where the matter is under Parliamentary powers with reference to what the parties who are taking the land under compulsory powers are obliged by their necessities, or what they suppose to be their necessities, to pay for it there—that it is to be excluded from consideration, and the only way it can or ought to be put forward at all is a possible illustration of the probability of the land being useful for such a purpose. You must not look at the particular purpose which the defendants in the case before the arbitrator are going to put land to when they take it under Parliamentary powers or undertakings for any special purpose ...'

This principle has been followed invariably and has been enunciated by the Privy Council in a judgment prepared by Lord MacDermott in the case of *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands*¹¹. He said:

'It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition.'

A recent application of the principle is to be found in a judgment of Widgery LJ in *Wilson v Liverpool City Council*¹². He used these words:

'... the purpose of the so-called *Pointe Gourde*¹³ rule is to prevent the acquisition of the land being at a price which is inflated by the very project or scheme which gives rise to the acquisition.'

In the instant case the increase in the value of the interests of the owners in the land must of course be disregarded but this has no application to the ascertainment of those interests. The *Pointe Gourde*¹³ principle is satisfied as the owners contend on the basis that the land is agricultural land ignoring any increased value attributable to the scheme for its use as a reservoir. As Russell LJ put it in the *Pettitt* case¹⁴ the principle relates—

'not to the ascertainment of what is the interest to be valued, but the value of the interest when ascertained.'

⁹ *Re Countess Ossalinsky and Manchester Corp'n* (1883) Browne and Allan's Law of Compensation (2nd Edn, 1903) p 659

¹⁰ *Ibid*, p 662

¹¹ [1947] AC at 572

¹² [1971] 1 All ER 628 at 635, [1971] 1 WLR 302 at 310

¹³ [1947] AC 565

¹⁴ (1968) 20 P & CR at 355, [1969] RVR at 30

a The majority decision in the *Pettitt* case¹⁵ was in my opinion correct.

The right to determine the tenancies was given to the owners by Act of Parliament, the land being required for a use other than agriculture and for this loss they must be compensated. Otherwise they will recover less than their loss which would be wrong: see *Horn v Sunderland Corp*¹⁶, where Scott LJ said¹⁶ that the first leading feature of what is given to the owner compelled to sell is compensation—the right to be put, so far as money can do, in the same position as if his land had not been

b taken from him. The fetter on the determination of the tenancies remains so long as the land is used for agriculture and no longer. The ability to give an effective notice to quit is an element in the value of land and cannot be disregarded. When the precise nature of the interest has been ascertained then the land can be valued.

The second main contention of the board therefore fails and I would dismiss the appeals, other than the cross-appeal.

c This last applies only to the *Footitt* case where the farm was the subject of a lease dated 12th August 1949 for seven years from 25th March 1949. The tenant held over after the expiration of the lease. Clause 1 (3) contains the reservation:

‘The right pursuant to Section 23 (1) of the Agricultural Holdings Act 1948—

d (a) from time to time to resume possession of any part of the said lands and buildings which the Landlords may from time to time require for . . . any . . . purpose (not being the use of the land for agriculture) upon giving to the Tenant not less than forty two days’ previous notice in writing of such requirement . . .’

On this point the doubts expressed by Cairns LJ in the Court of Appeal¹⁷ were in my opinion well founded. There is no question of importing the word ‘landlord’ into the lease. The relevant requirement is the requirement of the landlord and this is

e clearly stated and does not cover the requirement by the board. The reservation in the lease has no application. I would therefore allow the appeal of the board on this point alone.

I agree with the opinion which I understand the majority of your Lordships hold that the appellant board should pay the costs of the respondents on each of the

f appeals, including the appeal on the short point last mentioned.

LORD GARDINER. My Lords, I have had the advantage of reading the speeches of my noble and learned friends and I would concur with the majority.

LORD SIMON OF GLAISDALE. My Lords, the appellants (‘the water board’) required to construct a reservoir. To do this they had, amongst other steps to be

g taken, to obtain planning permission and power of compulsory purchase of land. The land in question involved two farms. One was owned by Mr and Mrs Footitt, the respondents in the first two of these consolidated appeals; the other was owned by the trustees of the will of the late Mr Shaw-Fox, who are the respondents in the third of the consolidated appeals.

The water board are bound to pay compensation for the land they require. It is

h common ground that a person whose property is compulsorily acquired should be paid compensation for the loss he has sustained—no more, no less. On the face of it these appeals are concerned with what compensation should be paid to the respondents in each case. But there is really more to the matter than that: the appeals are brought as test cases. The respondents in each case (or their predecessor in title)

i had let their respective farms to tenants. So the tenants too were liable to lose property in consequence of the water board’s requirements. What the tenants were losing were their leasehold interests; and what the respondents were losing were interests in fee simple in reversion on the determination of their respective tenants’ leasehold

¹⁵ (1968) 20 P & CR 344, [1969] RVR 26

¹⁶ [1941] 1 All ER 480 at 491, [1941] 2 KB 26 at 42

¹⁷ [1971] 1 All ER at 377, [1971] 2 QB at 22, 23

interests. It follows that the larger the tenants' interests, the more remote and less valuable were the respondents' interests as their landlords; and the shorter the tenants' interests, the nearer and more valuable were the interests of the landlords; so that the respective compensation to landlords and tenants must accordingly vary in inverse ratio (even though, owing to technicalities of valuation, the variation is not mathematically exact: the two interests do not add up, as a layman might be excused for supposing, to the value of the fee simple in possession).

Until the water board came on the scene, the tenants were in each case protected under the Agricultural Holdings Act 1948, which supervened on earlier Acts going back to 1923. That meant that they had security of tenure in the ordinary course of events: and provided they farmed efficiently (and there is no evidence that these tenants did not), there was no definite date when their leasehold interests would fall into their landlords' possession. The tenants' interests being thus enlarged by the 1948 Act, the landlords' interests were inversely diminished.

When the land was taken as a result of the water board's requirements, what the tenants in reality lost was the prospect of leasing the land indefinitely; and what the landlords in reality lost was the prospect of regaining the land at the end of the indefinite period of their tenants' holdings. Justice, one would have supposed, would require that compensation should have been assessed accordingly. But in *Minister of Transport v Pettitt*¹⁸ a majority of the Court of Appeal (Lord Denning MR dissenting) held that a tenant enjoying security of tenure under a previous but similar statute to the 1948 Act was to be treated, not as if he had the prospect of holding his tenancy indefinitely, but as if he had been turned out under a provision for a 12 months' notice to quit in his lease as unmodified by the statute; in consequence he would only get small compensation for his loss. In the cases under instant appeal the Court of Appeal¹⁹ considered themselves bound by that decision. They were bound accordingly to hold that the respondents did not, owing to the requirements of the water board, lose the prospect of resuming possession of their land at the end of an indefinite period, but rather lost the far more valuable prospect of resuming possession of their land at the end of 12 months; the respondents were accordingly entitled to large compensation for their loss—compensation which would, of course, in the end have to be paid by the people who were liable for the water rate.

Your Lordships, however, are not bound by *Pettitt's* case¹⁸. It is open to your Lordships to say that *Pettitt's* case¹⁸ was wrongly decided; that the law need not proceed on a basis of unreality and consequent injustice, treating a tenant who has in truth lost the prospect of holding his leasehold interest indefinitely as if he had lost merely the prospect of holding it for 12 months, so as to be entitled accordingly only to small compensation; that the law need not proceed on a basis of unreality and consequent injustice, treating a landlord who has in truth lost the prospect of resuming possession of his land at the end of an indefinite period as if he had lost the prospect of resuming possession of it at the end of 12 months, so that those liable for the water rate have in the end accordingly to foot the bill for large compensation to him. This is the point of the first and third appeals.

The Court of Appeal¹⁹ had to decide another point—the subject-matter of the second appeal—in relation to the Foottits only. There was a clause in their lease giving them as landlords the right to resume possession of the demised land on 42 days' notice in certain circumstances. If this clause meant what the Foottits asserted, what they had lost (and therefore what they were entitled to be compensated for) was the right to resume possession of their land, not after an indefinite period, not even after 12 months, but after 42 days (a far more valuable right still); and it would necessarily follow (although this does not fall for direct decision in this appeal) that all that their tenant would have been entitled to by way of compensation was what would reimburse him for the loss of his leasehold interest for 42 days.

¹⁸ (1968) 20 P & CR 344, [1969] RVR 26

¹⁹ [1971] 1 All ER 373, [1971] 2 QB 14

a My Lords, it is the task of the courts to apply the law as established to the facts as proved; and justice will ordinarily best be done thereby. But since the laws are established by fallible human beings who cannot be expected to foresee every contingency, and since laws deal with general situations to which there may be unfortunate exceptions, it is inevitable that less than perfect justice may sometimes be done. Mercifully, such cases are infrequent; and the instruments of law reform
b have been improved of recent years. Nevertheless it must always be a matter of misgiving if the law seems to proceed on a path which diverges from reality or leads to a conclusion which does not accord with justice.

In invoking the name of justice I am not, my Lords, indulging in forensic rhetoric: the concept lies at the very heart of the legal problem with which your Lordships are concerned—namely, how compensation should be assessed in the event of compulsory purchase. Under our system of government, when private property is
c required for some communal purpose the owner of the property is not expected to bear the entire burden for the benefit of his fellow citizens; the burden is shared equitably by the community, through compensation being paid to the owner to reimburse him, as far as money can do so, for what he has lost, no more, no less. However, if *Pettitt's case*²⁰ stands, the tenants get less than full reimbursement for what they have really lost; if the consequent decision of the Court of Appeal¹ in the
d instant case stands, the landlords get more than full compensation for what they have really lost.

But justice is not merely at the very heart of the legal rule principally concerned in these appeals. It is also available indirectly as a touchstone to assay how far the legal rule has been correctly refined. The lands with which your Lordships are concerned will be adjacent to other lands which the water board did not require.
e Those adjacent lands too may well have been let on tenancies modified by the Agricultural Holdings Act 1948. If the legal rule is correctly refined, the tenants of the lands with which your Lordships are concerned should have been placed, so far as money compensation could do it, *mutatis mutandis* in a similar position to that of the tenants on those adjacent lands, not in a position that is less favourable; and the respondents
f should have been placed, so far as money compensation could do it, *mutatis mutandis* in a similar position to that of the owners of those adjacent lands, not in a position that is more favourable. If the rule in *Pettitt's case*²⁰ is assayed in this way it begins to look somewhat pinchbeck.

But there is yet a third respect in which justice and injustice are relevant to these appeals—at an intermediate stage, and not only as their end-products. An important question in these appeals is what is the proper construction to be put on s 24 (2) (b) of the 1948 Act. It is a canon of statutory interpretation, founded on happy experience,
g that Parliament is presumed to intend justice and to avoid injustice. I believe that that canon of interpretation is available in the instant appeals, so as to preclude a construction which allows landlord or tenant to receive either more or less in money than will compensate for what has truly been lost. But however that may be, I
h believe that the general law of compensation in any event says that the landlord and the tenant should each receive compensation for what has really been lost as a result of the water board requiring the land in which each had an interest. I do not, in other words, believe that this is one of those unfortunate cases where the law proceeds on a path which diverges from reality or leads to a conclusion which does not accord with justice.

I must, however, try to make good these propositions to your Lordships.

j *The factual background*

Mr and Mrs Footitt owned a farm of some 132 acres in the parish of Thurlaston in Warwickshire. By a lease dated 12th August 1949 they let the farm to a Mr Bowie for a term of seven years from 25th March 1949. The lease contained a reservation providing for the re-entry of the Footitts pursuant to s 23 (1) of the Agricultural

Holdings Act 1948 in certain circumstances; I have already referred to this clause, and I shall have to return to it in greater detail later. The lease expired on 25th March 1956; but thereafter, by virtue of s 3 of the 1948 Act, Mr Bowie remained in possession as tenant from year to year, the terms of the original tenancy being otherwise applicable.^a

The Shaw-Fox farm was of about 216 acres in the neighbouring parish of Draycote. It was let to a Mr Bailey by an agreement dated 24th March 1960, the tenancy being deemed by cl 2—^b

‘to have commenced on the Twenty-fifth day of March One thousand nine hundred and Fifty nine and continued from year to year until determined by either Landlord or Tenant on the Twenty-fifth day of March in any year by Twelve months’ notice in writing.’

The Shaw-Fox lease, like the Footitt’s lease, contained a reservation for re-entry by the landlord in certain circumstances, in this case on giving three months’ notice in writing and not extending to more than one-tenth of the farm in any one year; the purposes were certain stated non-agricultural purposes ‘or for any purpose mentioned in Section 31’ of the 1948 Act (to which I shall have to refer later); and provision was made for compensation to the tenant either by substitution of other land or by reduction of rent.^c

No notice to quit was served on either Mr Bowie or Mr Bailey under the reservation clauses or under or by reason of any other provision either contractual or statutory.^d

On 6th April 1966 the Minister of Housing and Local Government gave to the water board planning permission to construct a reservoir on part of the land demised to Mr Bowie and to Mr Bailey. So far as the Footitt/Bowie farm was concerned, the planning permission involved 129 out of the 132 acres; so far as the Shaw-Fox/Bailey farm was concerned, it was 120 out of the 216 acres. (The planning permission must, of course, have been preceded by various carefully worked out steps and statutorily required formalities.) On 22nd August 1966 the Minister made the Rugby and South Warwickshire Water Order 1966², under the Water Acts 1945 and 1948, authorising compulsory acquisition by the water board of the land forming the site of the proposed reservoir. This order came into force on 7th March 1967. The water board served notices to treat on the Footitts and on Mr Shaw-Fox (to be treated as an effective notice in respect of the Shaw-Fox land) on 11th and 14th March 1967 respectively. The notices to treat related to the parts of the land required for the reservoir and invoked the Rugby and South Warwickshire Water Order 1966² and the Compulsory Purchase Act 1965.^e

Compensation in this case falls to be assessed under the Land Compensation Act 1961 and the Compulsory Purchase Act 1965. Nevertheless your Lordships were told from the Bar (although this does not appear in the evidence), that the water board agreed with Mr Bowie and Mr Bailey that they should be paid compensation as provided by the Agriculture (Miscellaneous Provisions) Act 1968, although that Act had not come into force so as to apply to the acquisitions instantly under consideration. I shall have to refer later to the provisions of that Act, if only so as to try to eliminate any element of confusion they might import into the construction of the Acts which concern your Lordships. It is sufficient at this stage to say that the water board agreed to pay to Mr Bowie and to Mr Bailey by way of compensation for disturbance such sums as would have been so payable by their landlords in the circumstances, plus four times the appropriate portion of the annual rent.^f

I go back to the main story. References to determine the proper basis of compensation payable by the water board to the respondents were made to the Lands Tribunal. Certain issues (which are those that arise before your Lordships) should, it was agreed, be disposed of as preliminary issues of law; and since the issues in the Footitts’ case overlapped (were possibly virtually identical with) those in the Shaw-Fox case, all the references were consolidated. The Lands Tribunal were asked to^g

a choose between three possible bases for compensation: (1) that the respondents' interest was a fee simple in agricultural land subject to an annual agricultural tenancy in respect of which the respondents had at the date of the notice to treat no right to give an effective notice to quit; or (2) that at the date of the notice to treat the respondents were entitled to give an effective notice to quit expiring Lady Day 1968; or
b (3) that the Footitts were entitled to give Mr Bowie a 42 day notice to quit. The chairman of the Lands Tribunal, considering himself bound by *Pettitt's case*³, answered that the correct basis of valuation in both cases was that the interest to be valued was a fee simple in agricultural land subject to an annual agricultural tenancy in respect of which at the date of the notice to treat the respondents were entitled to give an effective notice to quit expiring on Lady Day 1968. As regards the contractual reservations for re-entry, the chairman said: 'I do not think that either claimant can rely on the terms of his re-entry clause'. It is not clear now far the Shaw-Fox/Bailey
c landlords have formally submitted any claim based on their own re-entry clause; at any rate that matter has not been pursued further.

The water board appealed to the Court of Appeal⁴ against the finding on the main issue; the Footitts cross-appealed against the finding on the provision for re-entry on 42 days' notice. The Court of Appeal⁴ dismissed the appeal on the main
d issue on the grounds: (1) that they were bound by *Pettitt's case*³ which could not be distinguished; and (2) that the water board's argument on a point not argued in *Pettitt's case*³, based on the construction of s 24 (2) of the 1948 Act, was ill-founded. The Court of Appeal⁴ allowed the cross-appeal by the Footitts; and held that their compensation should be assessed on the basis that they were entitled at the date of the notice to treat to give Mr Bowie a 42 days' notice to quit; Cairns LJ, however, expressed considerable doubt on this point.

e The water board now appeal to your Lordships both on the main issues and on the issue arising from the re-entry clause in the Footitt/Bowie lease. In addition to his argument based on the construction of s 24 (2) (b), counsel for the water board has argued before your Lordships, as he could not do in the Court of Appeal⁴, that *Pettitt's case*³ was wrongly decided and that the dissenting judgment of Lord Denning
f MR should be preferred.

*Pettitt's case*³

Mr Pettitt was a tenant from year to year of a 58 acre farm. The Minister of Transport needed about seven acres of the farm for the construction of a motorway, which was to be driven right across the farm. He gave notice to treat on 6th September 1962. The question how much compensation should be paid to Mr Pettitt was referred
g to the Lands Tribunal. For the purpose of the instant appeals only two of the heads of compensation need be considered—the value to be placed on the seven acres taken and the compensation for the consequent severance and injurious affection of the farm. The Minister contended that the value of the claimant's interest under both heads should be limited to the period ending with the date on which a notice to quit the required land, given at the time of entry, would have expired (which he
h contended was Lady Day 1964). The Lands Tribunal, however, held that regard was to be had to the security of tenure afforded to Mr Pettitt by the Agricultural Holdings Act 1948, in particular s 24 (1); and assessed compensation under both heads accordingly. The Minister appealed. The majority of the Court of Appeal³ (Russell and Winn LJJ, Lord Denning MR dissenting) held that, since the land was required by the Crown for a motorway, s 24 (1) was excluded by the provisions of s 24 (2) (b);
i and that accordingly the claimant's interest in the seven acres which were acquired for the motorway should not be envisaged as having lasted beyond Lady Day 1964.

Lord Denning MR, in his dissenting judgment, said⁵:

3 (1968) 20 P & CR 344, [1969] RVR 26

4 [1971] 1 All ER 373, [1971] 2 QB 14

5 (1968) 20 P & CR at 349, [1969] RVR at 27, 28

'Such being the respective values before the motorway scheme was announced, [ie values on the basis that Mr Pettitt had security of tenure] I think that, prima facie, the owner and the tenant should be compensated for loss of those values. The owner should certainly get no more compensation because of the motorway scheme. In the case of the owner, the Minister could invoke the principle that "compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition": see *Pointe Gourde Quarrying and Transport Co. v Sub-Intendant of Crown Lands*⁶, per Lord MacDermott. Likewise, it seems to me that the tenant should get no less compensation because of the motorway scheme. He should, I think, be compensated for the loss of his prospects of remaining in possession had there been no motorway scheme'.

Russell LJ answered this last point by saying⁷:

'The *Pointe Gourde*⁸ principle . . . I believe to relate not to the ascertainment of what is the interest to be valued, but to the value of the interest when ascertained.'

Under this head of claim in *Pettitt's* case⁹, therefore, two matters were decided: (1) the tenant's property acquired should be valued on the basis that, s 24 (1) being excluded by s 24 (2) (b), the tenant at the relevant date was no longer a tenant with security of tenure under the Agricultural Holdings Act, but one liable to be turned out on a 12 months' notice to quit; and (2) the fact that he became so by virtue of the Minister's entry under compulsory powers was not a consideration that must be excluded under the *Pointe Gourde*⁸ rule. (It is true that Winn LJ did not refer expressly to this second point; but he must, I think, be taken to have agreed with Russell LJ about it.)

Counsel for the water board in the instant case argued before the Court of Appeal¹⁰ a point on the construction of s 24 (2) (b) which was not taken in *Pettitt's* case⁹, but which the Court of Appeal decided against him. On that footing, the Court of Appeal held that the decision on the issue in *Pettitt's* case⁹ with which I have just been dealing covered the instant cases. As Lord Denning MR said¹¹:

'If *Pettitt's* case⁹ was rightly decided (that the tenant only gets small compensation on the basis that he has only 12 months to go), it seems to follow that the owner of the farm should get large compensation on the basis that at the end of the 12 months he would get vacant possession.'

The other relevant issue in *Pettitt's* case⁹ is only indirectly of moment, but has a bearing on the canon of statutory construction against anomaly. The Court of Appeal upheld unanimously the Lands Tribunal decision that the tenant's compensation for severance and injurious affection was to be assessed on the basis (in effect) that he would have continued to enjoy security of tenure in respect of the whole 58 acres of the farm (which includes the seven acres taken for the motorway, compensation for which was, by the decision of the majority, to be assessed on the basis that he did not enjoy security of tenure thereof). The anomaly will be immediately apparent; but I shall have in due course to refer to it further.

The common ground: the rival arguments: some initial comments

There were certain matters which were common ground between the parties, and I think it would be convenient if I state them at this stage: (1) such a sum should

⁶ [1947] AC at 572

⁷ (1968) 20 P & CR at 355, [1969] RVR at 30

⁸ [1947] AC 565

⁹ (1968) 20 P & CR 344, [1969] RVR 26

¹⁰ [1971] 1 All ER 373, [1971] 2 QB 14

¹¹ [1971] 1 All ER at 375, [1971] 2 QB at 20

a be paid by way of compensation to any person who has an interest in land compulsorily acquired as will reimburse him for what he has lost (although the parties differed as to how 'what he has lost' should be adjudged); (2) the date for ascertaining the interest compulsorily acquired is the date of the notice to treat (the references in *Pettitt's case*¹² to the date of entry were presumably because there was no materiality in the date of entry being different from that of the notice to treat; the date of entry in the instant cases does not appear from the evidence); (3) for the purpose of assessing compensation, the interests of the landlord and the tenant respectively must be valued on the assumption that the landlord gave notice to quit on the earliest date after receiving the notice to treat on which he could have given an effective notice to quit, even if he did not in fact give any such notice to quit; (4) the Court of Appeal¹³ in the instant case were right in regarding compensation to be paid to landlords and tenants respectively as varying in inverse ratio—in other words, if *Pettitt's case*¹² stands as good law, then (subject to the point of construction not argued in that case) the water board must fail.

d The main arguments on each side were as follows. For the water board it was principally argued: (1) on the proper construction of the Agricultural Holdings Act Mr Bowie and Mr Bailey never ceased to be tenants enjoying security of tenure; and the respondent's compensation should be assessed accordingly; (2) further, or alternatively, if Mr Bowie and Mr Bailey ceased, by virtue of some provision in the 1948 Act, to enjoy security of tenure on planning permission being given in relation to their land or on the compulsory purchase order or on the service of notice to treat, the law of compensation for compulsory acquisition of land (and in particular the *Pointe Gourde*¹⁴ rule) required that factor to be left out of account in assessing compensation.

e On behalf of the respondents it was principally argued: (1) on the proper construction of the 1948 Act (in particular s 24 (2) (b)) Mr Bowie and Mr Bailey, on planning permission being given in relation to their land or on the compulsory purchase order or on the service of the notice to treat, ceased to enjoy security of tenure and become liable to 12 months' notice to quit; (2) therefore, at the date of the notice to treat, the tenants had an annual tenancy and the respondents a fee simple in reversion to an annual tenancy and each should be compensated accordingly; (3) the *Pointe Gourde*¹⁴ rule is limited to the valuation of the interest as ascertained at the moment of the notice to treat and does not affect the ascertainment of the interest to be valued; (4) the 'scheme' for the purpose of the *Pointe Gourde*¹⁴ rule is limited to the compulsory purchase order (or the notice to treat thereunder) and does not embrace the planning permission.

g Before I turn to examine these arguments in detail, there are three general observations which I hope I can make without seeming ungrateful to counsel for the respondents for advocacy of remarkable attraction and expertise.

h First, whereas the water board can succeed by establishing either point of their argument, in order for the conclusion contended for by the respondents to be valid each link in their chain of argument must be good. In my judgment, there is not merely one link which is unsound, but every single one is so. There is therefore, in my opinion, nothing in the final concatenation to constrain your Lordships from holding, in consonance with reality and justice, that what the tenant has lost (so as to call for compensation), by reason of the water board's requirement and consequent acquisition of the land in which he had an interest, is the right to enjoy his leasehold interest in it indefinitely—with complementary effect on the landlord's interest and right to compensation.

i Secondly, the legal situation which confronts your Lordships demands ultimately a simple answer to a simple question. The question is: what has the tenant lost for which he should be compensated by reason of the fact that the land in which he

12 (1968) 20 P & CR 344; [1969] RVR 26

13 [1971] 1 All ER 373, [1971] 2 QB 14

14 [1947] AC 565

enjoyed a leasehold interest was required (the word in the section of the statute on which the respondents themselves rely) by the water board in such circumstances that they compulsorily acquired it? The answer is that he has lost a leasehold interest which, by reason of the Agricultural Holdings Act, he could have expected to enjoy indefinitely. To chop the simple question up into a number of other questions the combined answers to which return some conclusion inconsistent with the simple answer is not logic but chop logic.

Thirdly, even if the argument were logically unimpeachable, that would not be an end of the matter. Logic is a handmaid of the law, not her mistress: in the famous words of Holmes J, 'The life of the law has not been logic; it has been experience'. The purpose and value of logic to the law is to ensure that persons whose relevant circumstances are similar receive similar treatment. It is, in other words, to promote equity: to use it to defeat equity is to misuse it. It follows, however, that logic is relevant when it comes to comparing the position of the respondents' tenants as compensated with adjacent tenants enjoying security of tenure under the Agricultural Holdings Act.

Agriculture (Miscellaneous Provisions) Act 1968

I venture to interpolate at this stage some observations on the 1968 Act, in the hope of thereby avoiding its confusing the real issues before your Lordships. By s 42 compensation in connection with compulsory acquisition of an agricultural holding is expressly to be assessed *without* regard to the tenant's prospects, if any, of remaining in possession after the earliest date on which, apart from the acquisition or taking of possession, the landlord could obtain possession of the holding in pursuance of a valid notice to quit served on the tenant as soon as possible after notice to treat has been served on the landlord (but, interestingly, disregarding any provisions for re-entry such as are to be found in the two leases with which your Lordships are concerned). By ss 9 and 12 an acquiring authority (or, indeed, a landlord giving a notice to quit in accordance with the terms of the lease) has to pay a sum equal to four times the annual rent of the holding or, in the case of part of a holding, four times the appropriate portion of that rent, in addition to any compensation for disturbance payable by the landlord to the tenant (which itself becomes payable by the acquiring authority).

The construction of the 1968 Act is likely to present serious problems: first, it refers expressly only to the compulsory acquisition of the tenant's interest, but it might be held, on the 'inverse ratio' principle, impliedly to affect the compensation to the landlord; secondly, the Act was passed after the decision by the Lands Tribunal in *Pettitt's case*¹⁵ but before that decision was reversed by the majority of the Court of Appeal.

If *Pettitt's case*¹⁵ is affirmed, an acquiring authority may have to pay more for land subject to an agricultural tenancy than it would have to pay for similar land being farmed by the owner of the fee simple himself. What would be the position if *Pettitt's case*¹⁵ is overruled is far from easy to determine. Even assuming that the 1968 Act is construed as affecting only the tenants' interest, if *Pettitt's case*¹⁵ is overruled it does not follow that an acquiring authority will necessarily have to pay less for land subject to an agricultural tenancy than for similar land farmed by the owner in fee simple; how the respective figures compare may depend on such uncertain factors as the age and efficiency of the tenant—nor did I understand counsel for the water board to concede otherwise.

It is unusual for a later statute to be of much use in the construction of an earlier one; and this does not seem to me to be one of those exceptional cases. All that one can say is that the 1968 Act is an example of Parliament, when it wished security of tenure to be disregarded for the purpose of compensation on compulsory

¹⁵ (1968) 20 P & CR 344, [1969] RVR 26, *rvsg* (1967) 19 P & CR 112, [1967] RVR 685

a acquisition, saying so expressly—as will appear, the 1968 Act does not stand alone in this respect.

Agricultural Holdings Act 1948

At common law an agricultural tenancy, like others, could be for a year or for more or less than a year. By s 2 of the 1948 Act agricultural land could not be let for a term less than a year (which would, of course, allow tenancies from year to year); and by b s 3 tenancies for two years or more, unless terminated by notice, were to continue as tenancies from year to year. (It was by virtue of this provision that Mr Bowie continued as a yearly tenant of Mr and Mrs Footitt after 1956.)

From s 23 inclusive onwards there is a series of sections dealing with notices to quit. At common law, in the absence of contrary agreement, yearly tenancies (as both tenancies with which your Lordships are dealing had become) were terminable by c half a year's notice to quit. But by s 23 12 months' notice to quit an agricultural holding or part of an agricultural holding had to be given. I must set out s 23 (1) in greater detail:

d 'A notice to quit an agricultural holding or part of an agricultural holding shall (notwithstanding any provision to the contrary in the contract of tenancy of the holding) be invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the then current year of tenancy: Provided that this section shall not apply—. . . (b) to a notice given in pursuance of a provision in the contract of tenancy authorising the resumption of possession of the holding or some part thereof for some specified purpose other than the use of the land for agriculture; . . .'

e It was by virtue of this proviso, coupled with the reservation in their lease, that Mr and Mrs Footitt claimed to be entitled to be compensated on the basis that they held a fee simple in reversion to a 42 day lease.

Section 24 may be of crucial significance in this case. It is this section (which must be read together with the succeeding ones) which, indirectly, gives the agricultural tenant security of tenure. It does this by enabling the tenant, except in certain f excluded cases, to challenge the notice to quit by a counter-notice, and thereby force the landlord to apply to the Agricultural Land Tribunal for consent to the operation of the notice to quit: if the landlord does not apply in time, or if his application is unsuccessful, the notice to quit does not take effect. I cite s 24 as amended by the Agriculture Act 1958:

g '(1) Where notice to quit an agricultural holding or part of an agricultural holding is given to the tenant thereof, and not later than one month from the giving of the notice to quit the tenant serves on the landlord a counter-notice in writing requiring that this subsection shall apply to the notice to quit, then, subject to the provisions of the next following subsection, the notice to quit shall not have effect unless the Agricultural Land Tribunal consents to the h operation thereof.

'(2) The foregoing subsection shall not apply where—. . . (b) the notice to quit is given on the ground that the land is required for a use, other than for agriculture, for which permission has been granted on an application made under the enactments relating to town and country planning, or for which (otherwise than by virtue of any provision of those enactments) such permission j is not required, and that fact is stated in the notice . . .'

Section 31 provides that notices to quit part of a holding are not to be invalid in certain cases. Such a provision was required for two reasons: first, because at common law a notice to quit part of demised land is bad in the absence of a clause in the tenancy agreement allowing such notice to be given; and, secondly, because s 23 merely said that a less than 12 months' notice to quit part of an agricultural holding should

be invalid, not that a 12 months' notice to quit part of such a holding should be good. It follows that ss 23 and 24 must be read together with s 31; and, indeed, since it was in both instant cases only part of the farms that was required by the water board, that s 31 as well as s 23 must be satisfied in both cases. (The reservation in the Shaw-Fox/Bailey lease, which invokes s 31, is of no materiality, since it permitted re-entry only into one-tenth of the farm in any one year, and a bigger proportion was affected by the planning permission, the compulsory purchase order and the notice to treat.) The relevant provisions of s 31 are as follows:

'(1) A notice to quit part of an agricultural holding held on a tenancy from year to year given by the landlord of the holding shall not be invalid on the ground that it relates to part only of the holding if it is given . . . with a view to the use of the land to which the notice relates for any of the objects mentioned in the following subsection, and the notice states that it is given . . . with a view to any such use as aforesaid. . . .

'(2) The objects referred to in the foregoing subsection are the following, namely,— . . . (g) the making of a watercourse or reservoir . . .'

Sections 32 and 33 modify s 31; and therefore, like s 31, must be read together with ss 23 and 24. Section 32 gives the tenant a right to cause a notice to quit part of a holding to operate as notice to quit the entire holding; and s 33 provides for reduction of rent where notice is given to quit part of a holding. The terms of s 33 are of great importance when it comes to construing ss 24 and 31; and I italicise the words which will be of particular significance.

'Where the landlord of an agricultural holding resumes possession of part of the holding either—(a) by virtue of subsection (1) of section thirty-one of this Act; . . . the tenant shall be entitled to a reduction of rent . . .'

The interpretation of s 24 (2) (b)

I have already cited s 24 (2) (b). It was argued for the respondents that its effect was to enable notice to quit to be given effectively under s 23, without the tenants being able to give a counter-notice under s 24 (1), since, at the moment of (or before) the notice to treat, this land was required by the water board for use other than for agriculture (ie construction of a reservoir) in respect of which planning permission had been granted. It was argued for the water board, and controverted for the respondents, that 'required' in that paragraph should be read as 'required by the landlord'. This point was not argued in *Pettitt's case*¹⁶, but the Court of Appeal¹⁷ in the instant case unanimously rejected the water board's contention. Before I come to consider the arguments put forward by each side on this part of the case, I venture to submit to your Lordships some general observations by way of approach to the questions of construction. In doing so I propose to use the terms 'Parliament' and 'draftsman' interchangeably, according as the context seems to make the use of either preferable.

The task of the courts is to ascertain what was the intention of Parliament, actual or to be imputed, in relation to the facts as found by the court. There are a number of established canons of interpretation to assist the courts in ascertaining and applying the parliamentary intention. These canons have two aspects: first, as a code of communication whereby the draftsman signals the parliamentary intention to the courts; and, secondly, as the quintessence of what experience has found to be the best guide to parliamentary intention. Different canons of interpretation will be more useful according to whether the first or second of these aspects is dominant. For example, if it seems likely that the draftsman has envisaged the actual situation facing the court, it is the more likely that an intention as to the legal result has been formed and evinced; so that the aspect of the canons as a code of communication will be

¹⁶ (1968) 20 P & CR 344, [1969] RVR 26 (affirmed on appeal).

¹⁷ [1971] 1 All ER 373, [1971] 2 QB 14 (affirmed on appeal).

- a dominant, and such a rule as that the words of a statute dealing with ordinary affairs are used in their ordinary meaning and with normal grammatical sense will be particularly significant. If, on the other hand, it seems likely that the draftsman had not envisaged the actual situation facing the court, it may be necessary to impute an intention to Parliament, by trying to ascertain what in all the circumstances would have been the likely intention of Parliament in relation to the actual situation had it been envisaged; so that the aspect of the canons as the quintessence of what experience b has found to be the best guide to parliamentary intention will be dominant, and such a rule as that Parliament is to be presumed to intend justice and avoid injustice or anomaly will be particularly significant.

- But the foregoing does not exhaust every possible relationship between Parliament and the actual forensic situation which is relevant to the parliamentary intention. It may seem likely that the draftsman has envisaged the actual forensic situation, c in which case he is likely also to have evinced an intention in relation thereto. It may seem likely that the draftsman has envisaged a situation different from the actual forensic situation and evinced an intention in relation to the former which may have certain consequences for the latter: in that case it will be necessary to determine whether the consequences are inevitable; and, if not inevitable, how Parliament is d likely to have regarded the consequences—whether welcome (as consonant with the general strategy of the Act), or acceptable, or to be avoided if at all possible.

- On scrutiny of a statutory provision, it will generally appear that a given situation was within the direct contemplation of the draftsman as the situation calling for statutory regulation: this may be called 'the primary situation'. As to this, Parliament will certainly have manifested an intention—'the primary statutory intention'. e But situations other than the primary situation may present themselves for judicial decision—secondary situations. As regards these secondary situations, it may seem likely in some cases that the draftsman had them in contemplation; in others not. Where it seems likely that a secondary situation was not within the draftsman's contemplation, it will be necessary for the court to impute an intention to Parliament in the way I have described, i.e. to determine what would have been the statutory f intention if the secondary situation had been within parliamentary contemplation (a secondary intention). But since the application of the primary statutory intention to the primary situation may inescapably affect some secondary situations, there must be an overriding rule that it is inadmissible to apply any canon of construction to ascertain a secondary (or imputed) statutory intention in relation to a secondary situation if the application of that canon of construction would have the effect of g frustrating the primary statutory intention in relation to the primary situation. To apply that proposition to the instant case, it would be inadmissible to read the word 'required' as meaning 'required by the landlord' if to do so would frustrate the ascertainable statutory intention in relation to a situation which the draftsman is likely to have had in contemplation.

- That primary situation and that primary statutory intention seem to me to be beyond doubt as regards s 24 (2) (b). By serving a counter-notice under s 24 (1) the h tenant can prevent a notice to quit from taking effect without the landlord's first obtaining the consent of the Agricultural Land Tribunal. But if the notice to quit has been served because the land is required for a non-agricultural use for which planning permission has been given, a decision will already have been made that the land should be used for a purpose inconsistent with the agricultural tenancy. It was therefore necessary to obviate a second (and, theoretically, inconsistent) decision j on the very same matter. Hence the provisions of s 24 (2) (b).

Not only does this seem to me to have been, beyond any doubt, the primary situation and the primary statutory intention, I find it quite impossible in any case to believe that the primary statutory intention was to bring about the result contended for by the respondents. For one thing, it is plainly unjust, for the reasons which I have already ventured to submit to your Lordships—the most cogent among many

being that the expropriated agricultural tenant does not receive compensation which places him, so far as money can do so, in a similar position to a neighbouring agricultural tenant fortunate enough not to have his land expropriated for the construction of a reservoir, so that the expropriated tenant would be required to bear personally a disproportionate burden of the cost of constructing a reservoir for communal purposes. For another thing, almost the last place where I should expect to find Parliament evincing an intention as to how compensation should be assessed on compulsory purchase of agricultural lands is in a section dealing with the machinery of counter-notices to notices to quit.

But the fact that it was not the primary statutory intention to bring about the result contended for by the respondents does not dispose finally of their case: they may be able to succeed in spelling out a secondary statutory intention in regard to a secondary situation—namely, that which actually confronts your Lordships. Moreover, although it is not difficult to discern the primary situation envisaged in s 24 (2) (b) and the primary statutory intention in relation thereto, it is less easy to be certain whether the draftsman had the instant situation in contemplation as a secondary situation (a consideration that affects which canons of interpretation are dominant); and although one can be certain that Parliament would have wished to obviate the injustice inherent in the respondents' construction if it had been possible without detriment to the vindication of the primary statutory intention, it remains for consideration whether that would be possible—to be specific, whether reading 'required' as meaning 'required by the landlord' would frustrate what is plainly the primary statutory intention in relation to the primary situation. Finally, the possibility must be borne in mind that the draftsman did have the instant situation in contemplation, but believed that injustice would be avoided by the application of the *Pointe Gourde*¹⁸ rule; if he did believe that, he was justified by the judgment of Lord Denning MR in *Pettitt's* case¹⁹, but was disappointed in his expectations by the majority of the Court of Appeal in that case. Parliament, of course, assumes responsibility for any mistake by the draftsman, however excusable; and Mr Pettitt, Mr Bowie, Mr Bailey, the payers of the water rate, and others in a similar position, must bear any consequent misfortune with such stoicism as they can command.

With this exordium I turn to examine the rival arguments on construction. The water board claim that the context demands that 'requires' should be read as 'required by the landlord' and that justice also so demands (construction according to context and construction to promote justice and obviate injustice both being established canons of statutory interpretation). The respondents, on the other hand, say that the words should be read in their ordinary meaning, without addition of words which could have appeared, but do not; that the general purpose of the Act demands the construction they favour; and that to read the words 'by the landlord' into the subsection would produce anomaly (construction according to plain words, construction according to the purpose of the Act and construction to obviate anomaly also being canons of statutory interpretation).

Construction according to 'plain words' and to context. I have already indicated that the canon of construction according to 'plain words' is dominant, because most relevant and therefore most useful, when the forensic situation calling for decision is likely to have been within the contemplation of the draftsman. I am perfectly convinced that the instant situation was not the primary situation with which he was concerned. On the whole I think it unlikely that the instant situation was within the draftsman's contemplation at all; although I cannot exclude the possibility that it was, and that he thought that it was taken care of by the *Pointe Gourde*¹⁸ rule. But, it is, in my view, unnecessary to pursue this question further; there is no room, in any case for the application of the 'plain words' canon—simply because the words are not plain. It is true that, if you look at s 24 (2) (b) alone, the words are plain enough,

¹⁸ [1947] AC 555. ¹⁹ (1968) 20 P & CR 344, [1969] RVR 26

a and 'by the landlord' does not appear in the paragraph. But statutory words must always be construed in their context, and this rule applies with particular force when provisions are interdependent. I have already ventured to point out why s 24 cannot be construed alone; it is self-evidently not independent; and it must be construed along with the sections with which it is connected, which include s 33. In that section appear the words 'the landlord . . . resumes possession'. This makes it at least permissible, if not absolutely necessary, to read the words 'by the landlord' into s 24 (2) (b). I would only add, with reference to the 'plain words' argument, that this is certainly not one of those cases in which it can be said that, whatever Parliament was aiming at, it hit the respondents' target fair and square; if Parliament has hit the respondents' target, it has done so with extreme obliquity and from a most unlikely angle.

c *Construction according to the purpose of the statute.* It was argued for the respondents that the purpose of the statute was to affect the relationship of landlord and tenant, and to protect tenants, only so long as the land was used for agriculture. This is correct if it states no more than the truism that the Act deals with agricultural holdings, other contracts of tenancy being dealt with by the Landlord and Tenant Act 1954, from which agricultural tenancies were excepted (s 43 (1) (a)). (It is significant, however, that, in the 1954 Act, where Parliament intended that compensation on compulsory acquisition should take no account of the tenant's security of tenure, it said so expressly (s 39)—just as it did in the 1968 Act.) But I do not accept the respondents' argument that the dominant purpose of this Act was to promote efficiency of agriculture, so that its provisions are only relevant while the land is being farmed. No doubt the Act erected long-stops to guard against inefficient husbandry; but, if this had been its dominant purpose, it would have been, but is not, made a ground for a landlord's resuming possession that the land would be more efficiently farmed if he resumed possession. The dominant purpose seems to me to be quite other. This is one of those many Acts (including the 1954 Act) regulating relations between landlord and tenant, rendered necessary by inequality of bargaining power between landlord and tenant, so that reliance on the common law and the terms of the contract of tenancy was liable to cause injustice to the tenant. The inequality of bargaining power particularly affected the tenant *after* his rights ceased at common law, i.e. when the agricultural tenancy came to an end. To relegate the tenant to his rights at common law merely because he has ceased farming is, in fact, to run directly counter to the whole general purpose of the Act, which can be gathered from many other provisions than those which I have cited (eg those relating to compensation for tenant's improvements on the termination of the tenancy). The Act deals separately with agricultural holdings for reasons of convenience and of legal history. Other types of tenant are given security of tenure by other Acts. The canon of interpretation according to the general purpose of the Act favours the construction proposed by the water board rather than that advanced by the respondents.

g *Construction with reference to anomaly.* The respondents relied strongly on an argument to the following effect. Section 24 (2) (b) is not confined to planning permission obtained by a statutory undertaker prior to compulsory purchase; it applies equally to planning permission, obtained in his capacity of 'prospective purchaser', by a private developer who subsequently buys by agreement from the owner (see Town and Country Planning Act 1962, s 16). On either construction this latter case falls within s 24 (2) (b), since the land is in such circumstances required by the owner, i.e. in order to sell it to the developer. (To take such a case out of s 24 (2) (b) it would be necessary to add the further words 'required by the owner for his own purpose', which, as will appear, would frustrate the primary statutory intention.) But if an effective 12 months' notice to quit can be served in such a case, without the possibility of a counter-notice involving reference to the Agricultural Land Tribunal, what the owner has to sell to the 'prospective purchaser' who has obtained planning permission is the valuable fee simple in reversion to an annual tenancy. It would be anomalous (it is argued)

if, simply because the purchaser is a statutory undertaker acquiring the land under compulsory powers, all that the owner should have to sell would be the far less valuable fee simple in reversion to a protected tenancy. a

To this argument there are, in my judgment, four main answers. First, the alleged anomaly must be viewed as it would have appeared in 1948: *contemporanea expositio est fortissima in lege*. Secondly, the position of the landlord vis-à-vis his neighbouring landlord on the water board's contention is generally no more than the counterpart of that of the tenant, at best and in the particular instance, vis-à-vis his neighbouring tenant on the respondents' construction; the tenant, on the respondents' construction, will not be put, so far as money compensation can do it, in the same position as a neighbouring tenant-farmer, who continues to enjoy security of tenure. Thirdly, some other, truly startling, anomalies are thrown up on the respondents' construction. Fourthly, the law abhors anomaly because an anomaly involves treating A more favourably than B in similar circumstances; the canon of construction to obviate anomaly is, in other words, only a particular aspect of the canon of construction to obviate injustice (see Maxwell on Statutes²⁰ and Craies on Statute Law¹); and the balance of justice clearly favours the water board's construction of the statute. b

First, then, for the *contemporanea expositio*. By the Town and Country Planning Act 1947 all rights to develop land were nationalised, a development charge of 100 per cent being payable on all private development (s 69). A compensation fund of £300,000,000 was set up, to be paid out to persons who had development values in land in 1949, their claims if necessary to be abated rateably (s 58). It was accepted by counsel for the respondents that both landlords and tenants of the lands with which your Lordships are concerned would have had claims on the compensation fund; that, for the purposes of such claims, the tenants would have been treated not as subject to a 12 months' notice to quit, but as enjoying security of tenure under the Agricultural Holdings Act; and that the landlords' claims also would be treated accordingly. It follows that the alleged anomaly virtually disappears; the owner has in effect no development right to sell to a private developer; and both he and his tenant will have received compensation for the loss of their development rights on the basis that the tenant had security of tenure. The anomaly would be if, when it came to compensation for all that remained (existing use value), landlord and tenant were to be compensated on the basis that the tenant did *not* have security of tenure. The point is emphasised by the fact that the 1947 Act itself (in Part V) amended the law relating to compulsory acquisition of land. c

As for other anomalies arising on the respondents' construction, I put forward one of the most startling with some diffidence, since it was not explored in argument. However, it is a point which appears on the face of the decision in *Pettitt's case*², and I have already referred to it. It is that, although compensation for the seven acres compulsorily acquired was to be on the basis that the tenant did *not* enjoy security of its tenure, compensation for severance and injurious affection was to be on the basis that he *did* enjoy security of tenure of the whole 58 acres, including the seven acres compulsorily acquired. As Winn LJ put it³: d

... I think that there is no relevance to be attributed to the period of time at the expiry of which the claimant could be required to quit the 7.5 acres. The Act of 1845⁴ requires an assessment of the damage done to the tenancy as a whole, and this is a tenancy which, with respect to some fifty acres, would have continued for an interminable but substantial period of time. Had the whole of the land held under the tenancy, viz., fifty-eight acres, been acquired, it would, of e

20 (1969) 12th Edn, ch 10

1 (1971) 7th Edn, p 86

2 (1968) 20 P & CR 344, [1969] RVR 26

3 (1968) 20 P & CR at 360, [1969] RVR at 31, 32

4 I.e. the Lands Clauses Consolidation Act 1845 f

- a course, have been appropriate to value the claimant's interest in the whole for such period only as he was entitled to retain possession and use of those fifty-eight acres. The fact, however, that part of the whole holding could not in the circumstances of the case be retained for as long as the rest of the holding does not, as I see the matter, mean that the damage to that part of the holding which is retained will be experienced only during the period before Lady Day 1964,
- b at which date it must be taken that the claimant's interest in the 7.5 acres would have ceased. On the contrary, so long as he holds or is taken to have been likely to have held the other fifty acres, the difference between the value to him, for the purposes of his user, of the former holding and that of the reduced holding after the loss of the 7.5 acres is a continuing loss and damage . . .

- c Applied to the Foottits' land, this would mean that Mr Bowie would be compensated for the loss of 129 acres on the basis that he did *not* enjoy security of its tenure; but that he would be compensated for its severance from and the injurious affection of the 129 + 3 acres on the basis that he *did* enjoy security of its tenure. And were reliance placed on the word 'is taken to have been likely to have held the other fifty acres' in Winn LJ's judgment, and were it said that no farmer would nowadays be likely to remain in occupation of 3 acres (even with a cow), I would point out that
- d this seems to involve the further anomaly that the more of a tenant's land is taken, the less compensation he gets.

- There is yet another anomaly, which will also be relevant when it comes to determining the ambit of the *Pointe Gourde*⁵ rule. On the respondents' construction, the landlord would be compensated for the loss of something he could never actually enjoy, even on their own argument, namely, a fee simple in reversion to an annual
- e tenancy. Fee simple nowadays implies absolute ownership—the right to enjoy, or dispose of, or transmit enjoyment of, the land in perpetuity. Two conditions have to be satisfied before s 24 (2) (b) comes into operation to preclude s 24 (1) from barring an effective notice to quit:—(i) the land must be 'required' for a use other than agriculture; (ii) planning permission must have been given for such use. The earliest
- f date that the land was 'required' for a use other than agriculture, was the date of the notice to treat (it was common ground that the landlords must be taken to have given notice to quit *after* receiving notice to treat). But at the very moment of the notice to treat, the landlords became liable to surrender the land to the water board.

- But the greatest anomaly of all is one I have already referred to: and it shows how far anomaly and injustice are overlapping concepts. On the respondents' construction the tenants who have been unfortunate enough to have their land required for
- g the construction of a reservoir are not placed, so far as money compensation can do it, in as favourable a position as neighbouring tenant-farmers; so that Mr Bowie and Mr Bailey are required, in effect, themselves, at their moment of expropriation, to subsidise the construction of the reservoir for the benefit of their more fortunate neighbours.

- I have no doubt that far greater and more outrageous anomalies arise out of the
- h construction proposed by the respondents than arise out of the construction proposed by the water board. I myself respectfully agree with the view of Lord Denning MR in *Pettitt's case*⁶ that the *Pointe Gourde*⁵ rule operates to prevent the landlords receiving more compensation and the tenants receiving less compensation as a result of the water board having, in order to carry out their scheme for a reservoir, had to obtain planning permission as well as a compulsory purchase order: I think that that well-
- i established rule operates absolutely to prevent any alteration of the value of the land by the operation of any part of the machinery of the scheme, so that the planning permission did not, for compensation purposes, alter a valuable protected tenancy into a less valuable annual tenancy. But if this were not so, I think that the canon of construction by context (invoking s 33) would permit, and that the canons

of construction to promote justice and to obviate the balance of anomaly would demand, that s 24 (2) (b) should be read, as proposed by the water board, to mean 'required by the landlord'—unless such a reading would frustrate the primary intention of Parliament in enacting that paragraph. Finally, then, in this part of the case, I turn to consider that question.

Frustration of primary intention? To read 'required' as meaning 'required by the landlord for his own purposes' would frustrate the primary statutory intention; since, where the landlord sells to a private developer who has got planning permission as 'a potential purchaser', counter-notice could be given under s 24 (1), and the question whether the land should be used for a non-agricultural use would fall for determination afresh, this time before the Agricultural Land Tribunal. Therefore, however much such a construction would be justified by contextual indications (which I cannot, in fact, find), and however requisite such a construction might be to do justice or prevent an anomaly, such a construction would be inadmissible. But merely to read 'required' as meaning 'required by the landlord', would not, in my view, frustrate the primary statutory intention. There are only three situations which need be considered: first, cases of compulsory acquisition like the instant; secondly, the landlord himself being the developer; and, thirdly, the 'potential purchaser' being the developer. The first situation presents no difficulty; notice to quit is not in fact given, but is purely notional; so that the water board's interpretation only affects the quantum and incidence of compensation, and does so in a way to obviate injustice and anomaly. Nor does the second situation (i.e. where the landlord is himself the developer) present any difficulty; the case falls squarely within the words 'required by the landlord'; and no counter-notice can be given. Nor does the third case (planning permission obtained by a 'potential purchaser'); the land is required by the landlord—for sale to the 'potential purchaser'. It follows that in none of the three cases would a second hearing of the question of non-agricultural use be involved; so that the primary statutory intention will not be frustrated.

It further follows that, in my view, the construction proposed by the water board is the correct one. But, were this not so, I think that they are right on the applicability of the *Pointe Gourde*⁷ rule, to which I now turn.

*The Pointe Gourde*⁷ rule

The status of the rule has not been questioned; the only question has been as to its ambit. It has a long history and high authority. It is most conveniently stated in the case which has lent it the name by which it is now usually known: *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands*⁷. In connection with the establishment of a naval base in Trinidad, the Crown compulsorily acquired quarry land owned by the appellant company. The value of the quarry land was increased by the construction of the naval base, which was nearby and required a large quantity of stone. It will be noted that this increased value was due, not to the compulsory acquisition itself, but to the undertaking for the benefit of which the compulsory powers were used. (To apply it to the present case, for 'naval base' read 'reservoir'.) The Privy Council held that the compensation for the quarry land compulsorily acquired should not take into account its increase in value due to the construction of the naval base. Lord MacDermott said⁸:

'It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the *scheme underlying the acquisition*.'

I venture to draw particular attention to the words I have italicised. It is not merely the effect on value of the acquisition itself which must be discounted, but also the

⁷ [1947] AC 565

⁸ [1947] AC at 572

a effect on value of the underlying scheme. This is in line with numerous previous statements of the rule: I cite only a few of the many that are available (in all cases the italics are mine). In *Re Gough and Aspatria, Silloth and District Joint Water Board*⁹, Lord Alverstone CJ, presiding over the Court of Appeal, cited with approval what had been said, in the judgment appealed from, by Wright J¹⁰:

b '... there is no value for which compensation ought to be given... if the value is created or enhanced simply by the Act or by the scheme of the promoters.'

Lord Alverstone CJ added: 'In my opinion that clearly expresses what is the law on the matter'. It will be noted that it is not simply the value created or enhanced by the Act which gave compulsory powers of acquisition which must be discounted, but any value created or enhanced by the scheme of the promoters. In *Re South Eastern Ry Co and London County Council's Contract*¹¹ Eve J, in a judgment affirmed by the Court of Appeal, stated the law as follows, his second, fourth and fifth propositions being the ones of crucial importance:

d '... the following propositions may, I think, be treated as established by authorities binding on this Court: (1.) The value to be ascertained is the value to the vendor, not its value to the purchaser; (2.) in fixing the value to the vendor all restrictions imposed on the user and enjoyment of the land in his hands are to be taken into account, but the possibility of such restrictions being modified or removed for his benefit is not to be overlooked; (3.) market price is not a conclusive test of real value; (4.) *increase in value consequent on the execution of the undertaking for or in connection with which the purchase is made must be disregarded*; (5.) the value to be ascertained is the price to be paid for the land with all its potentialities and with all the use made of it by the vendor; and (6.) the true contractual relations of the parties—that of purchaser and vendor—is not to be obscured by endeavouring to construe it as another contractual relation altogether—that of indemnifier and indemnified.'

In *Viscount Camrose v Basingstoke Corpn*¹² Lord Denning MR said:

f '... you do not take into account an increase in value of that parcel of land if the increase is entirely due to the scheme involving the acquisition.'

All these statements show that you must discount not merely value engendered by the acquisition itself but also value engendered by the scheme underlying or involved. But there is further high authority throwing light on what is meant by 'scheme' in this connection. In *Fraser v Fraserville City*¹³ Lord Buckmaster said:

g '... the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, *excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case.*'

h In *Wilson v Liverpool Corpn*¹⁴ Widgery LJ, a learned judge who has had deeper and wider experience of this branch of the law than any who has sat on the bench, said:

j 'Whenever land is to be compulsorily acquired, this must be in consequence of some scheme or undertaking or project. Unless there is some scheme or undertaking or project compulsory powers of acquisition will not arise at all,

9 [1904] 1 KB 417 at 423

10 [1903] 1 KB 574 at 576

11 [1915] 2 Ch 252 at 258, 259

12 [1966] 3 All ER 161 at 164, [1966] 1 WLR 1100 at 1107

13 [1917] AC 187 at 194

14 [1971] 1 All ER 628 at 635, [1971] 1 WLR 302 at 310

and it would I think be a great mistake if we tended to focus our attention on the word "scheme" as though it had some magic of its own. It is merely synonymous with the other words to which I have referred, and the purpose of the so-called *Pointe Gourde*¹⁵ rule is to prevent the acquisition of the land being at a price which is inflated by the very project or scheme which gives rise to the acquisition'.

My Lords, if this is, as I believe, a correct statement of the law, it is, in my respectful submission, conclusive of these appeals. It is clear from this cited passage, as well as from the other passages that I have cited, that 'scheme', when used in the authorities in this branch of the law, extends to matters arising before, though connected with, the compulsory purchase. Although what the 'scheme' consists of is a question of fact it is a question which in the instant cases admits of only one answer. The obtaining of planning permission for their reservoir was unquestionably part of the 'scheme or undertaking or project' of reservoir construction, in furtherance of which the water board's compulsory powers of acquisition, too, were exercised. To apply the actual terminology of Widgery LJ, the so-called *Pointe Gourde*¹⁵ rule prevents the acquisition of the land in question here being at a price which is inflated by the very project or scheme which gives rise to the acquisition; it therefore prevents the acquisition of these lands being at a price which is inflated by the planning permission which is part of the very project or scheme which gave rise to the acquisition; and, since the compensation payable to the tenant varies inversely with that paid to the landlord, the *Pointe Gourde*¹⁵ rule prevents the acquisition of the former's interest in the land being at a price which is deflated by the planning permission which is part of the very scheme or undertaking or project which gave rise to the acquisition.

Faced with a rule, carefully framed by high authority, which on the face of it applies exactly to the instant appeals, the respondents relied on the pungently expressed dictum of Russell LJ in *Pettitt's case*¹⁶:

'The *Pointe Gourde*¹⁵ principle . . . I believe to relate not to the ascertainment of what is the interest to be valued, but to the value of the interest when ascertained.'

My Lords, I believe that to attempt so to confine the *Pointe Gourde*¹⁵ rule is at variance with principle, is devoid of authority (indeed, contrary to authority), and is potential of injustice. I have already referred to the injustices; and I do not propose to repeat them.

As for principle, it is wrong to treat the *Pointe Gourde*¹⁵ rule as a fundamental rule standing by itself—as can be seen from Eve J's tabulation¹⁷. On the contrary, it is a subsidiary rule, evolved to ensure that the fundamental rules of compensation are correctly applied where the value of the land acquired is affected by the scheme or undertaking or project underlying the acquisition. The basic rule is thus stated in *Cripps on Compulsory Acquisition of Land*¹⁸:

'What the Act gives to the owner compelled to sell is compensation, the right to be put so far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains the right to secure a money payment not less than the loss imposed on him in the public interest, but on the other hand no greater.'

The judgment of Scott LJ in *Horn v Sunderland Corpn*¹⁹ is clear authority for this proposition. He said²⁰:

¹⁵ [1947] AC 565

¹⁶ (1968) 20 P & CR at 355, [1969] RVR at 30

¹⁷ In *Re South Eastern Ry Co and London County Council's Contract* [1915] 2 Ch at 258, 259

¹⁸ (1962) 11th Edn, pp 673, 674

¹⁹ [1941] 1 All ER 480, [1941] 2 KB 26

²⁰ [1941] 1 All ER at 491, [1941] 2 KB at 42

a '... what it gives to the owner compelled to sell is compensation—the right to be put, so far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains the right to receive a money payment not less than the loss imposed on him in the public's interest, but, on the other hand no greater.'

In a subsequent passage he said¹:

b 'The statutory compensation cannot and must not exceed the owner's total loss, for, if it does, it will put an unfair burden upon the public authority or other promoters, who on public grounds have been given the power of compulsory acquisition, and it will transgress the principle of equivalence which is at the root of statutory compensation, which lays it down that the owner shall be paid neither less nor more than his loss.'

c The purpose of the *Pointe Gourde*² rule is thus clear. You must not allow the price to be paid for property compulsorily acquired to be inflated by reason of the fact that it is acquired compulsorily under parliamentary powers, because you would then be making the acquiring authority pay, not for the value of the property to the vendor, but for its value to themselves, including the value engendered by the very powers by which they acquired the property. Nowadays, powers by which acquiring authorities take over property compulsorily generally include not merely those of compulsory purchase but also of change of land use by planning permission, and the principle which excludes value engendered by powers of compulsory purchase equally applies to value engendered by planning permission. Moreover, if the price cannot on principle be inflated in this way, neither can it be so deflated.

d The confinement of the rule in the way contended for by the respondents strikes at the very root of this principle. What your Lordships are concerned with is compensation which will put the interested parties, so far as money can do so, in the position that they would have enjoyed if there had been no scheme requiring the surrender of those interests for an overriding public benefit.

e Just how artificial, legalistic and destructive of the fundamental principles on which compensation is assessed it would be to attempt to restrict the *Pointe Gourde*² rule in the way contended for by the respondents can be easily seen by accepting their construction of s 24 (2) (b), and then testing the value in the open market of the various interests in the land at various relevant times. Take first the interest of the landlords. It became more valuable as soon as the scheme for the reservoir was adumbrated, albeit that that interest was still a fee simple in reversion to a protected tenancy.

f It became then more valuable because, precisely from that moment, there arose a potentiality of the instant situation, whereby (ex hypothesi) the landlords would, on receiving notice to treat, be able to give their tenants an effective 12 months' notice to quit. When planning permission was given, the landlords' interest became more valuable still (albeit still in reversion to a protected tenancy), because the potentialities became even more likely to be realised. And still more valuable again, for the same reason, when the Minister made his order; and again when the order came into force. If the landlord had sold at any time during the period, these increases in value, due to the growing imminence of the potential notice to treat, would have been reflected in the market price. It is the market price which prima facie determines the compensation, except insofar as the market price reflects a value generated by the scheme of the acquiring authority. But every increase in value that I have just been considering had been generated by the scheme of the acquiring authority in connection with which compulsory acquisition took place—while the interest of the landlords remained precisely the same (the ownership in fee simple in reversion to a protected tenancy). The notice to treat is only the final step, converting the growing potentiality, which has been reflected in

¹ [1941] 1 All ER at 496, [1941] 2 KB at 49. ² [1947] AC 565

growing value and steadily rising market price, into actuality, whereupon there was yet again an increase in value which would have been reflected in the market price. All these changes in value, all generated by the scheme in connection with which compulsory acquisition took place, must, in accordance with long established principles, be left out of account in assessing compensation.

And while the value of the landlord's interest had been steadily growing during this period, that of the tenant had been decreasing inversely, albeit his interest had remained throughout that of a protected tenant. It has been decreasing for precisely the same reason that the value of the landlord's interest had been increasing—namely, because the scheme in connection with which compulsory powers of acquisition would be used had been going steadily forward, bringing steadily more imminent the moment of the notice to treat, when (ex hypothesi) the protected tenancy was converted into an annual tenancy which the landlord would be able to give 12 months' notice to quit under s 23 unrestricted by s 24. All this surely shows how artificial, unjust and destructive of its rationale it is to attempt to limit the *Pointe Gourde*³ rule to the valuation of the interests as ascertained at the meta-physical moment of the notice to treat.

My Lords, not only is the respondents' attempted confinement of the *Pointe Gourde*³ rule, in my view, contrary to the principle underlying the rule, and oblivious of the necessities which led to its framing; such a confinement is also, I believe, contrary to authority. I have already quoted, from several cases of high authority, formulations of what is now called the *Pointe Gourde*³ rule which are inconsistent with the contentions for the respondents. I content myself with only two more. In *Re Lucas and Chesterfield Gas and Water Board*⁴ Fletcher Moulton LJ said:

'The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent, i.e., that which they were worth to him in money. His property is therefore not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser, and hence it has from the first been recognized as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers. The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses.'

In the instant cases, the inception of the authorisation of the scheme by which the lands were put to public uses was, at latest, the giving of planning permission. As for the equivalent in money to what has been lost, I have already pointed out in an earlier section of this speech that the respondents could never in reality have at their disposal a fee simple in reversion to an annual tenancy, because they were statutorily bound to surrender that interest to the water board at the very moment they acquired it—on the service of the notice to treat.

My last citation, by way of formulation of the *Pointe Gourde*³ rule is from the opinion of the Privy Council in *Cedar Rapids Manufacturing and Power Co v Lacoste*⁵. Lord Dunedin said:

'... the value ... is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility.'

Among the powers which the water board secured to make the undertaking as a

3 [1947] AC 565

4 [1909] 1 KB 16 at 29, 30, [1908-10] All ER Rep 251 at 255

5 [1914] AC 569 at 576, [1914-15] All ER Rep 571 at 574

a whole a realised possibility was the planning permission. Compensation, said Lord Dunedin, must be based on the price which the land would have fetched before obtaining those powers. These lands with which your Lordships are concerned would at that time have fetched only such price as a fee simple in reversion to a statutory tenancy would have commanded.

b Apart from *Pettitt's* case⁶ itself, the only authority which remotely supports the limitation of the *Pointe Gourde*⁷ rule proposed by the respondents is *Re Morgan and the London and North Western Railway Co.*⁸ The claimants had granted an underlease of the land in question to the local corporation for the making of a public park. The under-lease contained a proviso for re-entry if the land or any part of it should be 'required or taken by a railway or other public company under the power or authority of an Act of Parliament'. (I draw attention to the word 'required', which is the same as that used in s 24 (2) (b).) A railway company acting under powers c conferred on them by Act of Parliament gave notice to treat for, and took possession of, part of the land. The claimants did not actually re-enter any part of the land, but they claimed compensation on the basis that they were entitled to do so. It was argued for the railway company that—

d 'the Act of the Company cannot increase the value of the land to the claimants: *Penny v Penny*⁹.'

This was the only authority cited on behalf of the railway company on the point of what would now be called the *Pointe Gourde*⁷ rule. The Divisional Court held that compensation should be assessed on the basis that the land was land in hand. I do not think that *Morgan's* case⁸ was at all a decision on the *Pointe Gourde*⁷ principle; e if it were, I would, I confess, find that case difficult to distinguish from the instant cases: on the other hand, on such a basis I would find it even more difficult to distinguish from *Penny v Penny*⁹, which was decided the other way and which was not even referred to in the judgment in *Morgan's* case⁸. *Morgan's* case⁸ was decided before the days of protected tenancies, and the common law of contract, which various statutes have since modified in the interest of tenants, gave a perfectly clear f answer, even though Day J said¹⁰ that he had not arrived at his conclusion without difficulty. The ratio decidendi in my view, is¹¹:

'... that which was thought possible or probable by the parties, when the claimants granted the underlease . . . , occurred.'

In other words, the parties to the underlease envisaged that the land might be g compulsorily acquired, and agreed that in that event the claimants should recover possession, so as to be in a position to claim compensation on that basis (they could not in the circumstances be recovering possession of the land for their own enjoyment). Again¹¹,

'... the claimants are the only persons who can make a title to the land and can sell the land to the railway company.'

h Both these passages are sufficient to distinguish *Morgan's* case⁸ from *Pettitt's* case⁶ or the instant appeals.

In *Penny v Penny*⁹ a testator had a lease of a house in which a family business was carried on. His will provided that two sons should be entitled to occupy the house during the subsistence of the lease 'so long as they may carry on the business therein'.

j The Metropolitan Board of Works, acting under powers of compulsory acquisition, served notice to treat on the executor/trustee and on the two sons. The notice to treat (or at least the entry thereunder) would preclude the sons from carrying on

6 (1968) 20 P & CR 344, [1969] RVR 26

7 [1947] AC 565

8 [1896] 2 QB 469

9 (1868) LR 5 Eq 227

10 [1896] 2 QB at 475

11 [1896] 2 QB at 474

business in the house. The issue was how the interests of the executor/trustee (plaintiff) and the sons (defendants) should be valued. Page Wood V-C by his order declared—

'that the Plaintiff, as executor, is entitled to the leasehold premises, subject to the interest of the Defendants . . .; . . . that [the Defendants] . . . are . . . entitled to hold, use, occupy and enjoy the said leasehold premises, so long as they . . ., but for the taking of the same premises by the Metropolitan Board of Works, might have carried on the business therein . . .',

and then proceeded to deal with the valuation accordingly. The learned judge said¹²:

' . . . the Plaintiff's interest is not to be treated as having been increased through an act of the Board of Works . . . It is not the interest which has been acquired by the Board that has to be estimated, but the value of the interest taken from the person with whom the Board deals . . . every man's interest shall be valued, *rebus sic stantibus*, just as it occurs at the very moment when the notice to treat was given. Any difference in the result which is due to the accident of the property being taken by the public body is not to be thrown into the compensation fund.'

That case is, in my view, on all fours with *Pettitt's case*¹³ and with the instant appeals. The sons correspond with Mr Pettitt, Mr Bowie and Mr Bailey. The executor/trustee corresponds with Mr Pettitt's landlord and with the respondents. The Metropolitan Board of Works corresponds with the Minister of Transport and the water board. To translate, Page Wood V-C says and orders that the instant respondents' interests are not to be treated as having been increased through an act of the water board, and he orders that Messrs Pettitt, Bowie and Bailey are to be treated for valuation purposes as entitled to hold, use, occupy and enjoy their respective agricultural holdings as long as they, but for the taking of those holdings by the Minister of Transport or by the water board, might have carried on their farming business therein. I have already pointed out that s 24 (2) (b) does not operate until the two conditions are fulfilled of there having been planning permission for non-agricultural use and the land being 'required' for such use. The lands with which your Lordships are concerned were only 'required' when notice to treat was served, just as the land in *Morgan's case*¹⁴ was only 'required' when notice to treat was given. The alteration of value, consequent on alteration of interest, in all these cases took place on the service of the notice to treat. Such alterations, said Page Wood V-C, in entire consonance with the authorities in this branch of the law and their underlying principle, must be left out of account in assessing compensation.

The only way in which *Morgan's case*¹⁴ can be distinguished from *Penny v Penny*¹⁵ is by regarding the underlease in the former case as containing a provision whereby, on a contemplated compulsory acquisition, the underlessee should enjoy the entire compensation payable to the exclusion of the underlessee—the language of Day J's judgment justifies such a view of this decision. But it is not, in my view, authority that an alteration of value consequent on an alteration of interest, itself consequent on service of a notice to treat (or any other act of an acquiring authority), may be taken into account in assessing compensation; that would be directly contrary to *Penny v Penny*¹⁵, which *Morgan's case*¹⁴ did not purport either to disapprove of or to distinguish. *Morgan's case*¹⁴ is, however, useful as throwing light on the meaning of 'required' in connection with acquisition of land, and thus on s 24 (2) (b); it shows

¹² (1868) LR 5 Eq at 235, 236

¹³ (1968) 20 P & CR 344, [1969] RVR 26

¹⁴ [1896] 2 QB 469

¹⁵ (1868) LR 5 Eq 227

a that land is 'required' by an acquiring authority on service of the notice to treat—though this is how I should have so construed it independently of any authority. (No different result, however, ensues if the land is taken to be 'required' at the moment of the planning permission or the compulsory purchase order; both are part of 'the scheme or undertaking or project'; and their effect on valuation must be disregarded.)

b *Conclusion of the main issue*

For the foregoing reasons, in my view, *Pettitt's case*¹⁶ was wrongly decided. I agree with the dissenting judgment of Lord Denning MR. I would overrule *Pettitt's case*¹⁶ and allow these appeals.

The special term in the Foottits' lease

c There were a number of reservations in the Foottit/Bowie case. The one that is in question in this part of the appeals is numbered 1 (3) (a) and reads as follows:—

'The right pursuant to Section 23 (1) of the Agricultural Holdings Act 1948—

(a) from time to time to resume possession of any part of the said lands and buildings which the Landlords may from time to time require for building mining roadmaking or any purposes connected therewith or for any other purpose (not being the use of the land for agriculture) upon giving to the Tenant not less than forty-two days' previous notice in writing of such requirement . . .'

The Foottits' claim that this reservation became operative in the circumstances of the present case. The landlords, they say, required to resume possession of part of the demised land pursuant to s 23 (1) of the Agricultural Holdings Act 1949 for a

e purpose not being the use of the land for agriculture (i.e. construction of a reservoir)—not, it is true, so that they could themselves use the land for such purpose, but so that the water board could do so. It is not to be thought, the argument continues, that the landlords must themselves do the building, mining, roadmaking or reservoir construction; it is enough that they require the land so that those purposes can be carried out. Within the context of the lease the only person who can require the

f demised land is the landlord. The Foottits should therefore, it is claimed, be compensated on the basis that they had a fee simple in reversion to a lease of 42 days—with the concomitant result that the tenant would be entitled to compensation on the basis that all that he has lost was a 42 day leasehold interest in the demised land.

All my noble and learned friends who heard this appeal are, I understand, agreed that the argument for the Foottits on this part of the case is not valid, and that the

g appeal must succeed to that extent. I entirely agree. The land was not 'required' by Mr and Mrs Foottit, and certainly not for any purpose contemplated by s 23 (1); it was 'required' by the water board, just as it was 'required' by the water board in the purpose of s 24 (2) (b).

LORD CROSS OF CHELSEA. My Lords, these are appeals by the Rugby

h Joint Water Board ('the board') against three orders of the Court of Appeal¹⁷ each made on 22nd October 1970 dismissing two appeals by the board and allowing a cross-appeal by the respondents Edward Hall Foottit and Zoe Ruth Foottit from decisions of the Lands Tribunal given on 27th November 1969.

The facts are as follows. Mr and Mrs Foottit owned a farm of some 132 acres in the parish of Thurlaston in Warwickshire which by a lease dated 12th August 1949

j they let for seven years from 25th March 1949 to a Mr Bowie. Clause 1 (3) of that lease was in the following terms:

'The right pursuant to Section 23 (1) of the Agricultural Holdings Act 1948—
(a) from time to time to resume possession of any part of the said lands and

¹⁶ (1968) 20 P & CR 344, [1969] RVR 26

¹⁷ [1971] 1 All ER 373, [1971] 2 QB 14

buildings which the Landlords may from time to time require for building mining roadmaking or any purposes connected therewith or for any other purpose (not being the use of the land for agriculture) upon giving to the Tenant not less than forty two days' previous notice in writing of such requirement and allowing to the Tenant fair and reasonable compensation either by the substitution of other land for the land so required or by allowing a proportionate reduction in rent and also making compensation for every crop or preparation for a crop on the land of which the Landlords resume possession and (b) from time to time to resume possession of the farm buildings adjacent to the Landlords' dwellinghouse included in this demise in the following events (i) If the Landlords should desire to occupy them in order to increase the amenities of the Landlord's dwellinghouse (ii) If the Landlords should desire to vacate their dwellinghouse and dispose of the same with vacant possession (iii) If the Landlords should build other farm buildings appropriate to the Farm on land hereby demised in which case no reduction of rent in respect of the land so built upon or buildings so surrendered shall be made PROVIDED that any such notice by the Landlords shall not terminate or entitle the Tenant to terminate the tenancy hereby created except in regard to the land of which possession is resumed'.

After the expiry of the lease in 1956 Mr Bowie remained in possession as tenant from year to year.

The respondent Jean Helen Shaw-Fox was tenant for life of a farm of some 216 acres in the parish of Draycote in Warwickshire under a settlement of which her co-respondents, Patrick Hare Vivian Twist and Harold Ashworth Sibley, were trustees with her for the purposes of the Settled Land Act 1925. By a tenancy agreement dated 24th March 1960 Mrs Shaw-Fox let this farm to a Mr Bailey from 25th March 1959 on a tenancy from year to year which was expressed to be determinable by either party on 25th March in any year by 12 months' notice in writing.

On 6th April 1966 the Minister of Housing and Local Government granted the board permission under the Town and Country Planning Act 1962 to construct a water supply reservoir pumping station and ancillary works on land in the parishes of Thurlaston and Draycote which included parts of the farms let to Mr Bowie and Mr Bailey. By para 14 of the Rugby and South Warwickshire Water Order¹⁸ made on 22nd August 1966 by the Minister of Housing and Local Government under powers conferred on him by the Water Acts 1945 and 1948 and which came into operation on 7th March 1967 the board was given power to purchase compulsorily such of the lands shown on the deposited plans and described in the deposited book of reference as they might require for the purposes of the construction of the works authorised by the order. On 11th and 14th March 1967 the board, acting under their compulsory powers, gave notices to treat to Mrs Shaw-Fox in respect of 120 of the 216 acres of her farm and to Mr and Mrs Footitt in respect of 129 of the 132 acres of their farm. On 4th October 1968 Mrs Shaw-Fox, Mr Twist and Mr Sibley applied to the Lands Tribunal for the determination by the tribunal of the amount of compensation payable to them as trustees of the relevant settlement in respect of the compulsory acquisition of their interest in the lands to which the notices to treat of 11th March 1967 related and on 7th March 1969 the board applied to the tribunal for the determination of the following preliminary point of law:

"That it may be determined on which of the following bases the interest of the Claimants is to be valued: namely (a) That such interest is an interest in fee simple in agricultural land subject to an annual agricultural tenancy in respect of which the Claimants had at the date of the Notice to Treat no right to give an effective Notice to Quit; or (b) That such interest is an interest in

- a* fee simple in agricultural land subject to an annual agricultural tenancy in respect of which at the date of the Notice to Treat the Claimants were entitled to give an effective Notice to Quit expiring at Lady Day, 1968.'

On 28th May 1969 Mr and Mrs Foottit made a similar application to the Lands Tribunal in respect of the lands affected by the notice to treat dated 14th March 1967 and on the same day the board applied to the tribunal for the determination

- b* of the following preliminary point of law:

- c* 'That it may be determined on which of the following bases the interest of the Claimants is to be valued, namely: (*a*) That such interest is an interest in fee simple in agricultural land subject to an agricultural tenancy in respect of which the Claimants had at the date of the Notice to Treat no right to give an effective Notice to Quit; (*b*) That such interest is an interest in fee simple in agricultural land subject to an annual agricultural tenancy in respect of which at the date of the Notice to Treat the Claimants were entitled to give an effective Notice to Quit expiring in not less than 42 days from the date of such Notice as provided in the Tenancy Agreement dated the 12th August 1949 and made between the Claimants of the one part and John George Morrison Bowie of the
- d* other part relating to the said land.'

As the preliminary point of law in each case was substantially the same the Lands Tribunal (Sir Michael Rowe QC) heard both together on 27th November 1969.

- e* Under s 7 of the Compulsory Purchase Act 1965 which was the provision applicable to this case the tribunal, in assessing the compensation to be paid by the board, has to have regard, *inter alia*, to the value of the land to be purchased. In a case such as this where the land is subject to a tenancy what the tribunal must have regard to in assessing the compensation to be paid to the freeholder must be the value of his interest in the land—namely the fee simple in reversion on the tenancy—and in order to value that it is obviously necessary to know the incidents of the tenancy and in particular its length. To discover that one has to consider not only the tenancy agreement but some provisions of the Agricultural Holdings Act 1948. By s 1 of the
- f* Act the expression 'agricultural holding' means the aggregate of the agricultural land comprised in a contract of tenancy and 'agricultural land' means land used for agriculture which is so used for the purpose of a trade or business. The following provisions in ss 23, 24 and 31 of the Act are particularly relevant to this case:

- g* '23. (1) A notice to quit an agricultural holding or part of an agricultural holding shall (notwithstanding any provision to the contrary in the contract of tenancy of the holding) be invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the then current year of tenancy: Provided that this section shall not apply— . . . (*b*) to a notice given in pursuance of a provision in the contract of tenancy authorising the resumption of possession of the holding or some part thereof for some specified purpose other than the
- h* use of the land for agriculture . . .

- j* '24. (1) Where notice to quit an agricultural holding or part of an agricultural holding is given to the tenant thereof, and not later than one month from the giving of the notice to quit the tenant serves on the landlord a counter-notice in writing requiring that this subsection shall apply to the notice to quit, then, subject to the provisions of the next following subsection, the notice to quit shall not have effect unless the Minister [now the Agricultural Land Tribunal] consents to the operation thereof.

'(2) The foregoing subsection shall not apply where—. . . (*b*) the notice to quit is given on the ground that the land is required for a use, other than for agriculture, for which permission has been granted on an application made under the enactments relating to town and country planning, or for which (otherwise

than by virtue of any provision of those enactments) such permission is not required, and that fact is stated in the notice . . .

'31. (1) A notice to quit part of an agricultural holding held on a tenancy from year to year given by the landlord of the holding shall not be invalid on the ground that it relates to part only of the holding if it is given for the purpose of adjusting the boundaries between agricultural units or amalgamating agricultural units or parts thereof or with a view to the use of the land to which the notice relates for any of the objects mentioned in the following subsection, and the notice states that it is given for the said purpose or with a view to any such use as aforesaid, as the case may be.

'(2) The objects referred to in the foregoing subsection are the following, namely,— . . . (g) the making of a watercourse or reservoir . . .'

The question which arises is, of course, whether the reversionary interests of these landlords were at the dates of the respective notices to treat subject to tenancies which the landlords could determine on 12 months' notice without the consent of the Agricultural Land Tribunal or to tenancies in respect of which the tenants enjoyed statutory protection. This question came before the Court of Appeal in the case of *Minister of Transport v Pettitt*¹⁹ in relation to the valuation of the interest of a tenant. Mr Pettitt was tenant from year to year of a 58 acre farm. In 1962 the Minister in pursuance of a compulsory purchase order gave notice to treat and enter in respect of seven acres needed for the construction of a motorway. The Minister contended before the tribunal that Mr Pettitt's interest should be regarded as an interest for a period ending with the date on which a notice to quit given by his landlord at the time of the notice to treat would have expired, i.e. Lady Day 1964. The tribunal rejected that contention and held that the interest must be valued on the footing that the tenant had the security of tenure afforded by the Agricultural Holdings Act 1948, s 24 (1). On appeal by the Minister the Court of Appeal¹⁹ (Russell and Winn LJJ, Lord Denning MR dissenting) reversed the decision of the tribunal on this point. It appears not to have been argued in that case that as a matter of construction of the Act the landlord would not have served notices to quit since the land was not required for non-agricultural use by him or by anyone who could claim under him but by a public authority exercising compulsory powers. The ground on which Lord Denning MR dissented was that the Minister was contending that the compensation payable to the tenant should be decreased by the existence of the motorway scheme which gave the landlord the right to serve a notice to quit and that such a contention was precluded by the principle illustrated by the Privy Council decision in *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands*²⁰.

In his decision given on 27th November 1969 Sir Michael Rowe QC held that the decision in *Pettitt's* case¹⁹ covered the Shaw-Fox case and the main point raised in the Footitt case. There was, however, a subsidiary point raised in that case—namely, whether the compensation should be assessed on the footing that the landlords could have served a six weeks' notice under cl 1 (3) (a) of the lease. The tribunal decided that point against the landlords and held that in each case the interest to be valued was an interest in fee simple in agricultural land subject to an annual agricultural tenancy in respect of which at the date of the notice to treat the claimant was entitled to give an effective notice to quit on Lady Day 1968.

The board appealed from that decision to the Court of Appeal¹ and the Footitts cross-appealed on the question of the length of notice which they could have given. On the board's appeal what may be called the *Pointe Gourde*²⁰ point was covered by the previous decision of the court in the *Pettitt* case¹⁹. Counsel for the board, however, argued the point which had not been argued for the acquiring authority in that case

19 (1968) 20 P & CR 344, [1969] RVR 26

1 [1971] 1 All ER 373, [1971] 2 QB 14

20 [1947] AC 565

- a* —namely, that on the true construction of the Act the landlords could not have served notices to quit which did not require the consent of the Minister. The Court of Appeal rejected that argument. On the cross-appeal, however, the court held, although Cairns LJ felt grave doubts on the point, that cl 1 (3) (a) of the lease applied and that in that case compensation must be assessed on the basis that only a six-weeks' notice would have been needed.
- b* It is at first sight puzzling that the answer to the question which arose in *Pettitt's* case² and has arisen in this case should concern the acquiring authority at all. One would think that the aggregate of the sums to be paid by it to landlord and tenant for their respective interests in the land would be the same whether the tenant had only a tenancy determinable on six months' notice or had a tenancy enjoying statutory protection. The cake provided by the authority would be the same although
- c* in the former case the tenant would get a smaller and in the latter a larger share of it. We were told, however, that in practice as a matter of valuation the aggregate of the sums payable to landlord and tenant would almost certainly not be the same in each case. It would not, that is to say, follow that because, as has been agreed in the *Shaw-Fox* case, the landlord's interest will be worth £12,000 more if a six months' notice could have been given, the interest of the tenant would be worth £12,000 more if he had statutory protection. Again a further—and probably more important
- d* —reason for the concern of the acquiring authority in the question is that the compensation to be paid to landlord and tenant respectively is not determined at the same time in proceedings or negotiations to which both are parties but is fixed separately. Thus we were told that in this case the board had by agreement with the tenants acquired their interests on the basis now laid down by s 42 of the Agriculture (Miscellaneous Provisions) Act 1968—although that section did not in fact apply here.
- e* Under that section the interest of the tenant must now be valued on the footing that he had no statutory protection; but although it has acquired the interest of the tenant on the basis that it was unprotected—that is to say that the *Pettitt*² decision was right—the board says as against the landlord that the *Pettitt*² decision was wrong and that the landlord's interest must be valued as though the tenant had
- f* statutory protection. If they succeed in this appeal it must follow—as indeed counsel for the board readily conceded—that an acquiring authority will pay substantially less for land subject to an agricultural tenancy than for identical land which is being farmed by an owner in fee simple.

I turn now to consider the question of construction of the relevant provisions of the Agricultural Holdings Act 1948. It could not, of course, be suggested that s 24 (2) and s 31 (1) only apply when the landlord is proposing himself to put the land in question to some non-agricultural use. They must obviously also apply to the common case where the landlord is in negotiation with a developer with the necessary planning permission and proposes to sell or let the land to him with vacant possession when he has got rid of the tenant. What was submitted on behalf of the board was that although it is true that the land was 'required' by them for a reservoir the use of the words 'on the ground that' in s 24 (2) and 'with a view to' in s 31 (1) showed that they only applied to notices to quit the giving of which was necessary in order to enable the intended non-agricultural use to be achieved and that they did not apply to a case like this where the board was serving independent notices to treat on the tenants and could get possession of the land needed without any action by the landlord. In support of his submission counsel referred to several other sections in the Act. One of them—s 25 (1) (e)—does not appear to me to throw any light on the problem. But ss 33 and 60, each of which provides, inter alia, that certain consequences shall ensue if the landlord 'resumes possession' of part of the holding by virtue of s 31 (1), certainly tend to support counsel's argument.

In all probability the draftsman of the 1948 Act had not this particular problem in mind at all and it is this fact that makes the question of construction to my mind a

difficult one. There is, as I see it, nothing in s 24 (2) itself which supports the argument of the board. When once the board had obtained planning permission the landlord could, as I see it, properly say that he was serving the notice 'on the ground that' (ie 'because') the board required to use the land as a reservoir even though the serving of the notice would not itself be necessary for that result to be achieved. But ss 24 (2) and 31 (1) must be read so as to be consistent with one another and the use of the words 'with a view to'—not 'in view of'—in s 31 (1) certainly suggests that the serving of the notice is necessary to the achievement of the non-agricultural use and this reading receives some support from ss 33 and 60—although, of course, the landlord will on any footing normally resume possession after the service of a notice under s 31 (1) and one cannot deduce from those sections that he must always do so. So, as I see it, some strain has to be put either on the wording of s 24 (2) or on the wording of s 31 (1) in order to produce consistency between them in circumstances unforeseen by the draftsman. I ask myself then which reading produces the fairest and most reasonable result. I have no doubt that it is the reading favoured by the landlord. The general scheme of the Act is that the tenant is to have statutory protection so long as the land is being used as agricultural land but that if it is no longer to be so used the parties once more have the rights given them by the common law as modified by the tenancy agreement. If the landlord can serve an effective notice to quit when a private developer to whom he is willing to sell the land obtains planning permission why should he not be entitled to serve a similar notice when a public authority who can and probably will invoke compulsory powers obtains planning permission? As counsel for the landlords pointed out one can readily envisage a case where the authority after serving a notice to treat on the landlord enters into an agreement with him for the acquisition of the land which provides for the landlord getting rid of the tenant by serving the necessary notice to quit. In such a case there could be no doubt that the landlord could serve effective notice under ss 24 (2) and 31(1). It would be truly remarkable if his ability to serve effective notices depended on whether or not the authority was going to serve a notice to treat on the tenant as well as on the landlord. For these reasons I think that the Court of Appeal³ was right to reject the board's arguments on the construction of the Act.

I turn now to the argument founded on the so-called *Pointe Gourde*⁴ principle. The earliest reported statements of that principle are, it appears, to be found in the judgments of Grove and Stephen JJ in the case of *Re Countess Ossalinsky and Manchester Corp'n* decided in 1883 and reported under the heading 'Special Adaptability' in an appendix to Browne and Allan's *Law of Compensation*⁵. The principle, as there stated, amounts, as I understand it, to this. You may take into consideration in assessing compensation any likelihood that the land in question—by reason of its situation or physical features—would in the natural course of events come to be required for some purpose which would give it a greater value than it has at present simply as agricultural land. But you must remember that what you are concerned with is the value of the land to the owner not its value to the acquiring authority. Consequently you must not take into account the special need for the land which the authority has and which moved it to obtain compulsory powers. That would be in effect to make it pay for those powers.

The facts in the *Pointe Gourde* case⁴ itself were that the Crown had compulsorily acquired certain lands owned by the company so that they could be used by the United States authorities in connection with the establishment of a naval base in Trinidad. On part of the land there was a large quantity of limestone which before the acquisition the company had quarried and sold. The compensation tribunal found (1) that the land had a special suitability or adaptability for the purpose of

3 [1971] 1 All ER 373, [1971] 2 QB 14

4 [1947] AC 565

5 (2nd Edn) p 659

- a producing and marketing quarry products and had a market value as quarry land prior to the date of acquisition and (2) that the United States had a special need of a large quantity of stone for the construction of the naval base and so, over and above the special adaptability of the land referred to in (1) its proximity to the base made it specially suited to the United States' special needs. The tribunal awarded \$15,000 compensation to cover the matters set out in (2) but the Privy Council held that
- b that item of compensation must be disallowed because it was well settled that compensation for the compulsory acquisition of land should not include an increase in value which was entirely due to the scheme underlying the acquisition. That decision appears to me to be entirely in accord with and not to be in any way an extension of the principle as stated in the *Ossalinsky* case⁶. Counsel for the board referred us to a number of other cases, some decided before and others after the *Pointe Gourde* case⁷, in which the principle has been applied; but although the
- c language used by the judges is not always exactly the same I cannot for myself see that the principle has with the passage of time become any wider than it was in 1883. The way in which counsel sought to invoke the principle in this case was as follows.

- d 'The obtaining of planning permission was a necessary part of the board's scheme for the construction of a reservoir; but for the obtaining of the planning permission the landlord would not have been able to serve an effective notice to quit; to give him anything in respect of his ability to serve such a notice could be to compensate him for an increase in value which is due to the scheme.'

- To my mind that train of reasoning confuses the nature of the landlord's interest with its value. No one suggests that the sum of £27,200 which it is agreed is the value
- e of the Shaw-Fox reversion if the landlord could serve an effective notice contains any element which infringes the *Pointe Gourde*⁷ principle. That principle is being invoked here in order to induce the court to say that the landlord's interest in the land—which is what has to be valued under s 7 of the 1965 Act—is not what in truth it was, if the board are wrong on construction, but something quite different.
- f As Russell LJ said in the *Pettitt* case⁸, the *Pointe Gourde*⁷ principle as hitherto understood does not affect the ascertainment of the interest to be valued but only its value when ascertained. To accede to the board's submission on this point would involve an extension of the principle to which I would hesitate to agree, even if it seemed desirable in order to achieve justice between the parties; but for the reasons which I have already given on the construction point I do not think that there would be any injustice to the tenant—let alone that there would be any injustice to the board—
- g in allowing the landlord to be paid the value of the reversion assessed on the footing that he could serve an effective notice to quit.

- It remains to consider the subsidiary question whether the Footitts could at the date of the notice to treat served on them have served a six weeks' notice to quit on their tenant under s 23 (1) of the 1948 Act. The answer to that question depends on the construction of cl 1 (3) of the lease of 12th August 1949 which came to form one of
- h the terms of the annual tenancy on which the tenant held over after the expiry of that lease. That clause which must be construed contra proferentem appears to me to envisage a notice given to enable the landlord to resume possession of land of which he requires possession so that it may be put to a non-agricultural use either by him or by someone whom he puts into possession of it. I do not think that the Footitts could have invoked it in the circumstances subsisting when the notice to treat
- i was served on them. On that minor point, therefore, I think that the decision of the Lands Tribunal was right and the doubts of Cairns LJ justified and I would allow that appeal.

6 (1883) Browne and Allan's Laws of Compensation (2nd Edn, 1903) p 659

7 [1947] AC 565

8 (1968) 20 P & CR at 355, [1969] RVR at 30

But I would dismiss the two main appeals.

Appeals dismissed. Cross-appeal allowed.

Solicitors: Burton, Yeates & Hart (for the appellant water board); Gregory, Rowcliffe & Co (for the respondents).

S A Hatteea Esq Barrister.

Re Walker (deceased) (in bankruptcy), ex parte the trustee of the property of the deceased debtor v Department of Trade and Industry

CHANCERY DIVISION

FOSTER J

18th, 19th, 20th, 31ST JANUARY 1972

Bankruptcy – Trustee in bankruptcy – Payment into account with Bank of England – Bank account with local bank – Grounds for authorising payments into account with local bank – Probable size of the cash balance – Any other reason for the advantage of the creditors – Purpose of having account with local bank to earn interest for benefit of creditors – Cash balance of £36,000 paid into bankruptcy estates account – Application by committee of inspection to Department of Trade and Industry to authorise payment into local bank account – Refusal on ground that purpose of earning interest not a proper reason for authorisation – ‘Probable size of the cash balance’ a reference to small amounts not large – ‘Any other reason’ not including earning of interest – Bankruptcy Act 1914, s 89 (2), proviso (a).

The deceased died leaving a gross estate of some £71,000 and a nil net estate. It subsequently appeared that the deceased's estate was insolvent and an administration order in bankruptcy of the estate was made. The trustee of the deceased debtor's property paid £36,000 into the bankruptcy estates account with the Bank of England, where it had since remained. The deceased's tax affairs were in confusion at his death and the trustee was engaged in lengthy negotiations with the Inland Revenue and Estate Duty Office. As it appeared that the cash balance of £36,000 could not be distributed for a considerable period because of the difficulties in finding out the total liabilities, the committee of inspection applied to the Department of Trade and Industry ('the department') under s 89 (2)^a of the Bankruptcy Act 1914 to authorise the trustee to open an account with a local bank so that the £36,000 could earn interest for the benefit of creditors. The department refused, having been advised that it had no power under s 89 (2), proviso (a), to give the necessary authorisation where the sole purpose of having an account at a local bank was to earn interest. The trustee applied to the court for declarations (i) that, it appearing to the committee of inspection that, because of the probable amount of the cash balance, the trustee should have an account with the local bank, the department was not entitled under s 89 (2), proviso (a), to decline to authorise the trustee to open an account with a local bank; (ii) alternatively, that the obtaining of interest for the advantage of the creditors came within the words 'for any other reason' in s 89 (2), proviso (a), and was therefore a proper ground whereon the department might be satisfied that the trustee should have an account with a local bank.

Held – The declarations sought would not be made for the following reasons—

(i) the words 'probable amount of the cash balance' in s 89 (2), proviso (a), referred to small amounts rather than large; accordingly the fact that the cash balance was a large one was not a valid ground on which the department could be required to authorise an account with the local bank (see p 1103 j to p 1104 a, post);

(ii) although the words 'for any other reason' were *prima facie* very wide, to give

^a Section 89 (2), so far as material, is set out at p 1098 d and e, post

- a them a wide meaning so as to include the earning of interest as a proper reason would be to negative the whole basis of the 1914 Act which was that the costs of the department were to be defrayed from the fees and dividends arising from the investment of moneys in the bankruptcy estates account; accordingly the 'other reason' must be one which was advantageous because the account was a local one as opposed to one with the Bank of England, and advantageous in the sense that it would permit the bankruptcy to be more easily administered (see p 1104 d and g, post).

b **Notes**

For application by a committee of inspection for authority to open an account at a local bank, see 2 Halsbury's Laws (3rd Edn) 380, para 763, and 394, para 788.

For the Bankruptcy Act 1914, s 89, see 3 Halsbury's Statutes (3rd Edn) 123.

c **Case referred to in judgment**

Sims, Re, ex parte Official Receiver [1907] 2 KB 36, 76 LJKB 849, 96 LT 713, 14 Mans 169, 4 Digest (Repl) 245, 2210.

Cases also cited

- Barker, Re, ex parte Constable* (1890) 25 QBD 285.
Beale, (R G F) Re, ex parte Board of Trade [1939] Ch 761.
 d *Fastnedge, Re, ex parte Brooker* (1876) 2 Ch D 57.
Herbert, Re, Herbert v Bicester (Lord) [1946] 1 All ER 421.

Motion

- By notice of motion dated 25th October 1971 Bernard Phillips, the trustee in bankruptcy of the property of Raymond Neville Walker (deceased) who had died on 5th September 1964, sought the following relief, namely (i) a declaration that, it
 e appearing to the committee of inspection in the bankruptcy that, because of the probable amount of the cash balance, the trustee in bankruptcy of the estate should have an account with a local bank, the Department of Trade and Industry was not entitled to decline to authorise the trustee in bankruptcy to make his payments into and out of Lloyds Bank Ltd, 190 Great Portland Street, London W 1, being a local bank selected by the committee of inspection; further, or in the alternative,
 f (ii) a declaration that the obtaining of interest for the advantage of the creditors of the estate was a proper ground (or alternatively was by itself a proper ground) whereon the Department of Trade and Industry might be satisfied that the trustee in bankruptcy should have an account with a local bank. The facts are set out in the judgment.

- g *Leonard Bromley QC* for the trustee in bankruptcy.
Christopher Bathurst for the Department of Trade and Industry.

Cur adv vult

- 31st January. **FOSTER J** read the following judgment. By this motion two questions are raised, both concerning the construction of proviso (a) to s 89 (2) of the Bankruptcy Act 1914, and both concerning the circumstances in which a trustee in
 h bankruptcy may have a bank account in a bank other than the Bank of England.

The facts

- Raymond Neville Walker died on 5th September 1964 leaving a gross estate of some £71,000 and a nil net estate. Probate was granted to his executors on 28th October 1964. It soon appeared that the estate was hopelessly insolvent, and on 14th March 1966 an administration order in bankruptcy of his estate was made in the
 i Guildford County Court; and on 30th June 1966 Mr Bernard Phillips was appointed the trustee of the property of the deceased debtor. In August 1966 the trustee paid into the bankruptcy estates account with the Bank of England a sum of £36,000, and since that date the amount has never been less and may have increased somewhat.

In order that the questions which now face me could be decided in the High Court, this court, on 2nd November 1970, ordered that the bankruptcy proceedings should

be transferred from the county court to the High Court. On 6th September 1971 *a* the committee of inspection requested the Department of Trade and Industry (as the former Board of Trade is now known) to permit the trustee to open a bank account, the sole reason being that the sum of £36,000 could earn interest for the benefit of the creditors. The reason for this was that the deceased debtor's tax affairs were in a muddle, and that negotiations with the Inland Revenue and the Estate Duty Office were bound to be lengthy and difficult. The department, however, *b* refused this permission, not on the facts of the case but because it had been advised that it had no power to do so if the sole purpose of having an account at a local bank was the earning of interest. It appears that if the earning of interest is as a matter of law a valid consideration, the department would have acceded to the application in all the circumstances of the present case.

The questions

Section 89 (2) of the Bankruptcy Act 1914 is in these terms: *c*

'Every trustee in bankruptcy shall, in such manner and at such times as the Board of Trade with the concurrence of the Treasury direct, pay the money received by him to the Bankruptcy Estates Account at the Bank of England, and the Board of Trade shall furnish him with a certificate of receipt of the money so paid. Provided that—(a) if it appears to the committee of inspection that, for the purpose of carrying on the debtor's business or of obtaining advances, or because of the probable amount of the cash balance, or if the committee shall satisfy the Board of Trade that for any other reason it is for the advantage of the creditors that the trustee should have an account with a local bank, the Board of Trade shall, on the application of the committee of inspection, authorise the trustee to make his payments into and out of such local bank as the committee may select . . .'

In proviso (a) to that subsection there are four possible instances, the first three being decisions of the committee of inspection and the fourth being to the satisfaction of the Board of Trade. They are as follows: (1) for the purpose of carrying on a debtor's business; (2) for the purpose of obtaining advances; (3) because of the probable amount of the cash balance; (4) if for any other reason it is for the advantage *f* of the creditors. The first and second instances do not arise in the present case as there is no business to carry on and there is no question of obtaining advances. The two questions which arise under the third and fourth heads can be posed as follows: first, if it appears to the committee of inspection that the cash balance of £36,000 or more cannot be distributed for a considerable period because of the difficulties in finding out the total liabilities and that the trustee in bankruptcy should have a local account so that the sum can earn interest for the benefit of the creditors, can the committee request the department to authorise a local bank account, the department being bound to give its permission? Secondly, if the committee cannot request the department under the first question, and yet if it satisfies the department that the obtaining of interest comes within the phrase 'any other reason . . . for the advantage *g* of the creditors', is the obtaining of interest another reason for the department to authorise such an account? *h*

Concessions by the department

During the course of the hearing certain concessions were made by the department, in these terms. First, where s 89 (2), proviso (a), provides: *j*

'if it appears to the committee of inspection that, for the purpose of carrying on the debtor's business or of obtaining advances, or because of the probable amount of the cash balance, . . . the trustee should have an account with a local bank, the Board of Trade shall, on the application of the committee of inspection, authorise the trustee'

- a* to have such an account, and the Board of Trade receives an application in due form certifying that in the opinion of the committee of inspection the trustee should for one of the aforesaid purposes have such an account, the Board of Trade is required to authorise the trustee to have such an account unless it is not satisfied that the purpose for such an account is one authorised by statute and that the opinion expressed by the committee of inspection is an opinion which such a committee, properly instructed as to the law and the relevant facts, could reasonably hold. Secondly, where the section provides:
- b*

‘... if the committee shall satisfy the Board of Trade that for any other reason it is for the advantage of the creditors that the trustee should have an account’,

- and the Board of Trade receives an application in due form setting out the matters alleged to constitute such ‘other reason’, the Board of Trade is the arbiter whether or not such application should be granted, and its decision can be impeached if, but only if, it is shown that it was founded on a misapprehension of the law or is one which no reasonable person, properly instructed as to the law and giving due consideration to the matters advanced, could arrive at.
- c*

d *History of the bankruptcy legislation*

- The first statute to which I was referred is the Bankruptcy Act 1825¹. By s 12 of that Act application could be made to the Lord Chancellor for the appointment of commissioners to administer the bankrupt’s estate, and it was the commissioners who adjudged a person bankrupt (see ss 22 and 24). By s 61 the creditors chose assignees, and the estate of the bankrupt was conveyed to them by ss 63 and 64; and the conduct of the bankruptcy was in the hands of the creditors (see s 88).
- e* By s 103 the commissioners might ‘as often as it shall appear to them expedient for the Bankrupt’s Estate’ direct any money to be invested in exchequer bills for the benefit of the creditors. It is I think clear that under the provisions of the 1825 Act the creditors had the full control of the bankrupt’s estate. This turned out to be unsatisfactory, and led to the passing of Lord Brougham’s Act in 1831². This Act introduced a system of official administration by creating official assignees who acted in addition to the creditor’s assignees, but this Act applied only in London. However, a further Act was passed in 1842³ extending the appointment of official assignees over the whole country.
- f*

- In 1849 the Bankruptcy Law Consolidation Act⁴ was passed, which confirmed the position of the official assignee. The sections in this Act which are relevant are as follows. Section 31 provided that the accountant in bankruptcy should control the care and management of the funds belonging to bankrupt estates. Section 33 provided that there should be two accounts at the Bank of England, one called ‘the Bankruptcy Fund Account’ and the other ‘the Chief Registrar’s Account’. Section 34 permitted the sums to be invested and that the interest and dividends on such securities should be put in the latter account. Section 39 directed that one official assignee should be appointed who received the bankrupt’s estate and paid it into the Bank of England to the credit of the accountant in bankruptcy. Section 56 provided that the salaries of the commissioners and other officers should be paid out of the chief registrar’s account. Section 186 is, however, the most important section, and I will read it:
- g*
- h*

- ‘That the Court may, as often as it shall appear expedient for the Bankrupt’s Estate, direct any Money, Part of such Estate, to be invested in the Purchase of Exchequer Bills, for the Benefit of the Creditors, and may direct where and with whom such Exchequer Bills shall be kept, and cause such Exchequer Bills to be sold when it shall appear to such Court expedient, and may direct the Proceeds
- i*

1 6 Geo 4 c 16

2 1 & 2 Will 4 c 56

3 5 & 6 Vict c 122

4 12 & 13 Vict c 106

thereof to be again laid out in the Purchase of Exchequer Bills, or to be applied for the Benefit of the Creditors, the making of any such Purchase or Sale to be subject to the Rules or Orders at any Time in force under this Act relating to the Purchase, Sale, or Transfer of Exchequer Bills by the Accountant in Bankruptcy.' a

This system of having official assignees and creditors' assignees did not work at all well, and as a consequence the Bankruptcy Act 1861 was passed. This was an amending Act, but s 186 was not repealed, and remained in force until 1869. The effect of the Act was to reduce very considerably the duties of the assignees. b

In 1869 two Acts were passed: first, the Bankruptcy Repeal and Insolvent Court Act 1869, which repealed all the provisions of the Acts of 1849 and 1861; and, secondly, the Bankruptcy Act 1869. The general effect of the latter Act was to abandon to a great extent any official participation and to revert to a voluntary system. It was a consolidating and amending Act, and the relevant sections are, first, s 20, which provides as follows: c

'The trustee shall, in the administration of the property of the bankrupt and in the distribution thereof amongst his creditors, have regard to any directions that may be given by resolution of the creditors at any general meeting, or by the committee of inspection, and any directions so given by the creditors at any general meeting shall be deemed to override any directions given by the committee of inspection; the trustee shall call a meeting of the committee of inspection once at least every three months, when they shall audit his accounts, and determine whether any or what dividend is to be paid; he may also call special meetings of the said committee as he thinks necessary. Subject to the provisions of this Act, and to such directions as aforesaid, the trustee shall exercise his own discretion in the management of the estate, and its distribution amongst the creditors. The trustee may from time to time summon general meetings of the creditors for the purpose of ascertaining their wishes; he may also apply to the Court, in manner prescribed, for directions in relation to any particular matter arising under the bankruptcy...' d

Section 25 gave the trustee very wide powers, and by s 26 it was provided: e

'The trustee may appoint the bankrupt himself to superintend the management of the property or of any part thereof, or to carry on the trade of the bankrupt (if any) for the benefit of the creditors, and in any other respect to aid in administering the property in such manner and on such terms as the creditors direct.' f

By s 30 it was provided: g

'The trustee shall pay all sums from time to time received by him into such bank as the majority of the creditors in number and value at any general meeting shall appoint, and failing such appointment into the Bank of England; and if he at any time keep in his hands any sum exceeding fifty pounds for more than ten days he shall be subject to the following liabilities; that is to say, (1) He shall pay interest at the rate of twenty pounds per centum per annum on the excess of such sum above fifty pounds as he may retain in his hands: (2) Unless he can prove to the satisfaction of the Court that his reason for retaining the money was sufficient, he shall, on the application of any creditor, be dismissed from his office by the Court, and shall have no claim for remuneration, and be liable to any expenses to which the creditors may be put by or in consequence of his dismissal.' h

Under this Act, general rules were made both in 1870 and in 1871, and it is I think clear that any interest on money in the bank enured for the benefit of the creditors (see particularly form 104 of the appendix to the 1870 rules). j

- a* However, this voluntary system again proved unsatisfactory, and in 1883 Parliament decided to bring in a government department to supervise bankruptcies and to return the jurisdiction of officialdom. This led to the Bankruptcy Act 1883. This Act is the forerunner of the 1914 Act, with which I am concerned, and the particular sections are almost identical in each case. A comparison is given below: s 74 (3) of the 1883 Act is equivalent to s 89 (2) of the 1914 Act without the provisos; the first paragraph of s 74 (4) of the 1883 Act is equivalent to proviso (a) to s 89 (2) of the 1914 Act; the last two paragraphs of s 74 (4) of the 1883 Act are equivalent to s 89 (3) of the 1914 Act; s 74 (5) is equivalent to s 89 (4); s 74 (6) is equivalent to s 89 (5), s 74 (7) to s 89 (6), s 76 (1) to s 90 (1), s 76 (2) to s 90 (2), s 76 (3) to s 90 (5) and s 77 to s 91. The differences are so small that the answers to the questions of construction before me apply, in my judgment, equally to both these Acts. I shall consider them in more detail later, but it is to be noticed that there are no provisions in either Act specifically permitting investments of surplus funds, the dividends enuring for the benefit of creditors, or for allowing any interest on surplus funds, except where there is a local bank account.

Company legislation

- d* The development of the law in regard to company liquidation was later in time than that of bankruptcy law, but followed with one notable exception the pattern of the bankruptcy law. In 1890 the Companies (Winding Up) Act was passed. Section 11 is clearly based on the provisions of s 74 of the 1883 Act. It is in these terms:

- e* '(1) An account, called the Companies Liquidation Account, shall be kept by the Board of Trade with the Bank of England, and all moneys received by the Board of Trade in respect of proceedings under this Act shall be paid to that account.

- f* (2) Every liquidator of a company which is being wound up by order of the court shall, in such manner and at such times as the Board of Trade, with the concurrence of the Treasury, direct, pay the money received by him to the Companies Liquidation Account at the Bank of England, and the Board of Trade shall furnish him with a certificate of receipt of the money so paid.

- g* (3) Provided that, if the committee of inspection satisfy the Board of Trade that for the purpose of carrying on the business of the company or of obtaining advances, or for any other reason, it is for the advantage of the creditors or contributories that the liquidator should have an account with any other bank, the Board of Trade shall, on the application of the committee of inspection, authorise the liquidator to make his payments into and out of such other bank as the committee may select, and thereupon those payments shall be made in the prescribed manner.'

Subsection (4) is the same penal provision as is found in the Bankruptcy Act. Section 11 continues:

- h* '(5) All payments out of money standing to the credit of the Board of Trade in the Companies Liquidation Account shall be made by the Bank of England in the prescribed manner.

'(6) No liquidator of a company which is being wound up by order of the court shall pay any sums received by him as liquidator into his private banking account.'

- j* It is to be noticed that the expression 'or because of the probable amount of the cash balance' is omitted from s 11 (3).

Section 16, which I will read, follows closely s 76 of the 1883 Act, and is in these terms:

'(1) Whenever the cash balance standing to the credit of the Companies Liquidation Account is in excess of the amount which in the opinion of the Board of Trade

is required for the time being to answer demands in respect of companies' estates, the Board of Trade shall notify the same to the Treasury, and shall pay over the same or any part thereof, as the Treasury may require, to the Treasury, to such account as the Treasury may direct, and the Treasury may invest the said sums, or any part thereof, in Government securities, to be placed to the credit of the said account. a

'(2) Whenever any part of the money so invested is, in the opinion of the Board of Trade, required to answer any demands in respect of companies' estates, the Board of Trade shall notify to the Treasury the amount so required, and the Treasury shall thereupon repay to the Board of Trade such sum as may be required to the credit of the Companies Liquidation Account, and for that purpose may direct the sale of such part of the said securities as may be necessary. b

'(3) The dividends on the investments under this section shall be paid to such account as the Treasury may direct, and regard shall be had to the amount thus derived in fixing the fees payable in respect of proceedings in the winding up of companies.' c

However, there is a marked addition in ss 17 and 18 of that Act. Thus s 17 permits investment and the company being credited with the dividends, and s 18 permits interest being allowed on certain surplus funds over £2,000. These provisions have continued in company legislation, being found in the Companies (Consolidation) Act 1908 and the Companies Act 1929 and now are embodied in ss 48, 361 and 362 of the Companies Act 1948. d

Other bankruptcy legislation

I was also referred to the Bankruptcy (Office Accommodation) Acts of 1885 and 1886, to the Economy (Miscellaneous Provisions) Act 1926 and to the Insolvency Services (Accounting and Investment) Act 1970. By the latter two Acts the bankruptcy estates account and the companies liquidation account were amalgamated. Section 4 of the 1970 Act provides as follows: e

'Where under section 362 (4) of the Companies Act 1948 (investment of surplus balances) a company has become entitled to any sum by way of interest the Board of Trade shall certify that sum and the amount of tax payable on it to the National Debt Commissioners and the Commissioners shall pay, out of the Investment Account,—(a) into the Companies Liquidation Account, the sum so certified less the amount of tax so certified; and (b) to the Commissioners of Inland Revenue, the amount of tax so certified.' f

Section 8 of the 1970 Act amended s 90 of the Bankruptcy Act 1914 in the terms set out in the schedule. In my judgment, however, I derive little assistance on the construction questions before me from the other Bankruptcy Acts, as the policy since the earliest date in bankruptcy has swung to and away from officialdom, interest being allowed when it was in the hands of the trustee without official representation, but interest not being allowed when officialdom entered. g

The Bankruptcy Act 1914

In construing this Act, one must bear in mind that ss 89 and 90 are based on similar sections in the 1883 Act, which I have mentioned. The provision in question, s 89 (2), proviso (a), I have already read. Section 89 (1) provides: h

'The Bankruptcy Estates Account shall continue to be kept by the Board of Trade with the Bank of England, and all moneys received by the Board of Trade in respect of proceedings under this Act shall be paid to that account.' i

Proviso (b) to sub-s (2) is not relevant. Section 89 continues:

'(3) Where the trustee opens an account in a local bank, he shall open and keep it in the name of the debtor's estate, and any interest receivable in respect of

a the account shall be part of the assets of the estate, and the trustee shall make his payments into and out of the local bank in the prescribed manner.

b '(4) Subject to any general rules relating to small bankruptcies under section one hundred and twenty-nine of this Act, where the debtor at the date of the receiving order has an account at a bank, such account shall not be withdrawn until the expiration of seven days from the day appointed for the first meeting of creditors, unless the Board of Trade, for the safety of the account, or other sufficient cause, order the withdrawal of the account.

c '(5) If a trustee at any time retains for more than ten days a sum exceeding fifty pounds, or such other amount as the Board of Trade in any particular case authorise him to retain, then unless he explains the retention to the satisfaction of the Board of Trade, he shall pay interest on the amount so retained in excess at the rate of twenty per centum per annum, and shall have no claim to remuneration, and may be removed from his office by the Board of Trade and shall be liable to pay any expenses occasioned by reason of his default.

'(6) All payments out of money standing to the credit of the Board of Trade in the Bankruptcy Estates Account shall be made by the Bank of England in the prescribed manner.'

d Section 90 provides:

e '(1) Whenever the cash balance standing to the credit of the Bankruptcy Estates Account is in excess of the amount which in the opinion of the Board of Trade is required for the time being to answer demands in respect of bankrupts' estates, the Board of Trade shall notify the same to the Treasury, and shall pay over the same or any part thereof as the Treasury may require to the Treasury, to such account as the Treasury may direct, and the Treasury may invest the said sums or any part thereof in Government securities to be placed to the credit of the said account.

f '(2) Whenever any part of the money so invested is, in the opinion of the Board of Trade, required to answer any demands in respect of bankrupts' estates, the Board of Trade shall notify to the Treasury the amount so required, and the Treasury shall thereupon repay to the Board of Trade such sum as may be required to the credit of the Bankruptcy Estates Account, and for that purpose may direct the sale of such part of the said securities as may be necessary.

g '(3) The Treasury, out of any sums so paid to them, may pay such sums as they consider necessary for defraying the expenses of providing office accommodation for any officer performing duties under this Act...

'(5) The dividends on the investments under this section shall be paid to such account as the Treasury may direct, and regard shall be had to the amount thus derived in fixing the fees payable in respect of bankruptcy proceedings.'

h Proviso (a) to s 89 (2), as I have said, can be split into four parts, and I am not concerned with the first two parts, but only with the third and fourth.

The first question

j It is curious that the Act does not say whether the probable amount of the cash balance is because the amount is large or because it is small. In 1883 it is likely that the legislature thought that the Bank of England was the safest place for the moneys, and that local banks might be risky and liable to insolvency. But when one remembers that the scheme is that the dividends on the investments were to be used to defray the expenses and charges of the Board of Trade and that the fees were to be fixed, having regard to the dividends to be received, it is unlikely that the legislature intended that large cash balances should not remain in the bankruptcy estates account at the Bank of England. In my judgment, where the legislature used the words 'probable amount of the cash balance' it was referring to small amounts rather than

large. If the amounts were small, the risk of them being in a local bank could be faced and the inconvenience of having small sums in the Bank of England avoided. a

The second question

The words which I have to construe are:

‘... if the committee shall satisfy the Board of Trade that for any other reason it is for the advantage of the creditors that the trustee should have an account with a local bank...’ b

In my judgment, the submission on behalf of the trustee of the property of the deceased debtor that the obtaining of interest can be a proper reason fails to give any weight to the word ‘local bank’. If it succeeds, the whole framework of s 89—that is, the payment into an account with the Bank of England—would be vitiated, since every balance, however small, would be transferred to a local account to earn interest. c Further, in the companies legislation the provisions for interest would be otiose if interest could be acquired, and at a higher rate, through another bank account by virtue of the words ‘any other reason’ in s 248 (1) of the Companies Act 1948. It seems to me that the other reason must be one which is advantageous because the account is a local one as opposed to one with the Bank of England, and advantageous in the sense that it will permit the bankruptcy to be more easily administered. d The fact that, once a local bank account has been obtained, interest enures for the benefit of the creditor is, in my judgment, a result of obtaining it and not a reason for it.

Counsel for the trustee relied on the case of *Re Sims, ex parte Official Receiver*³, in which it was decided that the penal interest chargeable against a trustee in bankruptcy under s 74 (6) of the 1883 Act is payable to the bankrupt’s estate and not to the Treasury. e The basis of that decision was that there was a presumption that the trustee had improperly made a profit out of the money which he had retained, and that profit was money which he received to the use of the estate. I do not think that the case assists one way or the other except that it shows that interest can accrue to the estate otherwise than under s 89 (3) of the 1914 Act.

Conclusion f

It is of course true that the meaning of the words ‘for any other reason’ is prima facie very wide indeed, but to accede to the trustee’s submission would in my judgment be to negative the whole basis of the 1883 and 1914 Acts that the costs of the Board of Trade were to be defrayed from the fees and dividends arising from the investment of moneys in the bankruptcy estates account. Such a result can be avoided by limiting the meaning of the words as I have suggested, with the result that in my judgment the obtaining of interest is not in itself a reason for opening a local bank account. g

No order on the motion.

Solicitors: Titmuss, Sainer & Webb (for the trustee in bankruptcy); Solicitor, Department of Trade and Industry. h

Jacqueline Metcalfe Barrister.

a Re Union Accident Insurance Co Ltd

CHANCERY DIVISION

PLOWMAN J

6th, 7th, 8th, 9th, 15th DECEMBER 1971

Company – Winding-up – Liquidator – Appointment – Provisional liquidator – Power of court to make appointment – Circumstances in which exercisable – Provisional liquidator for insurance company – Necessity for appointment – Companies Act 1948, s 238.

Company – Winding-up – Liquidator – Appointment – Provisional liquidator – Powers – Limitations and restrictions – Compulsory winding-up – Insurance company – Protection of assets – Closure of branch office – Power of provisional liquidator to authorise closure – Duty of provisional liquidator.

Costs – Compulsory winding-up – Insurance company – Unsuccessful motion to discharge appointment of provisional liquidator – Power of company to instruct solicitors – Residuary power.

The Department of Trade and Industry ('the department'), pursuant to s 109 of the Companies Act 1967, required a motor insurance company ('the company') to produce its books and papers. The department also served on the company a notice under s 80 of the 1967 Act imposing on the company certain requirements on the grounds that there was a risk of the company becoming insolvent. Then, having given the company the requisite notice, the department gave it a direction under s 68 (1) of the 1967 Act forbidding the writing of new policies or the renewal of expiring policies. Subsequently the department presented a petition under s 35 of the 1967 Act and s 13 of the Insurance Companies Act 1958 to have the company wound up. The registrar forthwith made an order on an ex parte application by the department appointing an official receiver provisional liquidator of the company. By virtue of the order the provisional liquidator's powers were limited and restricted 'to taking possession of collecting and protecting the assets of the . . . company . . . such assets . . . not to be distributed or parted with until further order'. The day after his appointment the provisional liquidator applied ex parte for the appointment of a special manager. An order was made appointing W special manager. The order provided that the provisional liquidator 'be at liberty to employ and out of the assets of the . . . Company to pay such of the clerks servants and employees of the . . . Company as he may consider necessary to assist the . . . Special Manager'. W, with the concurrence of the provisional liquidator, closed down the company's Bradford branch office and dismissed the staff. The company instructed their solicitors to seek (i) an order discharging the appointments of the provisional liquidator and the special manager on the grounds that the court, under s 238^a of the Companies Act 1948, could only appoint a provisional liquidator where special circumstances (such as danger to assets, proof of insolvency or an undefended petition) existed and no such special circumstances applied in relation to the company; (ii) alternatively, injunctions restraining the provisional liquidator from acting otherwise than in accordance with the terms of the order appointing him, and the special manager from carrying on the business of the company otherwise than with a view to the preservation of its assets including goodwill until the hearing of the winding-up petition.

Held – (1) The power to appoint a provisional liquidator conferred on the court by s 238 of the 1948 Act was not limited to cases where such special circumstances

a Section 238, so far as material, provides: '(1) Subject to the provisions of this section, the court may appoint a liquidator provisionally at any time after the presentation of a winding-up petition. (2) . . . the appointment of a provisional liquidator may be made at any time before the making of a winding-up order . . . (4) Where a liquidator is provisionally appointed by the court, the court may limit and restrict his powers by the order appointing him.'

existed; other factors, such as the public interest, might be taken into account; in the present case the public interest required that the solvency of the company should be maintained or the company wound up before its liabilities exceeded its assets; that solvency depended to an important extent on the company recovering from its brokers and agents the balances which they held; the evidence showed that it was essential that continuous pressure should be maintained on such agents to remit the sums to the company; the appointment of a provisional liquidator, clothed with the necessary authority to collect those assets, was in the circumstances necessary; accordingly no order would be made discharging his appointment or that of the special manager (see p 1109 g to j, p 1110 h and p 1111 b and e to g, post).

(2) The injunctions sought would not be granted for the following reasons—

(i) the provisional liquidator was acting within the powers conferred on him in allowing the branch office to be closed and the staff dismissed (see p 1112 a and b, post),

(ii) it was the duty of the provisional liquidator to protect the company's assets; the reduction of the company's liabilities was a correlative of the protection of its assets; on the evidence the usefulness of the branch office had gone once new insurance business or the renewal of existing policies of insurance was forbidden under s 68, and the office had become unprofitable; accordingly the closure of the Bradford office was a sensible and proper step for the special manager, with the concurrence of the provisional liquidator, to take (see p 1112 c and j, post).

(3) The solicitors acting for the company would not be liable to pay the costs of the motion personally; they were acting with the authority of the board for, notwithstanding the appointment of the provisional liquidator and the general assumption by him of its powers, the board still retained certain residuary powers, which included authority to instruct solicitors and counsel in such circumstances (see p 1113 c d and f, post).

Dictum of Pennycuik J in *Re Mawcon Ltd* [1969] 1 All ER at 192 applied.

Notes

For the appointment and duties of a provisional liquidator and a special manager, see 6 Halsbury's Laws (3rd Edn) 559-562, paras 1076-1083, and for cases on the subject, see 10 Digest (Repl) 907, 908, 6159-6183.

For the margin of solvency and an insurance company being deemed to be unable to pay its debts, see 22 Halsbury's Laws (3rd Edn) 435, 436, para 875.

For the Companies Act 1948, s 238, see 5 Halsbury's Statutes (3rd Edn) 302.

For the Insurance Companies Act 1958, s 13, see *ibid* 515.

For the Companies Act 1967, ss 35, 68, 80, 109, see *ibid* 578, 599, 605, 618.

Case referred to in judgment

Mawcon Ltd, *Re* [1969] 1 All ER 188, [1969] 1 WLR 78, Digest (Cont Vol C) 119, 6932a.

Cases and authority also cited

Automatics (G & W) Ltd, *Re* (1968) The Times, 21st December.

Craven Insurance Co Ltd, *Re* [1968] 1 All ER 1140, [1968] 1 WLR 675.

Diamond Fuel Co, *Re* (1879) 13 Ch D 400.

London and Manchester Industrial Association, *Re* (1875) 1 Ch D 466.

Practice Note [1971] 2 All ER 700, [1971] 1 WLR 757.

Motion

This was a motion by the Union Accident Insurance Co Ltd ('the company') for (1) an order discharging the appointment of the official receiver as the provisional liquidator of the company under an order made on 22nd November 1971, on an ex parte application by the Department of Trade and Industry ('the department'), and continued over the adjourned hearing of the summons on 30th November 1971, and (2) an order discharging the appointment of Gerhard Adolph Weiss as special manager of the company under an order made ex parte on 23rd November 1971, or

a alternatively, (3) an injunction restraining the official receiver from acting whether by himself, his servants, agents or howsoever otherwise than in accordance with the terms of the order, and (4) an injunction restraining the special manager from carrying on the business of the company otherwise than with a view to the preservation of its assets including goodwill until the hearing of the petition, presented by the department, for the winding-up of the company. The facts are set out in the judgment.

b *T L G Cullen* for the company.
P J Millett for the department.
John Lindsay for the provisional liquidator.
Brian Parker and *Jonathan Parker* for the special manager.

c **PLOWMAN J.** This is a motion for an order discharging the appointment of the official receiver as the provisional liquidator of the company, Union Accident Insurance Co Ltd, and of Mr Weiss as special manager of the company, and for certain alternative relief by way of injunction.

The events leading up to the application are these. The company was incorporated on 30th December 1965 under the name Southern Counties Insurance Co Ltd, which was changed to its present name on 19th February 1968. The company has an issued capital of £400,000 and its business is that of motor vehicle insurance. It is said to have about 43,000 policy holders. In September 1968 the company passed into the control of a Mr Pittalis who is the chairman and the majority shareholder. At that time the Board of Trade, as it then was, had, in pursuance of its statutory powers, imposed on the company the requirement to submit quarterly accounts in addition to its annual audited accounts. On 22nd March 1971, pursuant to s 109 of the Companies Act 1967, the Department of Trade and Industry, which I will call 'the department', authorised Mr Woodman and Mr Knight, of its insurance and companies department, to require the company to produce books and papers, and that was done. On 21st May 1971 the department served on the company a notice pursuant to s 80 of the 1967 Act imposing on the company certain other requirements. That section is one authorising the department to impose requirements if it appears that the business of an insurance company, to which the Insurance Companies Act 1958 applies, is being so conducted that there is a risk of the company becoming insolvent. The requirements in question, so far as material, are set out in para 7 of the winding-up petition, to which I will refer in a moment, and were as follows;

g '(1) The Company should not thenceforth make investments of the following descriptions, that is to say, (a) loans and debentures, (b) the purchase of land or any interest in land, (c) shares in a company whose principal objects or activities included the purchase or development of land. (2) The Company should within three months after the date of the Notice (or such longer period as [the department] might allow) realise investments which consisted of freehold or leasehold land held by the Company otherwise than by way of security for moneys owing to the Company. [No 4, which is the third one set out in the petition, states:] The Company should take all such steps as were requisite to secure that the aggregate of the premiums to be received by it in consideration of the undertaking by it, during the period of six months beginning on 1st July 1971, of liabilities in the course of carrying on motor vehicle insurance business should not exceed four hundred thousand pounds (£400,000) net of refunds, rebates and premiums for re-insurance ceded.'

h
j That last requirement was complied with. The land which the company was directed to realise within three months has not yet in fact been realised, but I understand that part of it is to be sold by auction in a few days and the remainder in January 1972.

On 1st October 1971 a further order as to the production of books and documents to Mr Woodman and Mr Knight was made under s 109 of the 1967 Act. On 8th October the department served on the company a notice required by s 68 (3) of the 1967 Act that it was considering exercising its powers under s 68 (1), and on 17th November 1971, pursuant to s 68 (1), the department, not being satisfied that the company had the required margin of solvency, gave a direction, the effect of which was that the company was forbidden to enter into or vary any contract of insurance with reference to motor insurance. The effect of that is that the company cannot now write any new policy or renew any expiring policy, and any contravention of that is a criminal offence under the Act.

On 22nd November 1971 the department presented a petition to have the company wound up. In that petition they rely on two statutory grounds. The first is s 35 of the 1967 Act which enables the department to petition if, as a result of information or documents obtained under s 109, it appears to the department 'that it is expedient in the public interest' that the company should be wound up. It is, I think, of importance to note that in that respect the department is made guardian of the public interest. The second statutory ground is s 13 of the Insurance Companies Act 1958, which provides that an insurance company shall be deemed for the purposes of s 222 of the Companies Act 1948 to be unable to pay its debts if the value of its assets does not exceed the amount of its liabilities by what is called the relevant amount. The relevant amount in this case is one-fifth of its premium income in its last preceding financial year; in other words, the department can petition if the company has not got the necessary margin of solvency and the power to petition in that event is conferred by s 15 (2) of the 1958 Act, as amended.

As regards the first ground, namely, s 35 of the 1967 Act, the petition states in para 9:

'From the information obtained under s 109 of the Companies Act 1967 it appears to [the department] expedient in the public interest that the Company should be wound up, in that:—(i) the Company has failed to realise investments which consist of freehold or leasehold land as required by Paragraph (2) of the Notice dated the 21st May 1971 within the period of three months specified in the said Paragraph or at all; [I have already referred to the matter of the forthcoming auction.] (ii) there are circumstances suggesting that the Company has seriously insufficient liquid resources to meet liabilities and is deliberately delaying the settlement of claims; [it cannot I think seriously be disputed that the company is short of liquid resources.] (iii) on the 31st March 1971, despite the problem of liquidity the Company made an unsecured loan of £13,000 to Presto Bars Limited, a Company then under the control of the wife of Mr Pittalis, the Company's Chairman; [that is not denied, although the loan is now I understand secured.] (iv) there are circumstances suggesting that the Company has been seriously underestimating outstanding claims.'

Then in regard to the second ground, namely, s 13 of the 1958 Act, the petition states:

'10. The value of the Company's assets does not exceed the amount of its liabilities (computed in accordance with section 13 (2) of the Insurance Companies Act, 1958) by the amount which is the relevant amount for the purposes of section 62 (1) (a) of the Companies Act 1967. 11. By reason of the circumstances aforesaid the Company is deemed for the purpose of Section 222 of the Companies Act, 1948, to be unable to pay its debts. [Paragraph 12 states:] In the premises, it is just and equitable that the Company should be wound up.'

On 22nd November 1971, the day on which the petition was presented, the registrar made an order on an ex parte application by the department appointing one of the official receivers attached to the court to be provisional liquidator of the company

- a** until the conclusion of the adjourned hearing of the summons for the appointment of the provisional liquidator. The order contained the following paragraph:
- ‘And the court doth hereby limit and restrict the powers of the said Provisional Liquidator to the following acts, that is to say, to taking possession of collecting and protecting the assets of the above-named company but such assets are not to be distributed or parted with until further order.’
- b** On the following day 23rd November, the provisional liquidator applied *ex parte* for the appointment of a special manager pursuant to s 263 of the Companies Act 1948, and Mr Weiss, a partner in the well-known firm of W H Cork Gully & Co, chartered accountants, was appointed special manager until the conclusion of the hearing of the petition to wind up the company or further order. The order appointing Mr Weiss contains the following paragraph:
- c** ‘AND IT IS ORDERED that the Applicant the said Official Receiver and Liquidator be at liberty to employ and out of the assets of the said Company to pay such of the clerks servants and employees of the said Company as he may consider necessary to assist the said Special Manager’.
- d** On 30th November the appointment of the official receiver as provisional liquidator was continued over the adjourned hearing of the summons or further order.
- I am now asked to discharge those appointments. Counsel for the company submits that a provisional liquidator ought not to be appointed unless there are special circumstances and the fact that the company is an insurance company is not of itself, said counsel, a special circumstance. He submitted that special circumstances were such things as danger to the assets or proof of insolvency, or the fact that the petition was undefended, and he submitted that those circumstances do not prevail here. He referred me to a passage in Palmer’s Company Precedents, where it is stated¹:
- e**
- f** ‘The application to appoint a provisional liquidator is by r. 8 made to the registrar by summons. The application should be supported by an affidavit as to the circumstances which render the appointment desirable, and, where any person other than the official receiver is to be appointed, as to the special fitness of the proposed provisional liquidator. If the company makes, consents to, or is shown not to oppose, the application, the appointment is almost a matter of course when it is asked that the official receiver may be appointed. The early cases seem to show that the appointment would only be made where the petition was unopposed. But where the company opposes, or does not appear, the order may now be made, if there are special circumstances such as danger to the assets or obvious insolvency, or the company has admitted that it has no defence to the petition.’
- g**
- h** I am not prepared to accept that those examples of cases in which the provisional liquidator would be appointed are the only cases in which an appointment may be made. There is no such limitation in s 238 of the Companies Act 1948, which confers a quite general power on the court to appoint a provisional liquidator and depending on the circumstances of each particular case, there may be other matters which may be relevant, such as the public interest which is a matter to which I will refer again in a moment or two.
- i** I have been supplied with a good deal of evidence in this case and a lot of figures, but I do not propose to investigate the facts and figures in any great detail. In particular I do not propose to decide whether the necessary margin of solvency exists at the present time or not. It seems to me that that is a matter which will have

to be decided on the hearing of the petition and almost certainly only after there has been cross-examination on the affidavits which have been put in.

There are two matters though, which seem to be relevant for me to consider. The first is whether the department has made out a good *prima facie* case for a winding-up at the hearing of the petition. Any views I express about the matter now are of course provisional only because I am not trying the petition at the present time. If the department has not made out a good *prima facie* case for a winding-up order then clearly I think it would not be right to appoint a provisional liquidator. On the other hand, if the department has made out a good *prima facie* case for a winding-up order then the second matter for my consideration arises, namely, whether in the circumstances of this case it is right that a provisional liquidator should have been appointed. So far as the first matter is concerned, in my judgment the department has made out a good *prima facie* case, both under s 35 of the 1967 Act and under s 13 of the 1958 Act. So far as s 35 is concerned, all the matters set out in para 9 of the petition, which I have already read, are, in my judgment, supported by the evidence at least to the extent of a good *prima facie* case, and I only want to add a word about the fourth of those matters, namely, that there are circumstances suggesting that the company has been seriously underestimating outstanding claims. Let me give an example of that. The company's audited accounts for the year ending 31st March 1970 contain a provision for outstanding claims of £94,823. In March 1971, a year later, the department calculated that these claims amounted in fact to £183,000 odd. In October 1971 Mr Knight, whom I have already mentioned, was able to construct a run-off statement, as it is called, for all claims which had been reported up to 31st March 1970, and as a result of that it was ascertained that the correct figure was not £94,823, but £251,698; in other words, very nearly three times the amount of the estimate.

So far as s 13 of the 1958 Act is concerned I need only mention the fact that the company's own audited accounts for the year ending 31st March 1971 showed that the margin of solvency was not met. That fact of itself is evidence that the company continues to be unable to pay its debts unless the contrary is proved. That is provided by s 17 (1) of the 1958 Act. Having regard to the conflict of evidence in regard to what the present position is, a conflict which, as I have indicated, can only be resolved on the hearing of the petition, it is impossible, I think, to say that the contrary has been proved at the present time. In these circumstances I am of opinion that the department has made out a good *prima facie* case for a winding-up order.

The next question, as I said, is whether a provisional liquidator ought to have been appointed. In the first place it is important to remember that the effect of a s 68 direction, to which I have already referred, is that the company's business has been very seriously curtailed—as I say it cannot write new policies or renew old ones—and now as a result of the presentation of the winding-up petition it cannot pay claims. Then there is the public interest to be considered. Counsel for the department submitted, and I agree with him, that the public interest requires either that the solvency of the company should be maintained or that the company should be wound up before its liabilities exceed its assets. The company's solvency depends to an important extent on recovering in full from its brokers and agents the balances which they are holding for the company. Those balances amount to something in the region of £300,000 and the company's accounts assume that that money is going to be recoverable in full.

At this point I want to refer to the evidence, and first of all, to the affidavit of Mr Ian Glendinning Watt, who is a chartered accountant in the City of London. He states:

'1. I am the liquidator of The Carriage Insurance Co. Limited which was wound up by an order of this Honourable Court dated 6 July 1970. Shortly after the order to wind-up the Company was made I was appointed Special Manager of the Company. 2. Following my appointment as Special Manager I experienced great

a difficulty in collecting the balances due to the Company from brokers and in my opinion the difficulties were increased by the lapse of time between the presentation of the Petition and my appointment as Special Manager after the order to wind-up the Company had been made. If a Provisional Liquidator had been appointed immediately the Petition had been presented and had I been appointed Special Manager shortly thereafter I am of the opinion that the difficulties would have been considerably less. 3. In view of the difficulties which I have experienced, referred to above, I have formed the view that in all cases where a Petition b is presented for the winding-up of a Company carrying on business as motor insurers, where there are substantial balances in the hands of brokers, it is desirable that a provisional Liquidator and Special Manager be appointed as soon as possible after the presentation of a winding-up Petition.'

c Mr Weiss, the special manager, in one of the two affidavits which he has sworn in this matter, states:

d 'I have acted as Liquidator in some 15 liquidations of insurance companies in this country, and have experience in cases where there have and also where there have not been Provisional Liquidators and Special Managers appointed before the winding up order was made. I draw attention to the very large sums which are owing to the company on agents' balances. These are sums payable to the company on demand [and I pause there to say I think that is not strictly accurate and I think some of that money may be payable as long ahead as four or five weeks] mostly held by brokers and consisting of premiums held by them for policies already incepted or renewed. From my experience I e consider it very important that continuous pressure be maintained on the agents to remit these sums to the company. If such a pressure is not maintained for any period experience shows that the sums become progressively more difficult to collect. This is because on the presentation of the petition policyholders seek the return of their premiums from agents who prefer to pay their own clients rather than the company. Moreover I have found the presentation of f the petition in itself affords the agents an excuse for not paying monies over to the company; and for this reason it is, in my view, essential to appoint a Provisional Liquidator who is clothed with the necessary authority to collect these and other assets of the company.'

g There speak two very experienced provisional liquidators and in the circumstances in my judgment this is a case where there ought to be a provisional liquidator and the registrar in my view was perfectly right in appointing one. I need not deal separately with the appointment of a special manager because counsel for the company accepts that if the provisional liquidator stays then it is right that Mr Weiss should stay too.

h I then come to the alternative relief sought by the notice of motion which is as follows:

j 'An injunction restraining the Official Receiver from acting whether by himself his servants agents or howsoever otherwise than in accordance with the terms of the said Order [that is the order appointing a provisional liquidator] ... An injunction restraining Gerhard Adolph Weiss from carrying on the business of the company otherwise than with a view to the preservation of its assets including goodwill until the hearing of the Petition.'

What is really being challenged here is the action taken by the special manager, with the concurrence of the provisional liquidator, in closing down the company's Bradford branch office and dismissing the staff there. What is said on behalf of the company is that that was not preserving the assets of the company but getting rid of them, and it was being done on the assumption that the company would necessarily be

wound up on the hearing of the petition. It is said that this was not authorised by the order appointing a provisional liquidator which, as I have already said, contains the paragraph saying that the powers of the provisional liquidator were confined to taking possession of, collecting and protecting the assets of the company and that said assets should not be distributed until further order. In my judgment there really is not anything in this point. In the first place the order appointing the special manager itself contemplates that the provisional liquidator may not consider it necessary to employ the company's staff. I draw attention to the part of the order which I have already read saying that he is to be at liberty to employ such of the clerks, servants and employees of the company as he may feel necessary to assist the special manager, and it follows I think that those whom he did not consider would assist the special manager would have to be dismissed.

Secondly, protection of the company's assets, which the provisional liquidator is bound to afford, does not necessarily involve keeping all its offices open. As counsel for the provisional liquidator submitted, a reduction of the company's liabilities is the correlative of the protection of its assets, and this is what Mr Weiss says about the matter in the second of the affidavits which he swore. He states:

'As a result of the Company's inability to take on any new business, or even negotiate the renewal of current annual contracts, the business carried on at the Bradford premises was limited primarily to negotiating claims and maintaining contact with local brokers. I formed the view that in order to preserve the assets of the Company so far as possible it was necessary to close down the Bradford office. After consultation between myself and the Official Receiver, it was decided that this should be done, and I so instructed Mr. Stocken. He duly dismissed the staff at Bradford, closed the premises, and the keys were handed over to the Official Receiver.'

Mr Christmas, an assistant official receiver, who has had the conduct of this matter on behalf of Mr Cheek, the senior official receiver, has sworn an affidavit in which he states in para 12:

'... The Bradford Office of the Company employed 17 persons costing the Company in salaries alone some £13,834 per year or over £266 per week. Rent will become payable on the next quarter day, 25th December. The steps taken to close down the Bradford Office were taken with my approval and that of the Senior Official Receiver and upon the advice of the Special Manager. Arrangements were made for post coming to the Bradford Office to be sent to the Special Manager in London. So far from the closure of an unprofitable office being in excess of the Provisional Liquidator's powers, in my experience it is naturally one of the commonest first steps to be considered by a Provisional Liquidator. I have had no reason since to think that the closure of the Bradford Office was other than a sensible step to take for the purpose of preserving the Company's assets against continuing expenses. Even if it had been responsible for a quarter of the Company's turnover at one time its usefulness was gone once new insurance business or renewal of existing policies of insurance was forbidden under Section 68.'

In my judgment the closing down of the Bradford office was a proper and sensible step to take and one which was in the powers of the provisional liquidator. In those circumstances I do not propose granting any injunction and, as I indicated yesterday afternoon, I dismiss the motion.

[Following a discussion on costs the hearing was adjourned.]

15th December. **PLOWMAN J.** On 9th December I dismissed a motion by the company asking for the discharge of its provisional liquidator and special manager

a and for alternative relief by way of injunction. I then heard argument on the question of costs and said that I proposed to dismiss the motion with costs, but without prejudice to the question of the incidence of those costs, a matter which I wished to take time to consider in the light of the submissions on behalf of the respondents that the company's solicitors ought to be ordered to pay the costs personally. I indicated that I could not make any order of that sort without giving the company's solicitors an opportunity of being heard on the question. I am now satisfied that I ought not to make a personal order against the company's solicitors and I have accordingly let them know that it is unnecessary for them to be represented before me today.

b The respondents' submission was that the appointment of a provisional liquidator automatically put an end to the authority of the company's directors to instruct solicitors and counsel to represent it and that the solicitors purporting to act on its behalf were therefore liable to pay the respondents' costs personally. It is of course well settled that on a winding-up the board of directors of a company becomes *functus officio* and its powers are assumed by the liquidator, and my attention was drawn to *Re Mawcon Ltd*², where Pennycuik J stated in effect that the appointment of a provisional liquidator had the same result. No doubt that is so, but it is common ground that notwithstanding the appointment of the provisional liquidator the board has some residuary powers, for example it can unquestionably instruct solicitors and counsel to oppose the current petition and, if a winding-up order is made, to appeal against that order.

d The issue is to the extent of those residuary powers, and in particular whether they extend to the launching of the present motion. I think that it may sometimes be helpful to test the matter by considering the other side of the coin, namely to enquire whether the power which the board is said to have lost is one which can be said to have been assumed by the liquidator. If the answer is that it cannot, that may be a good reason for saying that the board still retains it. Clearly, for example, as I have already indicated, the power to instruct solicitors and counsel on the hearing of the winding-up petition is not a power which anyone could suggest has passed to the provisional liquidator and therefore the board retains it. If that is true in regard to the petition itself, it is, in my judgment, equally true of interlocutory proceedings which are such that it would not be appropriate for the provisional liquidator to give instructions on behalf of the company. A motion to discharge the provisional liquidator on the ground that he ought never to have been appointed clearly falls within that category, and in those circumstances I therefore dismiss the motion with costs and make no other order in regard to costs.

g *Motion dismissed with costs.*

Solicitors: Bernard Oberman & Co (for the company); Solicitor, Department of Trade and Industry; Sidney Pearlman & Greene (for the provisional liquidator); DJ Freeman & Co (for the special manager).

h Jacqueline Metcalfe Barrister.

² [1969] 1 All ER 188 at 192, [1969] 1 WLR 78 at 82

R v Prager

COURT OF APPEAL, CRIMINAL DIVISION

EDMUND DAVIES, STEPHENSON LJJ AND THOMPSON J

4th, 10th NOVEMBER 1971

Criminal law – Evidence – Admissibility – Admission – Confession – Confessions, answers and statements to police – Judges' Rules – Non-observance of rules – Failure to administer caution – Confession admissible despite breach of rules provided it is voluntary – Open to judge to admit confession on basis that it was voluntary without ruling whether obtained in breach of rules.

Criminal law – Evidence – Admissibility – Admission – Confessions, answers and statements to police – Voluntariness – Statements obtained by oppression – Meaning of oppression.

The Judges' Rules 1964^a are not rules of law and their non-observance will not necessarily lead to a confession being excluded from evidence, unless it is shown that the confession was not made voluntarily. Accordingly where it is alleged that a confession has been obtained in the course of questioning which was not introduced by a caution in accordance with r 2^b of the 1964 rules it is open to the trial judge to admit the confession on the basis that it was made voluntarily without ruling on the question whether it was obtained in breach of the rules (see p 1118 e and j to p 1119 a and p 1120 b, post).

In order to establish that a confession is not voluntary in that it was obtained by 'oppression'^c, it must be shown that it was obtained in circumstances which tended to sap, and did sap, the free will of the suspect. 'Oppressive questioning' may be described as questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the suspect that his will crumbles and he speaks when otherwise he would have remained silent (see p 1119 c to f, post).

Dictum of Sachs J in *R v Priestley* (1965) 51 Cr App Rep at 1 approved.

Notes

For the admissibility of confessions arising from questioning by the police, see 10 Halsbury's Laws (3rd Edn) 470-473, paras 863-865, and for cases on the subject, see 14 Digest (Repl) 474-477, 4528-4577.

Cases referred to in judgment

Callis v Gunn [1963] 3 All ER 677, [1964] 1 QB 495, [1963] 3 WLR 931, 128 JP 41, 48 Cr App Rep 36, Digest (Cont Vol A) 368, 4448c.

Comrs of Customs and Excise v Harz [1967] 1 All ER 177, [1967] 1 AC 760, [1967] 2 WLR 297, 131 JP 146, 51 Cr App Rep 123, Digest (Cont Vol C) 211, 4507a.

R v Priestley (1965) 51 Cr App Rep 11, Digest (Cont Vol C) 212, 4527a.

Application

This was an application by Nicholas Anthony Prager for leave to appeal against conviction, and against the sentences imposed on him on 23rd June 1971 at Leeds Assizes before Lord Widgery CJ and a jury on one count of making between 1st June and 29th July 1961 a sketch contrary to s 1 (1) (b) of the Official Secrets Act 1911 and

^a See *Practice Note* [1964] 1 All ER 237, [1964] 1 WLR 152.

^b Rule 2, so far as material, provides: 'As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or any further questions, relating to that offence . . .'

^c The introduction to the Judges' Rules states: 'These Rules do not affect the principles . . . (e) that it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.'

a on another count of communicating documents between 29th July and 2nd September 1961 contrary to s 1 (1) (c) of that Act. He was sentenced to concurrent terms of 12 years' imprisonment in respect of each of the two convictions. The facts are set out in the judgment of the court.

J P Comyn QC and E Lyons for the applicant.

The Attorney-General (Sir Peter Rawlinson QC) and D Herrod for the Crown.

b

Cur adv vult

10th November. **EDMUND DAVIES LJ** delivered the following judgment of the court. On 23rd June 1971 Nicholas Anthony Prager, the applicant, was convicted at Leeds Assizes of making between 1st June and 29th July 1961 a sketch, contrary to s 1 (1) (b) of the Official Secrets Act 1911 (that was count 1), and of communicating documents between 29th July and 2nd September 1961, contrary to s 1 (1) (c) of that Act. The convictions were by an 11:1 majority. The applicant was acquitted of the third count, which charged him with doing, on 16th January 1971, an act preparatory to the commission of an offence contrary to s 7 of the Official Secrets Act 1920. He was sentenced to concurrent terms of 12 years in respect of each of the two convictions. He applied to this court for leave to appeal against conviction and sentence. d On 4th November we heard the application, the submission of counsel for the applicant being made almost entirely in camera (at the request of counsel for the Crown and with the complete concurrence of counsel for the applicant). We did not deem it necessary to hear counsel for the Crown before announcing our refusal of the application in respect of both conviction and sentence, but indicated that we would at a convenient later date give our reasons for arriving at that conclusion. That we e now proceed to do.

The applicant was born in 1928 of Czech parents and lived in Czechoslovakia until he came to this country with them in 1948 or 1949 and became a naturalised British subject. In 1949 he married a Czech woman and in May of that year joined the Royal Air Force. By 1959 he had been promoted to sergeant and, being a clever engineer, was one of a very small team engaged on highly secret and important work. f In 1958 the applicant's wife acquired an interest in a house in Prague on the death of her aunt. The applicant and his wife wanted to sell it and get the money transferred to England. But, as there were exchange control difficulties, in 1959 the applicant proposed visiting Czechoslovakia. For this purpose he needed a visa and went to the Czech Embassy in London. There he met a Mr Malek, an officer of the Czech intelligence who occupied the post of consul, and what seems to have been initially a g wholly innocent contact was to prove a turning-point in the applicant's life. In 1960 the highly secret unit in which he was serving moved to Fittingley, near Doncaster. For some reasons, which merit and have doubtless already received attention, the security system obtaining there was imperfect, for it was possible to abstract classified matter at night, photograph it, and return it undetected the following day. Among the projects being carried out was one called 'Blue Diver', and count 1 relates to h the alleged photographing of material relating thereto for the purpose of supplying it to the Czechs.

In 1961 four important events occurred. Taken individually, they may well have been capable of an innocent explanation but, when regarded collectively, were said by the Crown to provide a powerful indication that the applicant was preparing for espionage. Firstly, in February 1961, the applicant and his wife—or at least the wife— j were on terms of social intimacy with Mr Malek. Secondly, in March 1961, the applicant sought a three months extension of his 12 year Royal Air Force engagement which was due to expire the following May. He explained that he sought the extension so as to complete a course of study he was then undoubtedly pursuing, whereas the Crown alleged that the extra months covered June and July, thus enabling him to have access to secret material for the time necessary to enable him to further the

course of espionage on which he was set. Thirdly, during 1961 the applicant bought a polaroid camera and a 'close-up' kit at a total cost in excess of £120. It could undoubtedly be used for photographing documents and would enable its user to know instantly whether he had procured a satisfactory result. Fourthly, the applicant and his wife required a visa for the Czechoslovakian holiday they took in 1961, and for this purpose were in contact with Mr Malek. The Crown alleged that it was during a visit by the applicant to the Czech Embassy that he handed over to Mr Malek his photographs of secret material. In August 1961 the applicant left the Royal Air Force and became engaged on computer work with English Electric. This involved his visiting Czechoslovakia from time to time during the next ten years.

When it was that the intelligence staff of this country first interested themselves in the applicant is not clear. All we know is that it was only after 'prolonged enquiries' that Detective Chief Superintendent Craig and Detective Superintendent Sills and other police officers arrived at his home near Rotherham at 8.00 am on Sunday, 31st January 1971. At the outset he was shown a search warrant issued under the Official Secrets Act 1911. He was then told that the police wanted to question him regarding a serious matter and was asked whether he preferred to go to the police station for the purpose. He said he did, and in the 25 minute journey to Doncaster police headquarters remarked, 'This whole thing is a fantasy, but I will help you all I can'. They arrived there at 9.15 am and his wife followed soon after. It has not been suggested to this court that the applicant then or at any time before he was charged thought, or had any grounds for thinking, that he was not free to leave the police station had he wanted to.

On arrival, the applicant was given refreshment and Detective Chief Superintendent Craig forthwith began questioning him and, conforming to a decision previously arrived at, they gave him no caution before doing so. In essence, this application turns on whether they were right in so refraining. The submission of counsel for the applicant is that it was a completely wrong decision and should have led to the exclusion from the jury's consideration of everything said or acknowledged by the applicant thereafter.

In his submissions before us, counsel for the applicant conveniently divided the events of the day into session I, lasting from 9.15 am to 12.30 pm, session II from 5.45 pm to about 7.40 pm, and session III from 7.40 pm to about 11.30 pm. During session I the applicant made no admissions, and in particular denied taking illicit photographs or meeting Czechs whom he knew to be intelligence agents working for their country. Questioning broke off at 12.30 pm, when (accompanied by a detective officer) the applicant took a walk in the precincts of the police headquarters, had lunch and then rested and slept in a room made available to him. When he awoke, he was given tea and freshened himself up. At 5.45 pm his interrogation was resumed, thus beginning what his counsel described as session II. At about 7.40 pm something significant occurred, for on being asked whether he had been regarded as an agent by the Czech intelligence, he replied, 'It did not happen like that. Anything I have done was done unwittingly, but you must know my family are out of this'. At this point Detective Chief Superintendent Craig cautioned the applicant in accordance with r 2 of the Judges' Rules 1964¹, and it is to be observed that when Lord Widgery CJ came to sum up, he told the jury:

'It is not perhaps without importance to remember that that caution was, according to the prosecution—the police officers—and really not challenged by the defence given to [the applicant] *before* he made any kind of admission in this matter at all.'

Session III began with the caution at 7.40 pm. Between then and 9.00 pm the applicant orally admitted buying a polaroid camera and a 'close-up' kit in Sheffield, and photographing 'stuff' in his kitchen. Asked what 'stuff' he was referring to, he replied,

¹ See Practice Note [1964] 1 All ER 237, [1964] 1 WLR 152

- a 'Just pictures of general calculations'. Asked to which device these calculations related, he said 'Blue Diver'. He went on to say that he had handed these over to Mr Malek at the Czech Embassy in London, and spoke of later passing notes on 'Blue Diver' to two Czech intelligence officers at Jevaney when on holiday in Czechoslovakia and of being paid by them £200 or £300, which he regarded as 'an advance against the sale of my house'. At 9.35 pm he was asked whether he was prepared to furnish a signed statement and he assented, but asked whether he might take another walk before doing so. He then took a short walk, again accompanied by a detective officer. At 9.50 pm he was cautioned in the terms laid down by r 3 of the Judges' Rules 1964 and between then and 11.30 pm he dictated a long statement. On its completion, he read and initialled each page and signed the completed statement. It is not contested that the statement, if true, constituted a complete admission of the two offences on which he was later convicted by the jury. In relation to one of counsel
- c for the applicant's submissions, it is convenient to observe at this point that Lord Widgery CJ in due course told the jury that, if they were satisfied that such portion of the statement as dealt with the alleged espionage arrangements in 1971 which formed the basis of the third count in the indictment was true and voluntary, 'then of course you will have no alternative but to convict him', despite which, as we have
- d already said, the jury acquitted on that count.

On 1st March the same two officers saw the applicant and his solicitor at the prison. Reading from a script, the applicant then made a second statement, the opening words being:

- e 'I wish to make a statement in which I will tell you the truth. The previous statement which I was required to make on the 31st January is not true in most of its contents because I was induced to make that statement and I was in a state of fear.'

- It constituted a complete denial of any participation in espionage activities. At the trial, when Detective Superintendent Sills was about to tell the court what happened after the applicant reached the police headquarters on 31st January, counsel for the applicant intimated that he desired to develop an objection in the absence of the jury.
- f They accordingly retired, and there ensued a trial within the main trial, regarding the admissibility of the proposed prosecution evidence relating to events occurring after 9.15 am. His submissions may thus be summarised. In laying information for the purpose of obtaining a search warrant pursuant to s 9 of the Official Secrets Act 1911 (which requires that a magistrate must be 'satisfied by information on oath that there is reasonable ground for suspecting that an offence under this Act has been or is about to be committed'), Detective Chief Superintendent Craig had sworn that his grounds for suspicion were that the applicant had 'made a sketch of a certain secret document which was calculated to be useful to an enemy'. Furthermore, the whole tenor of the questioning thereafter disclosed that the police already had detailed knowledge of the applicant's activities and that an informant or informants had disclosed matters of considerable gravity concerning him. As a result, before
- h any questioning began, the police had, in the words of r 2 'evidence which would afford reasonable grounds for suspecting' that the applicant had committed breaches of s 1 of the Act and should, therefore, have administered the caution prescribed by that rule. As they had failed to do so, the court ought, in the proper exercise of its discretion, to have excluded all evidence relating to what transpired after 9.15 am, for the omission was fatal to admissibility and could not be cured by the cautions
- j later given. This was a somewhat unusual trial within a trial. For example, at no stage of it was the police evidence challenged. Again, neither the applicant nor any other witness was called to testify as to circumstances which might provide a factual ground for excluding the confession. On the contrary, counsel for the applicant made it clear that his objection to admissibility had 'nothing to do with fears, inducements, or threats', although the applicant 'had certain fears in his own mind', which turned

out to be a fear that his wife might have been guilty of the offences into which the police were enquiring. It may here be conveniently noted that this disclaimer was in line with those made at a later stage in the trial when, his submission on admissibility having been overruled, counsel for the applicant cross-examined the police in the jury's presence. For example, he assured Detective Superintendent Sills that no impropriety was suggested, nor was it suggested that the applicant 'was induced by you in any improper sense', nor that, despite his second statement, the applicant had been 'made' to say anything.

Having regard to this attitude, one might be forgiven for concluding that counsel for the applicant was taking his stand simply and solely on the alleged breach of r 2. But it turned out that this was not so, for it later emerged that, despite his assurances, he was further (or alternatively) basing his objection on a wider and more fundamental ground. Turning to note (e) to the Judges' Rules 1964, with its insistence that, before being admitted in evidence, an alleged confession must be proved to have been 'voluntary, in the sense that it has not been obtained . . . by fear of prejudice or hope of advantage . . . or by oppression', counsel for the applicant submitted that the form, prolongation, and quick-firing of the questioning of the accused was designed to 'crack' him and accordingly amounted to 'oppression'. In the result, it somewhat tortuously emerged during the sub-trial that two questions were being raised: (a) was r 2 breached? and (b) had the prosecution proved that the applicant's oral admissions and signed statement were made voluntarily?

Question (a) was, in effect, treated by counsel for the applicant as conclusive of this appeal. But as the 1964 rules make clear, they were—

'put forward as a guide to police officers conducting investigations. Non-conformity with these rules may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings.'

Nevertheless, counsel for the applicant insisted that the admissibility of an alleged confession must in the first place (and, he seemed to be saying, in the last place also) depend on whether the rules have been complied with. He submitted that it was incumbent on Lord Widgery CJ to decide whether, when the interrogation of the applicant began, the police already had 'evidence' which would afford reasonable grounds for suspecting that he had committed offences against the Official Secrets Act 1911.

Lord Widgery CJ declined to rule whether or not such 'evidence' had existed. Some of the material presented when, in the course of the sub-trial the court proceeded to sit in camera, rendered this, as he understandably said, 'a very difficult question'. But Lord Widgery CJ added that, in the light of his conclusion regarding the overriding issue of voluntariness, he found it unnecessary to decide it. Counsel for the applicant has strongly criticised this approach. He submitted before us that Lord Widgery CJ should have decided first whether r 2 had or had not been breached for, if it had been, the confession should not have been admitted unless there emerged 'some compelling reason why the breach should have been overlooked'. He cited no authority for that proposition which, he claimed, involved a point of law of very great importance. This 'complete lack of authority' (to use counsel's phrase) is not surprising, for in our judgment, the proposition advanced involves no point of law and is manifestly unsound. Its acceptance would exalt the Judges' Rules into rules of law. That they do not purport to be, and there is abundant authority for saying that they are nothing of the kind. Their non-observance may, and at times does, lead to the exclusion of an alleged confession; but ultimately all turns on the judge's decision whether, breach or no breach, it has been shown to have been made voluntarily. In the present case, Lord Widgery CJ was, without deciding the point, prepared to assume in the applicant's favour that there *had* been a breach of r 2, and then proceeded to consider whether its voluntary nature had nevertheless been established. In our judgment, no valid criticism of that approach can be made. On the contrary,

a it appears to us entirely sound and, it should be pointed out, strictly in line with the observation of counsel for the applicant: 'I cannot complain if your Lordship says, "I prefer to answer the overall question" . . .'

We, therefore, turn to question (b), namely, was the voluntary nature of the alleged oral and written confessions established? In *Comrs of Customs and Excise v Harz*² Lord Reid, in a speech with which all the other Law Lords agreed, treated the test laid down in principle (e) in the introduction to the Judges' Rules as a correct statement of the law. As we have already indicated, the criticism directed in the present case against the police is that their interrogation constituted 'oppression'. This word appeared for the first time in the Judges' Rules 1964, and it closely followed the observation of Lord Parker CJ in *Callis v Gunn*³ condemning confessions 'obtained in an oppressive manner'.

c The only reported judicial consideration of 'oppression' in the Judges' Rules of which we are aware is that of Sachs J in *R v Priestley*⁴ where he said:

' . . . to my mind, this word in the context of the principles under consideration imports something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary . . . Whether or not there is oppression in an individual case depends upon many elements. I am not going into all of them. They include such things as the length of time of any individual period of questioning, the length of time intervening between periods of questioning, whether the accused person has been given proper refreshment or not, and the characteristics of the person who makes the statement. What may be oppressive as regards a child, an invalid or an old man or somebody inexperienced in the ways of this world may turn out not to be oppressive when one finds that the accused person is of a tough character and an experienced man of the world.'

In an address to the Bentham Club in 1968⁵, Lord MacDermott described 'oppressive questioning' as—

f 'questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the suspect that his will crumbles and he speaks when otherwise he would have stayed silent.'

We adopt these definitions or descriptions and apply them to the present case. In doing so, we must bear in mind that in the lower court counsel for the applicant, while in one breath complaining of the nature of the police interrogation, in the next breath told Lord Widgery CJ:

'This is not a case, and I stress it, of continual third degree grilling or questioning from 9.15 right through the whole time.'

We must also have regard to the fact that, while counsel expressly disclaimed the assertion made in the course of the applicant's second statement of 1st March that the police had 'made' and 'induced' him to say things which were untrue, before us he asserted that, although 'two very skilful police officers did their duty in the highest tradition of their force', they erred in that, 'by persistent pressure and cross-examination they set out to break this suspect'. By the time the sub-trial began, one of these two officers, Detective Superintendent Sills, had embarked on his evidence and was thus seen and heard by Lord Widgery CJ (although not under cross-examination), but at no stage before a ruling on admissibility was called for was any

2 [1967] 1 All ER 177 at 182, [1967] AC 760 at 818

3 [1963] 3 All ER 677 at 680, [1964] 1 QB 495 at 501

4 (1965) 51 Cr App Rep 1

5 See (1968) 21 Current Legal Problems, p 10

evidence given by the applicant. The ruling had accordingly to be based on what had emerged regarding the events of 31st January, including sessions I and II, the giving of the first caution at 7.40 pm, the giving of the second caution at 9.50 pm, and the manner in which the written statement was taken, read, initialled and signed by the applicant. In the light of that material, Lord Widgery CJ posed to himself the question of whether the propriety of admitting evidence of the oral and written admissions had been established by the Crown. He expressed himself as satisfied that this was so even on the assumption that r 2 had been breached.

In the judgment of this court, nothing has emerged during the hearing of this application to indicate any reason for holding that Lord Widgery CJ erred in exercising his undoubted discretion as he did in admitting the accused's oral and written statements. After the jury had returned to the court, the detective officers were strongly cross-examined on this issue of voluntariness. The applicant, the sole defence witness, said that his admissions were untrue, that he had wanted to leave the police station, that he had asked in vain to see a lawyer and his wife (who he knew was also at the police headquarters) that by 7.30 pm he was feeling terrible and his mind was a blank, and that from that time onwards he tried to tell the police what they were obviously expecting him to say, being able to 'make up' his confession from the form of the questions they had put to him. As against that, the jury had the evidence of Detective Superintendent Sils that, when his colleague said he was seeking the applicant's co-operation regarding the truth or falsity of certain matters, the applicant replied:

'I came with you because I wanted to find out what it was all about and I want to help you if I can because I admire the British way you know, but it really sounds a lot of rubbish to me, but go ahead, ask me what you like.'

In the course of the summing-up, repeated warnings were given to the jury of the necessity of their being sure that the confessions were both true and voluntary. Nevertheless, the criticism was advanced before us that the long, detailed questioning of the applicant called for a stronger warning than those given. We find this criticism baseless. Other criticisms were advanced and we do not propose to deal with them here, save to say that we have considered them carefully and they have induced no doubt in our minds regarding the soundness of the convictions returned. We make special mention only of the submission that there was such an inconsistency between the convictions on counts 1 and 2 and (despite the previously quoted observation of Lord Widgery CJ) the acquittal on count 3 that the former should be regarded as unsafe. We do not agree. The charges were entirely different in character, further evidence which related only to the first two charges was presented, the third charge related to alleged incidents occurring ten years later than those giving rise to the first two counts, and it may well be that, having come to a firm conclusion in regard to the 1961 counts, they regarded as vague and unsatisfactory the further charge of doing 'an act preparatory to communicating to another person', etc. But speculation on the point is a sleeveless errand. The real test is whether, despite the undoubted inconsistency, there are any grounds for suspecting that the convictions on the first and second counts were unsafe and unsatisfactory. In our judgment, no such grounds have been shown to exist.

For the foregoing reasons, we came to the conclusion that the application for leave to appeal against conviction must be refused.

As to the 12 year concurrent sentences imposed, the applicant is a man of 42, and his counsel stressed that his convictions related to events of ten years ago and that it had not been suggested that actual harm to this country had resulted therefrom. On the other hand, with typical candour he conceded that the applicant had revealed a very important anti-radar device to the agents of a potential enemy. Nevertheless, he submitted that concurrent sentences of seven to eight years would meet the justice of the case. In our judgment, it was one of great gravity and the sentences

- a imposed might well have been higher had the offences not been, as Lord Widgery CJ put it—
- ‘substantially mitigated by the fact that . . . ten years have passed since [the offences were] committed and no disaster, fortunately, has befallen this country as a consequence of what you did.’
- b We see no reason to take a different view and accordingly the application in relation to sentence is likewise refused.
- Application refused. Application refused for a certificate that a point of law of general public importance was involved.*
- Solicitors: *J Levi & Co, Leeds (for the applicant); Director of Public Prosecutions.*
- c Susan Corbett Barrister.

Morss v Morss and others

- d COURT OF APPEAL, CIVIL DIVISION
DAVIES, MEGAW AND STAMP LJJ
25th, 26th JANUARY 1972

- Divorce – Financial provision – Variation of order – Change of circumstances – Order embodying arrangement between parties – Circumstances not contemplated by parties at time arrangement made – Provision of house for wife – Undertaking by husband to make house available rent free for wife’s use – Meaning of ‘use’ – Wife ceasing to live in house – Wife letting house to third party – Application by husband to be released from undertaking – Whether wife continuing to use house consistently with the terms of the order.*
- e

- The husband and wife were married in 1949 and had three children. The husband was granted a divorce in 1968. Prior to the hearing of the petition an arrangement was made between the parties which was approved and, in substantially the same words, incorporated into the order of the court. Under the terms of the order the husband undertook, inter alia, ‘to make available for the [wife’s] use the house he is now erecting at . . . Cheam, Surrey, rent free for her life or until such time as circumstances should arise in which by reason of her conduct she is debarred by the Court from access to the children of the family . . .’ Following the divorce, the wife formed an association with A with whom she had subsequently in effect been living for a period of well over two years. During this time she rarely used the house at Cheam, sleeping in it only on rare occasions and visiting it sometimes during the week to deal with personal property which she kept there. She also let the house during this period to another woman. The husband applied to have the order varied and to be released from his undertaking on the ground that the wife no longer had any use for the house. On behalf of the wife it was contended, (1) that by the terms of the order she had been given a complete unfettered use of the house subject only to the two limitations imposed on her by the court, i.e. death or a subsequent order of the court as to access; (2) that subject to those two limitations she was entitled to treat the house as her own, either occupying it herself, or living elsewhere and, if she wished, letting the house to one or more tenants; and (3) that consequently she was using the house consistently with the terms of the order.
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Held – It was plain from the circumstances of the agreement and the terms of the order that the husband’s undertaking was to allow the wife to use the house for her personal residence and not otherwise; it was not within the contemplation of the parties, nor within the terms of the order, that the wife should reside elsewhere and let the house to a third party for profit; accordingly the court was not debarred by

the terms of the order from considering whether or not the order should be varied; in the light of the new, un contemplated circumstances which had arisen the order should be varied by releasing the husband from his undertaking to make the house available for the wife's use (see p 1126 e, p 1127 c e and f, p 1128 c e and f and p 1129 b to h, post.)

Dictum of Sargant J in *Re Anderson* [1918-19] All ER Rep at 978 applied.

Rabbeth v Squire (1859) 4 De G & J 406 distinguished.

Notes

For the variation of orders for financial provision, see Supplement to 12 Halsbury's Laws (3rd Edn) para 999A.

For a gift by will of the use of a house, see 39 Halsbury's Laws (3rd Edn) 1088, 1089, para 1620, and for cases on the subject, see 49 Digest (Repl) 880, 881, 8242-8249.

Cases referred to in judgments

Anderson, Re, Halligey v Kirkley [1920] 1 Ch 175, [1918-19] All ER Rep 975, 89 LJCh 81, 122 LT 261, 49 Digest (Repl) 880, 8244.

Fillingham v Bromley (1823) Turn & R 530, 37 ER 1204, 48 Digest (Repl) 299, 2639.

Mannox v Greener (1872) LR 14 Eq 456, 27 LT 408, 49 Digest (Repl) 880, 8245.

May v May (1881) 44 LT 412, 49 Digest (Repl) 881, 8246.

Rabbeth v Squire (1859) 4 De G & J 406, 28 LJCh 565, 34 LTOS 40, 49 Digest (Repl) 880, 8243.

Appeal

This was an appeal by the husband against that part of the order made by Faulks J in chambers dated 18th November 1971 whereby he dismissed the husband's application to be released from his undertaking contained in the order of Orr J made on 20th June 1968 on the grant of a decree nisi in proceedings for divorce brought by the husband. By his notice of appeal the husband sought to be released from the undertaking and to vary in such manner as to the court might seem just that part of the order made by Faulks J as ordered that the maintenance payable by the husband to the wife in accordance with the order of Orr J be reduced from £1,500 per annum less tax to £780 per annum less tax. The facts are set out in the judgment of Davies LJ.

K Bruce Campbell QC and *P T H Morgan* for the husband.

Joseph Jackson QC and *J C J Tatham* for the wife.

DAVIES LJ. This is an appeal by a husband petitioner from an order of Faulks J made on 18th November 1971. There was before him a two-fold application by the husband. The first application was to release him from an undertaking which he had given on the divorce and was embodied in an order of the divorce court, as it then was, made on 20th June 1968—I am not quoting the exact words now; they will have to be quoted in a moment—to make available a house for the wife. The second application by the husband was to reduce the amount of maintenance which he had agreed to pay to her and was also contained in the order of the court of June 1968, in the amount of £1,500. In the event the learned judge refused the first application by the husband, on the ground that he had no power to make the order asked for; but he allowed the husband's application to vary the amount of periodical payments (as they would be called now) from £1,500 less tax to £780 less tax. The husband, as I say, appeals against that order.

I need not say anything about the reduction of £1,500 to £780. Counsel for the wife has not sought to upset that order; and counsel for the husband says that the husband is a very rich man and that, although in theory he would be prepared to contend that the maintenance or periodical payments should be further reduced, the husband is content that the wife should continue to have this sum of £780. The real fight below and on this appeal has been with regard to the house.

The material dates are really within a very small compass. The parties were married in March 1949. They have had three children, a daughter, now about 22,

a a son, now about 20, and another daughter of about 15 years of age. In 1968, after the parties had separated, the husband obtained a decree of dissolution on the ground of adultery. There were two co-respondents, as they were then called. The wife at first defended the proceedings; she denied adultery, and cross-prayed on the ground of cruelty and adultery, the husband having asked in his petition for the exercise of the court's discretion. In the event, the defence was abandoned and the wife was content to let the husband obtain a decree on the ground of adultery with one of the two co-respondents.

b Prior to the hearing, which was on 20th June 1968, a date which I have already mentioned, there had been negotiations between the parties acting through two very experienced firms of solicitors. They resulted in an arrangement between the parties which was put before the court and approved of and was then incorporated, not quite in the same order but in substantially the same words, into the order of the court. Speaking for myself, I do not think it makes any difference whether what the court is concerned with is the contractual arrangement between the parties or the actual order of the court, although for my part, I think that the document to be considered is the actual order of the court, which I think took the place of and incorporated the previous arrangement between the parties.

c One thing should be said at the outset of this judgment. Counsel for the wife, with his great knowledge of these matters, admits categorically that the court (Faulks J in this case) had power not only to vary the maintenance order but to vary, amend or discharge any other part of the order under the Matrimonial Proceedings and Property Act 1970, including the power to release the husband, if the learned judge on the facts so thought fit, from his undertaking. It is therefore unnecessary to consider the provisions of s 9 of the Act or of ss 13 and 14, the jurisdiction being admitted.

d I turn now to the order. It is convenient perhaps that I should read all the effective parts, although it is really para (1) of the order with which we are here concerned. After dealing with custody and care and control and access, it proceeds in these terms:

f '... upon the Petitioner undertaking:— (1) to make available for the Respondent's use the house that he is now erecting at Salisbury Avenue, Cheam, Surrey, rent free for her life or until such time as circumstances should arise in which by reason of her conduct she is debarred by the Court from access to the children of the family. Until such house is available for the Respondent's use, she shall be entitled to remain at her present address Rothbury, Tite Hill, Englefield Green, Surrey; (2) to pay the outgoings, namely rates, external decorative and structural repairs, and the insurance of the property and its contents; (3) to pay the Respondent's reasonable costs of removal from Rothbury, Tite Hill, Englefield Green, Surrey to Salisbury Avenue, Cheam, Surrey; (4) to see that the house at Salisbury Avenue, Cheam, Surrey is reasonably and adequately furnished either with existing furniture from Rothbury aforesaid and/or with new furniture. In this context, furniture will include curtains and carpeting; (5) to pay the Respondent a lump sum on the date upon which the Decree Nisi herein shall be made Absolute of £500. 0. 0. It is ORDERED that the Petitioner do pay or cause to be paid to the Respondent as from the date on which the Decree Nisi herein shall be made Absolute or until further order Maintenance at and after the rate of £1,500. 0. 0. per annum less tax payable monthly, the Petitioner having undertaken to provide that such sum shall be payable to the Respondent during her life or until her remarriage'.

Then there is an order with regard to costs.

The important part of that order with which we are concerned is the paragraph numbered (1):

'... the Petitioner undertaking ... to make available for the Respondent's use the house that he is now erecting at Salisbury Avenue, Cheam, Surrey, rent free for her life or until such time as circumstances should arise in which by reason of her conduct she is debarred by the Court from access to the children of the family';

and then there is the transitional provision with regard to the period during which the house was being built.

That order, as I have said, was made in June 1968. The decree became absolute on 20th September. At some date of which we are not precisely apprised but, it would appear, well over two years ago, the wife formed an association with a Mr Ashton. It is perfectly clear on the evidence that for that period of over two years she has in effect been living with Mr Ashton, at a house I suppose not far away because it is at Cheam Common. She has not been living at the house at Salisbury Avenue, and it would appear that on very rare occasions has she ever slept the night there. She has on one or two occasions; and it is perhaps to be noticed that on 8th and 9th November 1971, when it is to be presumed that she was aware of the husband's application, she did actually sleep the night there. According to her evidence she does go to the house during the day time some three or four days a week; but obviously her sleeping quarters are in Mr Ashton's house. She has had the children to the house to lunch or dinner or something of that kind from time to time; but by and large her residence has been at Mr Ashton's house.

As I understand it, the way in which the case is put by counsel for the husband, subject to a new matter that I shall mention in a moment, is not that her conduct in committing adultery (because she has been committing adultery) with Mr Ashton disentitles her to have either the same amount of maintenance or the facility of having this house for her use, but that she in effect has now, in the light of the life she has been leading for the past two years and a bit, no use for the house, because she is not using it. That submission is emphasised by the fact that admittedly she has let the house to another woman, who, I think, has a child there, the wife says at £5 a week although the daughter of the marriage apparently told her father that the rent was £9 a week. What is said is that, the husband having undertaken to provide the house for her use in the terms which I have read, he should now be released from that undertaking because she obviously has no use for the house at all. The learned judge in a passage to which I will refer in a moment talks about forfeiture. I am afraid that I cannot see that forfeiture has anything whatsoever to do with this case.

I interpolate here something that happened this afternoon. Counsel for the wife made an application for leave to call fresh evidence. I do not propose to read out, because we rejected the application, the statement which the wife has made with regard to this matter. Had we been prepared to admit the evidence, then of course counsel for the husband would have been entitled to cross-examine the lady. But we did not admit it, and I will only summarise very shortly the remarkable matter that emerges from the lady's written statement. We were told, as I believe is the fact, that Mr Ashton, with whom she has been living for this considerable period, was sitting in court yesterday—not, of course, to give any evidence, but I suppose as an interested supporter of the wife's case. He was not in court today. In effect, the evidence that counsel for the wife wished her to give was a complete volte face, a complete change of circumstances, to be summarised in the last paragraph of the wife's statement to the effect: 'I do not think that I shall renew my association with Mr Ashton.' We came to the conclusion that this short statement of the wife's, quite apart from being possibly somewhat suspect in all the circumstances of this change of heart that had apparently crystallised last evening when this case was part-heard, was really not relevant evidence which could have any decisive effect on the decision in this appeal, and so, as I say, it was rejected.

As I understood counsel for the wife's argument, the effect of it was that the word

a 'use' in the undertaking—'to make available for the [wife's] use the house'—gave the wife the right to do as she pleased with it, to occupy it or not occupy it, or to let it as she has done; and he went so far, I think, as to suggest that by the terms of the document the wife had an equitable interest (as it used to be) in the house and, therefore, it is to be assumed, under the Settled Land Act 1925 could sell it and receive the income from the proceeds. It seems to me that the words used are wholly inapt to create such an estate or interest.

b Counsel for the wife cited to the court, as he did to Faulks J in the court below, a number of authorities as to the effect of similar dispositions, if I may so call them, in wills. I think I need not refer to more than one of them, namely *Re Anderson, Halligey v Kirkley*¹. That was a judgment of Sargant J, in which he reviewed a number of the other authorities that were cited to us and spoke as follows. He said²:

c 'I have to consider the case, first of all, apart from the Settled Land Act, and, secondly, with regard to any alterations in the law alleged to be introduced as the result of that Act. As regards the law independently of the Act, it seems to me that the terms of Kirkley's will are perfectly plain, and that he has merely given to his widow, in addition to the annuity of 6000*l.* a year, an option, liberty or licence to occupy personally by herself any one or more of his residences, but has not given her anything beyond a personal right of occupation. Does such a gift of a personal right of occupation carry with it the right to let to another person and to receive the profits of the letting or the right in case of a sale to receive the income of the proceeds of sale as an equivalent or substitution for the right of personal occupation? In my judgment, neither on principle nor on authority can such a claim be sustained. The very clear words of the will, looking at the question apart from authority, prescribe that the lady is to have the right of personal use and occupation; the words are "shall be at liberty to use and enjoy all or any of my residences for her own personal use and occupation."'

e It is right, of course, as counsel for the wife pointed out, that those words are much more conscribed than the mere word 'use' in the present case. Nevertheless I think
f that the judgment of Sargant J is of very great assistance in the present case. He continued³:

g 'It appears to me quite clear that those words, apart from the decisions, merely give her a personal right to live in the house—to reside in it—if she thinks fit. Whether, if she were living in the house generally, permanently, that would preclude her from letting it for short periods furnished is a question which has not arisen and which I do not consider at all.'

Then he refers to one of the decisions to which we were referred by counsel for the wife, *Rabbeth v Squire*⁴, and I will read the passage³:

h 'Is there anything in the authorities cited to displace that view? In my judgment there is not. The authorities rather support the conclusion at which I have arrived. In *Rabbeth v. Squire*⁴ Lord Chelmsford L.C. decided that a gift by will of the joint use and occupation of lands did not require personal use and occupation but permitted the donees to let the lands. But he pointed out that that was the effect of the gift of the use and occupation, and especially that there was nothing in the terms of the other parts of the will that would reduce that general right to a right of personal use and occupation. It seems to me to be clear that if, either in consequence of the context or by virtue of the terms of the original

i [1920] 1 Ch 175, [1918-19] All ER Rep 975

2 [1920] 1 Ch at 180, 181, [1918-19] All ER Rep at 978

3 [1920] 1 Ch at 181, [1918-19] All ER Rep at 978

4 (1859) 4 De G & J 406

gift, what had passed to the claimant had been the right of personal use and occupation, the decision of Lord Chelmsford would have been the other way.' a

Then he refers to two other cases that we have had—*May v May*⁵ and *Mannox v Greener*⁶—and concludes⁷:

'The reasoning in *Rabbeth v. Squire*⁸ and the decision in *May v. May*⁵ really render it indisputable that a gift of a right personally to use and reside in a house cannot carry with it the right to live elsewhere and to let the house and receive the rents.' b

I think that that is a clear statement of the law. One looks at this particular order and the context in which it was made, bearing in mind that this was a husband who on a divorce was providing accommodation for the wife to live in; and some weight, in my judgment, should be given to the somewhat unusual provision whereby her right to live there should be defeated if her conduct was such as to debar her by court order from access to the children. That points, of course, to one of the purposes for which the wife was to have this house, namely, to have access to her children. Counsel for the wife contends on the facts that she was 'using the property'. He could not, I think, contend that she was living there, because she obviously was not. But he says that she was 'using' it, even though she had let it, because she went there a few days per week, I suppose, although there is no evidence about it, to look out some clothing or other things, personal property that she had in the house, to deal with them. We have no evidence about that. c

It seems to me that it is quite wrong to say that she was 'using' the property. The purpose of her use of the property was to be as a residence, as is perfectly plain from the circumstances in which the agreement was made. d

The learned judge's judgment is, if I may say so with respect, not altogether easy to understand. He states, correctly no doubt, that he had been taken through these various authorities by counsel for the wife; and he sums up the law in this way: e

'The upshot of all those cases is that if someone is given a house for their life, it does not follow because they rent it to another person that a forfeiture is brought about. Indeed, Lord Eldon, in the case cited⁹, very sensibly referred to the case of a man who has got a town house and a country house and asked if a Member of Parliament were to occupy his town house for the course of the session, could it really be said that there was a forfeiture because he had rented it to someone else apart from that period.' f

I would interpolate there that obviously the wife would have been entitled to let the house for a short term if she was going abroad for a holiday or going for a cruise round the world, or something of that kind. But that is quite different, as I see it, from living in another house and letting this one, for what period we do not know, but semi-permanently. Then the judge continued: g

'I am sure that the effect of those cases is as [counsel for the wife] suggests, and the terms of the agreement being as follows [and then he quotes the debarment from access], I hold that those are the two circumstances, and the two circumstances only, by which, as a matter of contract, she is to be deprived of that house. And what has happened? (1) She is alive, and (2) nobody has suggested for a moment that she should be debarred by the court from access to the children of the family.' h

In regard to that I would say, as I have already indicated, that I do not consider that j

5 (1881) 44 LT 412

6 (1872) LR 14 Eq 456

7 [1920] 1 Ch at 181, 182, [1918-19] All ER Rep at 978

8 (1859) 4 De G & J 406

9 *Fillingham v Bromley* (1823) Turn & R 530

a this is a matter of contract. It is a matter of the jurisdiction of the court to alter or discharge a provision in an order which the court has made.

Then the judge concludes as follows, having discussed the evidence of the wife (whom, rather surprisingly, he described as 'a truthful witness'; I say 'surprisingly' in view of some of the statements in her affidavit).

b 'She tells me that she was in the house at Salisbury Avenue as recently as last Wednesday, Thursday and Friday for the day and that she actually spent the night there on 8th and 9th November [1971], although it is true she had not been there for seven or eight months past. [I have already referred to the nights of the 8th and 9th November and the circumstances in which she came to go there.] So she has not, in my view, completely abandoned the house, even though, in law, I think she was entitled to let it to another.'

c So he decided that the action of the wife did not amount to an abandonment of the house and of her right to use it.

I take a different view. It seems to me that the terms of this order made by Orr J did not give the wife any right or interest in the house at all. It seems to me that it was a licence, a permission, undertaken to be given by the husband to her for and as a residence for her. It is true that, in the light of the new suggestion that has been

d put forward for the first time today, the circumstances in which she has been living over the last two years or so may, or may not, have been altered. But, on the evidence that was before the learned judge, and the only evidence that has been admitted before us, the wife was not 'using' the house in the sense of the licence that she had been given to do so. On the evidence she had no need of the house. She was able to be housed, no doubt very largely at the expense of Mr Ashton, in Mr Ashton's
e house.

In those circumstances, I think that the judge was not only wrong in law, if I may say so with respect, as to the effect of this undertaking, but came to the wrong conclusion on the facts on the question whether she had by her conduct rendered the licence wholly unnecessary.

f In those circumstances, whatever may happen in the future on different evidence on a different occasion, I think that the learned judge came to the wrong conclusion with regard to this house, and I would for myself allow the appeal in that regard and release the husband from his undertaking.

MEGAW LJ. The argument put forward by counsel for the wife, as I understand it, was this: take the agreement which was made between the parties, settled by
g counsel, no doubt carefully and in advance of the divorce proceedings. Look, says counsel, at cl 4 of that agreement, or, because for all practical purposes it is identical, at the undertaking which was incorporated in the order of Orr J made on 20th June 1968. On the true construction of that clause of that agreement, counsel says, the
h parties had agreed that the wife should be free to have complete, unfettered use of the house at Salisbury Avenue, Cheam, rent free, subject only to two limitations: first, her right to the house would terminate on her death; secondly, her right to the house would terminate if circumstances should arise in which, by reason of her
conduct, she should be debarred by the court from access to the children of the family. Subject to those two limitations, one of death and one of a subsequent order of the court as to access, the wife was entitled to treat the house as though it were her own
i for the period of her life. She could, if she wished, live in it. She was not obliged to do so. She could, if she wished, live elsewhere, leaving the house unoccupied. She could, if she wished, let the house to one or more tenants and herself live elsewhere. The true construction of that agreement, says counsel for the wife does not involve any kind of condition as to the wife continuing to reside in the house. Then, says counsel, if that construction be correct it must be accepted that the parties, when they made that agreement, subsequently incorporated as an undertaking in

the order of the court, appreciated its consequences and intended that its consequences should follow. Those consequences, on that construction, would be that the wife was perfectly entitled under the terms of that agreement to do any of the things which I have mentioned, involving her absence from the house—even permanent absence. a

That being the intention of the parties, the argument goes on, it cannot now be said that there has been any change of circumstances from those which the parties both contemplated when the agreement was made, because all that has happened is that the wife has done that which the agreement permitted her to do within her rights under cl 4 of the agreement, namely, herself to live elsewhere over a period of years and to allow somebody else to live in the house, paying—I had better not use the word ‘rent’—remuneration to her. b

That might be a powerful argument, although it is unnecessary to consider whether there are possible weaknesses in it, if it were the true construction of the agreement. But in my judgment it is not the true construction of the agreement. On the contrary, in cl 4 of the agreement (and, as I have said, the same applies to the undertaking in the judge’s order) the words ‘for the [wife’s] use’ mean, in this context, ‘to reside in’, or ‘for her residence’. c

That that is the meaning in the context is, to my mind, plain when one looks at other provisions of the agreement. For example, under cl 7 the husband undertook to see that this house, which was then being completed, was ‘reasonably and adequately furnished’, to include curtains and carpeting. The furniture belonged, and would continue to belong, to the husband. For what purpose? For the use of the house as a residence for the wife, and not for the use of other persons to whom the wife might, for gain, choose to let the house. To suggest that this agreement contemplated that this furniture was to be provided by the husband for such a purpose is, to my mind, absurd. d

It goes further than that. In cl 5 one finds that the husband undertakes to ‘pay the outgoings, namely rates, external decorative and structural repairs, and the insurance of the property and its contents’. Could it sensibly be suggested that the husband was undertaking by that agreement to insure the property and its contents, the contents to include such things as might be brought into the house by other persons when the wife was no longer residing there? As I say, it is to my mind plain, on a construction of this agreement as a whole, that what was contemplated, and intended, and provided, by the words used was that the house was to be made available for the wife as her residence and not otherwise. e

It is unnecessary to decide in this case—as it was unnecessary for Sargant J to decide in *Re Anderson, Halligey v Kirkley*¹⁰, which Davies LJ has cited—to what extent the wife would have been free to go away for a holiday and allow somebody else to occupy the house temporarily. I have no doubt myself that within a reasonable degree that would have been perfectly permissible, within the scope of the intention of cl 4. But that does not arise in the present case. f

In my view the learned judge has been led astray by his consideration of the old cases which were cited to him. The passage in the judgment which Davies LJ has already read, where the learned judge referred to the question of a forfeiture, in my respectful view shows that the learned judge had not fully appreciated the position. There is here no question of forfeiture, in the sense in which that word is used in the cases. It is simply a question of the true construction of the agreement for the purpose of seeing to what extent it can fairly and properly be said that what has happened is something which is a new circumstance beyond that which was contemplated when the agreement was made and the order was made. g

The true approach to the old cases which were cited is in my view set out in one short sentence of the judgment of Sargant J which again Davies LJ has already read. h

¹⁰ [1920] 1 Ch 175, [1918-19] All ER Rep 975 i

a That is the sentence of the report where, dealing with the old case of *Rabbeth v Squire*¹¹, Sargent J said this¹²:

‘It seems to me to be clear that if, either in consequence of the context or by virtue of the terms of the original gift [that was a gift under a will], what had passed to the claimant had been the right of personal use and occupation, the decision of Lord Chelmsford would have been the other way.’

b In other words, in all these cases you have to look not merely at the particular words, but also at the context; and here, looking at the words in the context, I am satisfied that the intention and meaning of this agreement is the one which involved residence by the wife. It follows, therefore, that that which has happened is not, as counsel for the wife contends, something which must be deemed to have been within the contemplation of the parties when they made this agreement. It is something which falls outside that contemplation, and therefore the court is in no way debarred or hindered by the terms of that agreement from considering whether or not there ought to be a variation, and if so what that variation ought to be, having regard to the new, un contemplated, circumstances which have arisen and have been proved.

c In the light of the circumstances which have been proved in this case, I take the view that it would be wrong to leave unvaried the term of the agreement which became a part of the undertaking in relation to the house—that is, that the husband should continue to make the house available for the wife’s use. I am inclined to think that the learned judge, had he regarded himself as free to give a different construction to the agreement, would have taken the same view. At any rate he expressed in no uncertain terms his sympathy towards the husband in respect of what had happened.

d I agree with the view expressed by Davies LJ that in these circumstances there ought to be a variation of the order in the manner which he has suggested.

e **STAMP LJ.** I agree. The house has not been made subject to any conveyance by the husband to the wife. It is not the subject of a devise or bequest. It is not the subject of any declaration of trust. As a matter of construction, I agree that the most that is conferred on the wife by the effect of the undertaking is a right to reside in the house so long as the undertaking remains in existence and so long as the period defined in it has not terminated.

f I safeguard myself by remarking that our attention has not been called to the terms of the introductory sections of the Settled Land Act 1925, and it has not been contended that the undertaking created a situation such as is, to the best of my recollection, referred to in those introductory sections.

g I agree that the wife obtained no interest, legal or equitable, in the house. She is, in my judgment, a mere licensee. I agree that the appeal should be allowed and that the husband should be released from his undertaking.

h *Appeal allowed.*

Solicitors: *Lovell, White & King* (for the husband); *M A Jacobs & Sons* (for the wife).

Gillian Whitear Barrister.

j ¹¹ (1859) 4 De G & J 406

¹² [1920] 1 Ch at 181, [1918-19] All ER Rep at 978

Lord Advocate v Babcock & Wilcox (Operations) Ltd

HOUSE OF LORDS

LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD DIPLOCK, LORD SIMON OF GLAISDALE
AND LORD KILBRANDON

11th, 12th JANUARY, 15th MARCH 1972

Selective employment tax – Premium – Payment of premium in respect of employment in, or carried out from, an establishment – Carried out from – Head office of employers constituting an establishment – Employers carrying out work on sites scattered all over United Kingdom – Site qualifying as an establishment – Central planning carried out at headquarters – Employees on site hired through headquarters where individually taken on and documents kept – Gross weekly pay calculated on site – Net pay calculated at headquarters – Whether employees on site in employment ‘carried out from’ headquarters – Selective Employment Payments Act 1966, s 1 (2).

The respondents were a subsidiary of a very large engineering company and had, inter alia, a manufacturing division and a construction division with their headquarters at Renfrew which was within a development area. The construction division was chiefly concerned with the installation and erection of steam raising plant manufactured by the respondents and to a lesser degree with repairs to such plant. The sites at which their operations were carried out were scattered over the United Kingdom. The co-ordinated work programme was carried out at the respondents' Renfrew headquarters. The contract at each site was under the charge of a sponsor engineer at Renfrew and under the day-to-day charge of a resident engineer who had no financial authority. Employees working at the sites were all employed through the Renfrew headquarters, by whom they were individually taken on and where their documents were kept. Gross weekly pay was calculated at the site and the wages records were sent to Renfrew where the net pay was calculated. A cheque to cover the total sum of wages was sent from Renfrew to each site where the wage packets were made up. One of the respondents' sites was at Didcot where they held the head contract for the construction of a power station. 500 men were employed on the project which was expected to last between three and four years. As the respondents were the main contractors, the site manager co-ordinated the work of the sub-contractors and had power to vary the terms of the sub-contracts. The respondents had erected a number of temporary buildings on the site to house their administration staff, to provide stores and workshops, and to serve as messing and changing rooms. The respondents claimed to be entitled to regional employment premiums (i.e. payments additional to the refund of selective employment tax) in respect of employees at Didcot on the ground that they were, within the meaning of s 1 (2)^a of the Selective Employment Payments Act 1966, engaged in ‘employment... carried out from’ their ‘establishment’ at Renfrew. It was common ground that the respondents' headquarters at Renfrew constituted an ‘establishment’ and that, as the establishment was in a development area, the respondents were, under s 26 (1)^b of the Finance Act 1967, entitled to regional employment premiums in respect of persons engaged in employment in or carried out from that establishment. Didcot however was not in a development area and accordingly, under s 1 (2)^c of the Revenue Act 1968, regional employment premiums could not be claimed in respect

^a Section 1 (2), so far as material, is set out at p 1132 f, post

^b Section 26 (1), so far as material, is set out at p 1139 f, post

^c Section 1 (2) provides: ‘No addition to the refund of tax shall be added to a payment under section 1 of the [Selective Employment Payments Act 1966] unless the relevant establishment is situated wholly within a development area.’

a of persons engaged in employment in or carried out from an establishment there. The issues arose therefore whether the site at Didcot constituted an 'establishment' within s 1 (2) of the 1966 Act and, if so, whether the respondents' employees at the Didcot site could nevertheless be said to be engaged in employment carried out 'from' the Renfrew establishment.

b **Held** – (i) The Didcot site constituted an 'establishment' within s 1 (2) of the 1966 Act since the respondents had exclusive occupation of the premises, and there was a sufficient degree of permanence, the contract having several years to run, and a sufficient degree of organisation on the premises, both in relation to labour on the site and control over sub-contracts (see p 1132 a, p 1134 c, p 1135 h, p 1137 a and p 1140 j, post); dictum of Lord Parker CJ in *Secretary of State for Employment and Productivity v Vic Hallam Ltd* (1970) 5 ITR at 110 applied.

c (ii) The word 'employment' in s 1 (2) of the 1966 Act signified work carried out by employees under a contract of employment and not the act of entering a contract of employment; so far as employees at the Didcot site were concerned some, such as clerks, storekeepers and canteen staff, were employed in the establishment, and the remainder carried out their work from it on other parts of the site not forming part of the establishment; accordingly they were all engaged in 'employment in, or carried out from' the Didcot establishment within the meaning of s 1 (2) of the 1966 Act and it followed, therefore, that it could not be said that they were carrying out employment 'from' the Renfrew establishment; accordingly the respondents were not entitled to claim regional employment premiums in respect of those employees (see p 1132 a, p 1135 a to f and h, p 1137 b to d, p 1140 b and c, and p 1141 a d and g, post).

e *Secretary of State for Employment and Productivity v Clarke Chapman & Co Ltd* [1971] 2 All ER 798 overruled.

Notes

For selective employment tax, see Supplement to 33 Halsbury's Laws (3rd Edn) para 479A.

f For the Selective Employment Payments Act 1966, s 1, see 12 Halsbury's Statutes (3rd Edn) 352. For the Finance Act 1967, s 26, see *ibid* 382. For the Revenue Act 1968, s 1, see *ibid* 390.

Cases referred to in opinions

Secretary of State for Employment and Productivity v Clarke Chapman & Co Ltd [1971] 2 All ER 798, [1971] 1 WLR 1094.

g *Secretary of State for Employment and Productivity v Vic Hallam Ltd* [1969] TR 431, 5 ITR 108, Digest (Cont Vol C) 848, 841Anc.

Appeal

This was an appeal by the Lord Advocate, as representing the Secretary of State for Employment, against an interlocutor of the First Division of the Court of Session (the Lord President (Lord Clyde), Lord Johnston and Lord Cameron) dated 27th November 1970 refusing an appeal by the appellant against a decision by an industrial tribunal in Scotland dated 23rd April 1970 on a reference made to the tribunal by the respondents, Babcock & Wilcox (Operations) Ltd, under s 7 (5) of the Selective Employment Payments Act 1966. The facts are set out in the opinion of Lord Kilbrandon.

j J P H Mackay QC, D R B Cay (both of the Scottish bar) and Thomas Bingham for the appellant.

A J Mackenzie Stuart QC and W D Cullen (both of the Scottish bar) for the respondents.

Their Lordships took time for consideration.

15th March. The following opinions were delivered.

LORD REID. My Lords, I have had the advantage of reading the speech of my noble and learned friend, Lord Kilbrandon. I entirely agree with regard to the Didcot establishment but I have more difficulty with regard to the three smaller sites. I do not think that it can have been intended that large numbers of small sites should be treated as separate establishments, nor do I think that it would be in anyone's interest to do this. But as the facts with regard to those three small sites are not given very fully I am prepared to treat them as borderline cases and to agree that they can be regarded as establishments. a b

I would therefore allow this appeal.

LORD MORRIS OF BORTH-Y-GEST. My Lords, I have had the advantage of reading in advance the speech prepared by my noble and learned friend, Lord Kilbrandon, and I am in agreement with it. As we are differing from the Court of Session¹ and as our decision is of general application I will briefly express my view. c

After the introduction of selective employment tax (see s 44 of the Finance Act 1966), there were some provisions for a refund of it to the employer who had paid it. In certain cases (see s 1 of the Selective Employment Payments Act 1966) there could be a refund with a premium. In certain cases (see s 2 of that Act) there could be a refund but without a premium. In certain cases there was no refund at all. Then by s 26 (1) of the Finance Act 1967 there could in certain cases be an increased premium where there was a refund; that was known as a regional employment premium; that could become payable if the 'establishment' (a term to which I must more fully refer) was within a development area. Later (see s 1 (2) of the Revenue Act 1968) it was provided that no addition to the refund of tax should be added to a payment under s 1 of the 1966 Act unless the relevant 'establishment' was situated wholly within a development area. d e

The word 'establishment' is found in the 1966 Act. The conditions for a refund with a premium are to be found in s 1. Under that section the refund (with premium) is made by the Minister of Labour to an employer (a) who has paid selective employment tax, (b) for any contribution week, (c) in respect of a person in an employment to which the section applies. By s 1 (2), subject to an exception not now material, 'this section applies to any employment in, or carried out from, an establishment' satisfying certain conditions. f

The respondent company have a number of divisions including a manufacturing division and a construction division. The construction division is chiefly concerned with the installation and erection of steam raising plant, often of a very large size manufactured by the respondents. The construction division is also concerned (although to a lesser degree) with repairs to such plant. Both the manufacturing and construction divisions are based at Porterfield Road, Renfrew, where they occupy very large engineering premises. The work of installing and erecting plant must naturally be carried out at the place where it is desired to have the plant. The work of repairing plant must naturally be carried out wherever the plant is. So it followed that the respondents had many men working on sites in many different places. Many of these places were not within development areas. But Renfrew is. When the legislation to which I have referred resulted in differences concerning payments to certain employers according as to whether an 'establishment' was or was not within a development area the respondents wanted to know how they stood. So under s 7 (5) of the 1966 Act they submitted a question to the appropriate tribunal. It is important to see how the question was framed. It was as follows: g h i

'Whether the employees of [the respondents] employed on sites outside development areas during the period from 6th January to 6th July 1969 were employed from [the respondents'] establishment at Renfrew and whether [the

a respondents] are entitled to be paid regional payments in respect of these employees for the said period.'

It is to be noted that one part of the question was expressed as being whether those employed on sites were 'employed from' the respondents' establishment at Renfrew. This is not the language of s 1 and it is to the language of s 1 of the 1966 Act that attention must be paid.

b For the purposes of the hearing before the tribunal four sites were taken as example sites. They were sites at Didcot, Carrington, Fulham and Barking. Those sites are not within development areas. At Didcot the respondents were engaged in constructing a power station; at Carrington in installing a steam raising boiler; at Fulham and Barking in renewing and repairing steam raising plant. At Didcot the work was to last nearly four years. Over 500 people were to be concerned. At Fulham (to

c take the site where as between the four sites the operations were on the smallest scale) the work was to last about one and a half years and initially there were 38 people concerned. The facts concerning the four sites are fully set out in the decision of the tribunal and I need not summarise them, but it is helpful to have in mind the nature of the labour forces at the sites. Some were 'travelling men'. They were employees of the respondents who had undertaken to work at any site within the

d United Kingdom. Some were chosen by the labour officer (who is stationed at Renfrew) from persons who had applied to the respondents for work. Some came as the result of requests to the Department of Employment and Productivity who recruited on a nation-wide basis. Some were locally recruited from men who called at a site asking for work. Generally speaking, the work at the sites was planned and directed from Renfrew.

e The refund (with a premium) under s 1 of the 1966 Act will be made where the tax (for any contribution week) has been paid by an employer in respect of a person 'in an employment' to which the section applies; and (for present purposes) the section applies to any employment in, or carried out from, an establishment that satisfies certain conditions as set out in s 1 (2). One of these is that the 'establishment is engaged by way of business' in certain activities. If there was an 'establishment'

f at Renfrew it is common ground that it satisfied the statutory conditions. If there was an 'establishment' at each one of the four sites it is also common ground that each one satisfied the statutory conditions.

What, then, is an 'establishment'? Section 10 (2) of the 1966 Act refers to the site of an establishment; s 7 (1) deals with registers of establishments; s 7 (2) provides that no business or part of a business is to be registered except on the application of the employer. Section 1 (2) refers to an establishment being 'engaged by way of business'; it also refers to 'employed persons employed in any employment in, or carried out from, [an] establishment'. It would seem clear that where operations of any magnitude are to take place on a site (such as a place where a power station or a steam raising boiler is to be built or where plant is to be repaired) there would be need to have some premises (probably temporary buildings or sheds or huts) on the

h site. It would be necessary to have places where men could report, places where they could resort, places where they were paid, places where records were kept, places where tools were kept or where stores or equipment were kept.

Some tests or indications as to what may constitute an establishment were set out by Lord Parker CJ in *Secretary of State for Employment and Productivity v Vic Hallam Ltd*². He mentioned 'exclusive occupation of premises'; 'some degree of permanence';

j 'some organisation on the premises, an organisation of the men who are working there'. So he said that one of the matters to be considered was whether it could properly be said that men are working in or from such premises. The tribunal were assisted by those tests or indications which Lord Parker CJ formulated and stated

that it was not in dispute that there was an establishment at the Renfrew works. As regards the four sites the tribunal held as follows:

'On each of the four sites described in evidence there was sufficient in the way of premises within the exclusive occupation of the [respondents], of permanence and of organisation of activities of the men working on the site to constitute an establishment at each site. Moreover, for all men working on the site the site establishment is one from which in some sense they are employed. It is the one to which they report each day; at which they receive their orders and from which they go to the constructional sites to carry out their work. It is the one from which they collect their wages and to which they make complaints and address enquiries.'

The conclusion which the tribunal reached that at each one of the four sites there was an 'establishment' was in my view correct; it was a conclusion amply warranted from the facts as found.

As to the Renfrew works, where there was an 'establishment' the tribunal posed the question whether it was the establishment 'from which the employment of men on sites outwith development areas is carried out'. The tribunal said:

'The Renfrew works have a good claim to be so regarded. These works are the establishment to which each employee applies for employment; from which he is paid and dismissed; where all his labour records are kept; where most of the planning is done; and from which supervision and instruction proceed. In the case of those employees of the [respondents] who are travelling men, sites may come and sites may go but Renfrew remains as the centre from which they are employed and by which they are transferred from one site to another. For men locally employed, the picture is rather different. No doubt they are engaged, paid and dismissed by the labour officer at Renfrew but their local site is the only establishment of the [respondents] with which they have any connection.'

The tribunal proceeded to say that it would be prepared to hold that there were two establishments 'from' each of which, in some sense, employees working at sites 'were employed'. It considered that it had to make a choice because the relevant statutory provisions envisaged that for each person there is only one establishment 'in or from which his employment is carried out'. It chose Renfrew because, taking the 'travelling men', Renfrew 'was the place from which travelling men transferred from other sites should be considered as having been employed'; and that no distinction should be made in the case of travelling men working at sites at which they had commenced employment with the respondents. Although the tribunal considered that a better case could be made for treating 'local men' as employed at and from the sites where they worked it decided on balance that they should be treated as being 'employed from Renfrew'. That was because all important matters relating to their employment were handled at Renfrew and because their employment was controlled from there. No distinction could be drawn between the four sites.

The several references made by the tribunal to the conception of men being employed 'from' Renfrew were in line with the decision which was arrived at. It was in the following terms:

'... that the employees of the [respondents] employed on sites at Didcot, Carrington, Fulham and Barking during the period from 6th January 1969 to 6th July 1969 were employed from the [respondent company's] establishment at Renfrew and the [respondent company] are entitled to be paid regional payments in respect of these employees for the said period.'

With every respect, it seems to me that the tribunal's approach and finding involved a departure from the language of the statute. For an employer to be entitled under

a s 1 of the 1966 Act he must have paid selective employment tax (for a contribution week) in respect of a person 'in an employment' to which that section applies; and the statutory provision applies 'to any employment in, or carried out from, an establishment' satisfying certain conditions. It being found and accepted that there is an establishment (satisfying the conditions) at each one of the four sites, the question in
b reference to a person employed at one of the sites was not whether it could be said that he was in one sense employed 'from' Renfrew, but whether he was in employment in or carried out from the establishment at the site. If someone was engaged in clerical work that involved his working indoors in one of the temporary huts or buildings erected on a site it could not rationally be said that he was working in the Renfrew establishment. If someone was engaged in outdoor work such as that of constructing a power station at a site it seems to me that he would be in employment carried out from the establishment at the site. It would not be a normal use of
c language to say that he was in employment carried out from the establishment at Renfrew. In the context of s 1 of the 1966 Act I think that the notion of an employment being 'carried out' denotes a carrying out by the person who is employed; he will carry out his employment at the place where he works. The word 'employment' involves that there is someone who employs because he wants some work to be done and that there is someone who is employed and who agrees to do the work.
d In s 1 of the 1966 Act I think that the primary reference which is made by the words 'employment . . . carried out' is a reference to the person employed. He is the person who is 'in an employment'. He carries out that employment and he carries it out from some base or establishment. Those on the sites were carrying out their employment from those sites. The work they were doing was directed from Renfrew and because of the internal arrangements of the respondents it could be said that in one sense they were employed 'from' Renfrew. The conception of being employed 'from' a place is a difficult one, but whether it is or is not it is not one that is expressed in or that is inherent in the language of the statute. The statute enjoins the enquiry whether persons work in a qualifying establishment or whether they carry out their work from such an establishment.

f On the facts as found by the tribunal their decision should have been that the employees employed at the four sites during the period referred to were in employment in or carried out from the respective establishments at the sites and that the respondents were not entitled to be paid regional payments in respect of those employees for the period referred to.

g We were referred to the decision of the Divisional Court in *Secretary of State for Employment and Productivity v Clarke Chapman & Co Ltd*³. The facts in that case were closely parallel to the facts in this case. In line with practice in revenue and taxation matters the Divisional Court followed the decision of the Court of Session⁴ in the present case while indicating, for the reasons given by Widgery LJ, that their own view would have led them to an opposite decision. I find myself in agreement with the reasons expressed by Widgery LJ.

h I would allow the appeal.

LORD DIPLOCK. My Lords, I agree with the speech of my noble and learned friend, Lord Kilbrandon, and for the reasons which he gives would allow this appeal.

j **LORD SIMON OF GLAISDALE,** My Lords, I have had the advantage of reading in advance the speeches prepared by my noble and learned friends, Lord Morris of Borth-y-Gest and Lord Kilbrandon, with which I agree.

As its name implies, the selective employment tax was imposed with a view to fiscal discrimination between different sorts of employment—even though the

3 [1971] 2 All ER 798, [1971] 1 WLR 1094

4 (1970) 6 ITR 69

original taxing provision, s 44 of the Finance Act 1966, on which all subsequent provisions depend, itself provided no element of discrimination. A significant feature of the tax—as indeed also of concomitant statutory provisions which did provide the discrimination—is that it was weekly in temporal scope. a

The first of these concomitant statutory provisions was the Selective Employment Payments Act 1966. When taken together with s 44 of the Finance Act 1966, it provided (to speak very broadly) for fiscal discrimination in favour of employment in productive industry and against employment in service industry. The second concomitant statutory provision, contained in s 26 (1) of the Finance Act 1967, when taken together with the provisions of the previous Acts to which I have referred, provided for fiscal discrimination in favour of employment in development areas (i.e. areas of higher incidence of unemployment) and thus against employment in other areas (i.e. areas of higher incidence of employment). b

It will be immediately apparent that the decision appealed from involves a result which must be directly contrary to what Parliament intended in 1967. It involves that employers and employees in areas of high or higher incidence of unemployment are taxed to subsidise the employment of people, including those recruited locally, in areas of high or higher incidence of employment (e.g. south-east England). Normally such a conclusion would be the end of the case; a decision directly contrary to what Parliament so plainly intended must be wrong. c

In the instant situation, however, the matter cannot be disposed of thus summarily. The 1967 Act can only operate within the framework of the 1966 Acts; and, as I have pointed out, the discriminatory purpose of the Selective Employment Payments Act 1966 is not the same as that of s 26 of the Finance Act 1967. Nevertheless, although even the manifest intention of a later Act can rarely control the construction of an earlier Act, it is legitimate, in my view, if there is any dubiety as to the construction of the earlier Act, to resolve this in favour of giving effect to the manifest intention of the later Act. This is particularly so when the earliest provision of all merely lays a general foundation (here, for discrimination between employments—potentially on widely different grounds) and where the ensuing particular provisions operate in perfect harmony. d

In any case, even looking no further than the Selective Employment Payments Act 1966, the appellant is, in my judgment, entitled to succeed. There are three crucial terms or phrases which fall for interpretation in their instant context: 'establishment', 'employment' and 'carried out from'. 'Establishment' is a word of wide meaning. Among other, different, senses, it can signify, on the one hand, a body of persons (generally an organised body) or, on the other hand, premises—with a number of senses intermediate between these two. I think that any attempt at exhaustive judicial definition would be inappropriate where the draftsman himself has not attempted to define; but what this word conveys to me in its instant context is a body of persons carrying on activities by way of business (see Selective Employment Payments Act 1966, s 1 (2) (a)) associated with a locality. I think that the criteria suggested by Lord Parker CJ in *Secretary of State for Employment and Productivity v Vic Hallam Ltd*⁵ are relevant and likely to be helpful in deciding in particular cases whether what is in question amounts to an 'establishment'. A further criterion that might be useful in some cases (although possibly inherent in Lord Parker CJ's third and fourth criteria) would be to ascertain where lies the effective control of the activities of those whose 'employment' (the term next for consideration) is in question—which in turn would involve consideration of how far and in what respects control is delegated. (In all four cases under instant consideration, control of employment was so delegated as to be effectively exercised at the local site and not at Renfrew.) I would not, for myself, add size as a further criterion—partly because of difficulty in drawing the differentiating line, but even more because a number of small units of employment e

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a could cumulatively be significant for the purposes of the relevant Act.

The tribunal found that the respondents had 'establishments' in all four localities in question. I would have found so myself on the available evidence; in any case, it is sufficient to say there was material which justified the findings of the tribunal.

b Then for 'employment'. In the context of these Acts the word signifies to me work done under a contract of employment. I do not think it means the contract of employment itself, nor the contractual relationship simpliciter. I can see no reason for considering it from the point of view of the employer; on the contrary, if anything turns on the choice, I think it should be considered from the point of view of the employee, since it is his employment (i.e. work) which the Act contemplates as the subject-matter of discrimination.

c Thirdly, employment 'carried out from' an establishment. I think that this means no more than that the employees whose employment is in question are, in popular language, 'based on' a particular establishment. The employees whose employment is in question in the instant appeals were based on the establishments at the local sites. They were not based on Renfrew; so that their employment was not 'carried out from' any establishment there. To hold that it was 'carried out from' there was a misdirection.

d I desire to add only two further matters. First, I agree with the observations of Widgery L.J. in *Secretary of State for Employment and Productivity v Clarke Chapman & Co Ltd*⁶, although not with the conclusion to which the court felt bound out of comity. Secondly, once there is an 'establishment', it does not cease to be such merely because it is running down. In businesses like the respondents' the activities are bound to build up and run down. In this connection, the situation must, in view of the temporal incidence of tax, refund and premium, be considered from week to week. The provisions relating to registration of establishments contained in s 7 of the Selective Employment Payments Act 1966 are also important in considering problems of build-up and run-down—in particular, sub-s (1) (whereby the Minister is not required to make payment for any contribution week falling wholly or partly before the date of registration of the establishment) and sub-s (3) (whereby the Minister may, subject to reference to the tribunal, remove from the register any establishment which he is

f I would allow the appeal.

LORD KILBRANDON, My Lords, before coming to the closer examination of the relevant statutory provisions which will be necessary for the disposal of this appeal, I propose to describe as briefly as possible the scheme of the selective employment tax (SET) and its associated benefits. The tax was imposed by s 44 of the Finance Act 1966 which provided:

g '(1) . . . in respect of each contribution week beginning on or after 5th September 1966, an employer shall be liable, in respect of each person in respect of whom the employer is liable to pay an employer's insurance contribution for that week, to pay'

h SET, the amount of the weekly payment being regulated by the age and sex of each employed person. The tax was to be collected together with the employer's weekly contributions in respect of his employees. In spite of the name of the tax, there is in the instituting statute no element of selection to be found. For that you must go to the Selective Employment Payments Act 1966, which was passed more or less contemporaneously; I shall call it 'the 1966 Act', since it will not be necessary to refer to the Finance Act 1966 again.

j Section 2 of the 1966 Act provides for 'selective employment refund', namely, the repayment of the tax paid to an employer who has paid SET for any contribution week

in respect of a person in an employment to which the section applies. Section 1 of the Act provides for 'selective employment premium'; not only does the employer receive repayment of the SET he has paid in respect of a person in an employment to which *that* section applies, but also a premium calculated by reference to that person's age and sex. Section 3 of the 1966 Act provides for payment of selective employment refund and of selective employment premium to employers who may be classified as public undertakers, on the same principle as those payments are to be made to employers in the private sector under ss 1 and 2.

In both ss 1 and 2, the employment to which the sections apply is 'employment in, or carried out from' establishments having certain characteristics. Putting the matter broadly, and using language which is not intended to compromise the questions which are in issue, the policy of Parliament appears to have been to confer repayment in respect of employment in some forms of industrial activity, to confer repayment plus a premium in respect of others, and for the rest to leave the SET paid to be retained by the Treasury.

SET, with its associated refunds and premiums, has been made the vehicle of a second policy, namely, the conferring of benefit and encouragement on the development areas. These are areas in which there is a higher than average rate of unemployment, and a lower than average rate of industrial development. By s 26 (1) of the Finance Act 1967 the selective employment premium payable under s 1 of the 1966 Act is increased, in respect of development areas, by an amount called the regional employment premium. A further discrimination in favour of development areas is effected by s 1 of the Revenue Act 1968, whereby the premium payable, in addition to refund of tax, under s 1 of the 1966 Act, is no longer to be payable except—again to use non-statutory language—in respect of development areas. These payments, namely, the refund of tax, the selective employment premium, and the regional employment premium have been compendiously and conveniently termed 'the regional payment' by the industrial tribunal which dealt with the present case. The question before us is whether the respondent employers are entitled to regional payment in respect of the employment of certain of their employees who work in areas which are not development areas and whose situation I am about to describe.

The respondents are a subsidiary of Babcock & Wilcox Ltd; they have their registered office and their head office in London, where are stationed their planning and engineering staff, as also the main design drawing offices. They are organised in a number of divisions. The division with which we are concerned is the construction division, which is based at Renfrew, in a development area. That division is chiefly concerned with the installation and erection of steam raising plant, manufactured by the respondents' manufacturing division, also situated at Renfrew, and to a lesser extent with repairs to such plant. The sites on which their operations are carried on are scattered over the United Kingdom. The allocation of functions as between the divisional headquarters at Renfrew and the personnel actually on the sites where the construction is proceeding has been carefully described in the tribunal's reasons for their decision, and I shall only summarise it here. Renfrew (as I shall describe the division's headquarters there) prepares what is called the 'critical path network', which I take to mean a co-ordinated work programme. Each contract is under the charge of a sponsor engineer at Renfrew, and under the day-to-day charge of a resident engineer. The resident engineer, except for being in charge of a small cash float, has no financial authority. Nor can he alter the critical path network, although he can recommend alterations to the sponsor engineer.

When it comes to labour, with which of course this appeal is primarily concerned, the position is that there are several classes of employee, some being 'travelling men' who may move from site to site, and some being specially recruited at the Department of Employment and Productivity for a contract, or accepted for employment locally at the site. Neither party in this case distinguishes in any way, for present purposes, between the classes of labour; it is enough to say that all are hired through Renfrew,

a by whom they are individually taken on, and where their documents are kept. So also their employment is terminated by Renfrew, except for misconduct, when the resident engineer can dismiss. Gross weekly pay is calculated at the site, and the wages records go to Renfrew, where the net pay is calculated. Renfrew sends a cheque to cover the total sum of wages to the site, where the wage packets are prepared and handed over to the employees.

b When the question came to be raised between the Secretary of State for Employment and the respondents whether, in respect of the persons employed at the many sites where the respondents' contracts are being carried out, not being sites within development areas, the respondents were entitled to regional payment, it was agreed to test the matter by reference to four individual sites, namely, those at Didcot, Carrington, Fulham and Barking. No distinction was sought to be made in principle among these sites by either party for the purposes of this appeal, although the sites
c differ greatly in size and character. I shall take first Didcot as exhibiting, in my opinion, most clearly the factors which will lead to a decision affecting all.

At Didcot the respondents hold the head contract for the construction of a power station on behalf of the Central Electricity Generating Board. It is a large project, on which about 500 men are employed, and the work is expected to last for between
d three and four years. The respondents have erected a number of temporary buildings on the site to house their administration staff, to provide stores and workshops, and to serve as messing and changing rooms. In 1969 the assessment to local rates in respect of these buildings amounted to £1,263. The arrangements as to the preparation of plans, the critical path network, and the engagement and administration of labour are in accordance with the general practice I have outlined above. There is this
e special feature arising out of the fact that at Didcot the respondents are the main contractors; the site manager, who is responsible to Renfrew, co-ordinates the work of the sub-contractors, and has power to vary the terms of the sub-contracts.

The question whether the respondents are entitled to regional employment premium payments in respect of their employees at Didcot will depend in the first place on the exact terms of the Finance Act 1967. Section 26 (1) provides that the premium
f is payable:

'Where, in the case of a person in an employment to which section 1 of the principal Act [i.e. the 1966 Act] applies in respect of whom a payment under that section falls to be made to the employer, *the establishment in or from which that employment is carried out* is situated wholly within a development area . . .'

The words I have italicised appear first in s 1 (2) of the 1966 Act; selective employment
g premium, as provided for in the preceding subsection, is applied 'to any employment in, or carried out from, an establishment' fulfilling certain conditions. It is, therefore, plain that the meaning of the words contained in the 1967 Act may be interpreted by reference to the former Act. The phrase is used continually throughout the code, for example, in s 7 (1) of the 1966 Act in connection with the keeping and maintaining of registers of establishments for the purposes of ss 1 and 2, in s 26 (1) of the 1967 Act,
h as pointed out, in connection with regional employment premium, and in s 1 (6) of the 1968 Act, in connection with the confining of the payment of premiums to development areas.

The phrase contains two words which may be equivocal—'establishment' and 'employment'. An establishment may be either incorporeal (an abstraction), or local (a place). The National Coal Board is an establishment in the first sense, so is its
i headquarters in Westminster in the second. I am satisfied that here the word is used in the second sense. In my opinion, the remaining words of the phrase make that clear. You could perhaps colloquially, although not accurately, say that a man's employment was in the National Coal Board, but you could not say that it was carried out from the National Coal Board, although it might well be carried out from the headquarters in Westminster. Section 10 of the 1966 Act provides by sub-s (2) that if

access between all parts of an area comprised in the premises occupied by an employer is not available without leaving the premises of the employer, then each part is to be treated as the site of a separate establishment, and goes on in sub-s (3) to speak of premises 'constituting the site of a single establishment'. Again, s 1 (3) of the 1968 Act provides for the withdrawal of selective employment premiums from public undertakings unless the employment 'is employment at or from places situated wholly within a development area'. Here the word 'places', in the case of public undertakings, is made exactly the equivalent of 'establishments' in the private sector. a

'Employment' may mean the act of entering into a contract of employment—as Lord Cameron put it in the Court of Session⁷, 'the employer's employment of the employee'—or it may mean, quite simply, work. I prefer the latter interpretation. I do not think it is helpful to attempt a sharp discrimination between looking to the activity of the employer and looking to the activity of the employee, but certainly the words of the statute seem to be concentrating on the latter. It is the employee who 'carries out' the employment, and that must show where the primary emphasis lies. So I would paraphrase, for this purpose, the word 'employment' as 'work carried out by a person under a contract of employment'. b

In the light of these interpretations, accordingly, the first question is whether the tribunal was right in holding that there is an establishment at Didcot within the meaning of the statute in which the word is used. That the respondents have such an establishment at Renfrew is not in question. The word 'establishment' has not received any statutory definition, but in *Secretary of State for Employment and Productivity v Vic Hallam Ltd*⁸, Lord Parker CJ laid down some guidelines: c

'For my part I find it quite impossible to give any exclusive definition or test as to what constitutes an establishment. The tribunal said that they approached the matter as one of broad common sense. For my part I think that is the correct approach in deciding whether as a matter of fact and degree any particular premises do constitute an establishment. But as it seems to me there are certain indications which help in the matter. The first is one to which I have already referred, exclusive occupation of premises; secondly some degree of permanence—both those are present in this case—and thirdly, as it seems to me, some organisation on the premises, an organisation of the men who are working there. Finally, the question whether a particular premises is an establishment is bound up with the question of where the men who are working there are being employed in or from, because by section 1 (2) it is provided that: "... this section applies to any employment in, or carried out from, an establishment ... " therefore an establishment must be a place in which or from which people are employed. One of the matters, therefore, to be considered in considering whether premises are an establishment, is whether it can be properly said that men are working in or from that establishment. When one finds, as here, a place in which there is no organisation of staff whatsoever, no administration is carried out, then there is a strong pointer, as it seems to me, to it not being an establishment.' d

This passage has been referred to with approval by a Divisional Court in *Secretary of State for Employment and Productivity v Clarke Chapman & Co Ltd*⁹, and by the Court of Session¹⁰ in the present case. I would wish to follow the guidelines there laid down, which lead me to the conclusion that Didcot is an establishment in the relevant sense. The respondents have exclusive occupation of premises, this very large contract had several years to run, and, apart from the labour organisation on the site, there is the exercise by the site manager of control over the sub-contracts. e

⁷ (1970) 6 ITR 69 at 74

⁸ (1969) 5 ITR at 110

⁹ [1971] 2 All ER 798, [1971] 1 WLR 1094

¹⁰ (1970) 6 ITR 69

a If, then, Didcot is an establishment, the position of the workers is, in my opinion, that some, such as clerks and storekeepers, workshop fitters and canteen staff, are employed *in* the establishment, and the remainder carry out their work from it on other parts of the site not forming part of the establishment. Here I agree with the conclusion of the tribunal. After pointing out that the requirements laid down by Lord Parker CJ are clearly satisfied, the tribunal goes on:

b 'Moreover, for all men working on the site the site establishment is one from which in some sense they are employed. It is the one to which they report each day; at which they receive their orders and from which they go to the constructional sites to carry out their work. It is the one from which they collect their wages and to which they make complaints and address enquiries.'

c It is in the next sentence, however, that I cannot agree with the tribunal.

'If not constrained by statute to make a choice, we would be prepared to say that there were two establishments from each of which, in some sense, employees working at sites were employed'

—the second site, of course, being Renfrew. Here, in my view, the tribunal mis-directed themselves. No doubt the men were, in some sense, employed from Renfrew, but that is not the relevant consideration. The question being, from what establishment did they carry out their employment? then, for those that were not employed *in* the Didcot establishment, it seems to me there is only one answer.

d A precisely similar question came before a Divisional Court in *Clarke Chapman & Co Ltd's* case¹¹. The court followed the decision of the Court of Session¹² in the present case, and did so on the ground that it is the practice in revenue and taxation matters that the English courts should endeavour to keep in line with the courts of Scotland. At the same time the court made it plain that they did not agree with that decision. I agree with the criticisms of the Court of Session judgment¹² as stated by Widgery LJ, and concurred in by Lord Parker CJ and Bean J. The basis of the Court of Session's judgment¹² is that you have here men some of whom are employed *in* the establishment at Didcot, but all *from* the establishment at Renfrew, and that the employers have therefore in respect of all the men satisfied one of the two conditions either of which would have entitled them to regional payments. As I have indicated, I do not think it is correct to say that the men at Didcot carry out their employment there from Renfrew. In my view, the statutes were not envisaging any such possibility. In most industrial concerns the men work *in* the establishment, but in some rather exceptional employments, like the present, while all the employees are based on the establishment, some go out to work *from* it. That is the reason for the propounding of the alternative in the statutory phrase. The employment of the persons at Didcot, accordingly, is not, in my opinion, employment *in* or carried out from an establishment situated within a development area.

e The cases of Carrington, Fulham and Barking are not so clear. The projects are very much smaller in scale, and we are told very little about the physical nature of the respondents' premises on the sites. However, for the following reasons I think the decision in relation to them should be governed by the decision for Didcot. First; the parties did not distinguish them either before the tribunal, the Court of Session¹², or this House. Secondly, the general considerations, as far as labour is concerned, are the same as for the establishment at Didcot. Thirdly, the contracts at Fulham and **f** Barking, employing now comparatively few men, are running down; assuming that at their inception they were, for present purposes, indistinguishable in principle from Didcot, and were establishments on their own, we have no materials on which we could decide at what stage, if ever, their character changed.

¹¹ [1971] 2 All ER 798, [1971] 1 WLR 1094.

¹² (1970) 6 ITR 69

For these reasons I would allow this appeal.

Appeal allowed.

Solicitors: Solicitor, Department of Employment, agent for Shepherd & Wedderburn, Edinburgh (for the appellant); Coward, Chance & Co, agents for Macklay, Murray & Spens, Glasgow, and Dundas & Wilson, Edinburgh (for the respondents).

S A Hatteea Esq Barrister.

Dymond v Pearce and others

COURT OF APPEAL, CIVIL DIVISION

SACHS, EDMUND DAVIES AND STEPHENSON LJJ

12th, 13th JANUARY 1972

Nuisance – Public nuisance – Obstruction of highway – Liability for damages – Basis of liability – Causation – Negligence – Danger – Accident causing injury to plaintiff – Nuisance as cause of accident – Relevance of negligence in creating obstruction – Obstruction as a source of danger – Vehicle parked on highway – Vehicle constituting a public nuisance – Parking of vehicle not negligent – Collision of motor cycle with parked vehicle injuring pillion passenger – Accident wholly caused by negligence of driver of motor cycle – Nuisance not a cause of accident – Nuisance not a source of danger.

A long distance lorry driver loaded his employer's lorry and, at about 6.00 p.m. on an August bank holiday, parked it beneath a street lamp in a northerly direction on the northbound side of a dual carriageway road intending to move it at about 4.00 a.m. on the following day. The carriageways were each 24 ft in width and were divided by a central reservation. The lorry, which was 7½ ft wide, was parked on the outside of a very shallow right hand bend and accordingly about 16 ft of the carriageway was left unobstructed for northbound traffic to pass between the offside of the lorry and the central reservation. At lighting-up time the lorry driver put on his tail lights; the street lamps were alight affording excellent illumination. To approaching traffic there was nothing to obstruct the view of the lorry for a distance of at least 200 yards. A motor cyclist, with the plaintiff riding on the pillion, failed to look where he was going and collided with the stationary lorry. The plaintiff was injured. There was no mist or fog or other traffic hazards at the relevant time and the traffic was light. The plaintiff having recovered judgment in default of defence against the driver of the motor cycle sought to recover damages against the owner and the driver of the lorry on the ground that they were negligent in the manner in which the driver had parked the lorry, or alternatively that the leaving of the lorry on the highway constituted a public nuisance. The trial judge found that the accident was wholly the fault of the driver of the motor cycle and held that the parking of the lorry was not negligent and did not constitute a nuisance. On appeal,

Held – The parking of a large vehicle for many hours on the highway constituted an obstruction which resulted in a nuisance being created, for part of the highway was thereby removed from public use; the owner and driver of the lorry were not however liable for the plaintiff's injuries because (i) (per Sachs and Stephenson LJ) the sole cause of the accident being the motor cyclist's negligence, it followed that the nuisance created by the defendants was not a cause of the accident; (ii) (per Edmund Davies LJ) the nuisance did not present a danger to those using the highway in the manner in which they could have been expected to use it (see p 1146 f to h, p 1147 b and f, p 1150 j, and p 1152 c, post).

Per Sachs and Stephenson LJ. It may well be that a person who has created a nuisance by obstructing the highway would be liable in nuisance even though an

- a action in negligence would fail, if an unexpected supervening event has occurred, e.g. the sudden failure of rear lights on a vehicle, which so affects the situation that the obstruction becomes the cause of the accident (see p 1147 g to j and p 1152 c, post).

- b Per Edmund Davies LJ. In order that a plaintiff may succeed in an action for personal injuries caused by a collision with an obstruction constituting a public nuisance, he must establish that the obstruction constituted a danger; furthermore fault on the part of the defendant is essential to liability in the sense that it must appear that a reasonable man would be bound to realise the likelihood of risk to highway users resulting from the presence of the obstructing vehicle on the road; where, however, an obstruction is shown to be a danger the person who created it is liable unless he can show sufficient justification or excuse (see p 1148 h and p 1150 b and e to g, post).

c Notes

For liability for obstruction of the highway, see 28 Halsbury's Laws (3rd Edn) 62-64, paras 60-62, and for cases on obstruction of the highway, see 26 Digest (Repl) 466, 467, 1558-1568.

Cases referred to in judgments

- d *Anon* (1535) YB Mich 27 Hen 8, f 10, pl 10.
Farrell v John Mowlem & Co Ltd [1954] 1 Lloyd's Rep 437.
Maitland v Raisbeck & Hewitt (R T & J) Ltd [1944] 2 All ER 272, [1944] 1 KB 689, 113 LJKB 549, 171 LY 118, 36 Digest (Repl) 251, 26.
Morton v Wheeler (1956) The Times, February 1st.
Parish v Judd [1960] 3 All ER 33, [1960] 1 WLR 867, 124 JP 444, Digest (Cont Vol A) 1167, 538a.
- e *Read v J Lyons & Co Ltd* [1946] 2 All ER 471, [1947] AC 156, [1947] LJR 39, 175 LT 413, 36 Digest (Repl) 83, 452.
Rylands v Fletcher (1868) LR 3 HL 330, [1861-73] All ER Rep 1, 37 LJEx 161, 19 LT 220, 33 JP 70, 36 Digest (Repl) 282, 334.
Southport Corpn v Esso Petroleum Co Ltd [1954] 2 All ER 561, [1954] 2 QB 182, [1954] 3 WLR 200, 118 JP 411, [1954] 1 Lloyd's Rep 446; *rvsd in part sub nom Esso Petroleum Co Ltd v Southport Corpn* [1955] 3 All ER 864, [1956] AC 218, [1956] 2 WLR 81, 120 JP 54, [1955] 2 Lloyd's Rep 655, Digest (Cont Vol A) 1213, 68a.
- f *Trevett v Lee* [1955] 1 All ER 406, [1955] 1 WLR 113, 26 Digest (Repl) 473, 1617.
Wagon Mound (No 2), The, Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd [1966] 2 All ER 709, [1967] AC 617, [1966] 3 WLR 498, [1966] 1 Lloyd's Rep 657, Digest (Cont Vol B) 555, 185b.
- g

Cases also cited

Coote v Stone [1971] 1 All ER 657, [1971] 1 WLR 279.
Ware v Garston Haulage Co Ltd [1943] 2 All ER 558, [1944] 1 KB 30.

Appeal

- h This was an appeal by the plaintiff, Paul Leslie Dymond, against the judgment of Bridge J at Exeter Assizes dated 25th June 1971, dismissing the plaintiff's action for damages for personal injuries and consequential loss suffered as the result of an accident in which a motor cycle which was being driven by the first defendant, Christopher Albert Pearce, and on the pillion of which the plaintiff was being carried, ran into a stationary lorry which was owned by the second defendant, Ranco Controls Ltd, and had been parked on the highway by the third defendant, the driver, Alfred George Noonan. The plaintiff recovered judgment in default of defence against the first defendant and sought to recover damages against the second and third defendants. The facts are set out in the judgment of Sachs LJ.
- j

R J S Harvey QC and A R Tyrrell for the plaintiff.
 C Fawcett QC and M J Turner for the second and third defendants.

SACHS LJ. This is an appeal from a judgment of Bridge J¹ given at Exeter Assizes on 25th June 1971. On that occasion there came before the learned judge the claim of a pillion riding passenger on a motor cycle. The driver of that motor cycle had in Wolseley Road, Plymouth, driven it into the back of a large stationary lorry at about 9.45 p.m. on 29th August 1966, a bank holiday. The plaintiff passenger having recovered judgment in default of defence against the driver of the motor cycle, who was the first defendant, was seeking at assizes to recover damages also against the second and third defendants, who were respectively the owner and driver of the lorry. The case against those two defendants was founded on alleged negligence and alternatively on alleged nuisance. The learned trial judge, however, found against the plaintiff on both issues. Hence this appeal.

The facts in essence are simple and were related by the learned trial judge as follows²:

‘Wolseley Road, Plymouth, carries at certain times of day a substantial volume of traffic. It is in a built-up area, and subject to the statutory speed limit of 30 mph. In the relevant length it is divided into twin carriageways by a central reservation which is broken at points to allow traffic to cross into side streets or to make “U” turns. Each carriageway is some 24 feet in width. The lorry, which was parked by the [third defendant], was on the outside of a very shallow right-hand bend in the northbound carriageway. The lorry was some 7½ feet wide; accordingly it left unobstructed not less than 16 feet of the carriageway for north-bound traffic to pass between the offside of the lorry and the central reservation. The time of the accident, as I have already indicated, was 9.45 p.m. late in August after lighting-up time. The street lamps in Wolseley Road were alight; they afforded excellent illumination. The lorry was parked immediately beneath a street lamp and its lights were also properly illuminated. Approaching the point where the lorry was parked in a northerly direction, as was the [first defendant], there was nothing whatever to obstruct the view of the parked lorry for a distance of at least 200 yards. I am quite satisfied on the evidence that this accident happened for one reason only, namely that the [first defendant] simply was not looking where he was going. If he had been, the accident could not have occurred, because there was the lorry plain for all to see. I have heard the evidence of a Miss Lashbrook, which I accept. She and another girl with two boys, all in their teens, were standing on the pavement talking and laughing together as the motor cycle passed by, and her evidence is that both the [first defendant] and the [plaintiff] turned to look at the group on the pavement. They waved and one of them shouted. It is quite plain to my mind that it was because the [first defendant], perhaps in a Bank Holiday mood, allowed his attention to be distracted in that way from the road ahead of him that he reached a position, travelling as he himself says, at a speed of 30 to 35 mph, so close behind the lorry before he realised it was in his path, and when he did realise that it was too late to take avoiding action.’

How the lorry came to be parked on that dual carriageway was stated in the course of some further findings of the learned trial judge. He referred to the fact that the third defendant lived in a semi-detached house, 37 Wordsworth Crescent. That crescent ran parallel to Wolseley Road, but on the opposite side of the carriageway where the lorry was parked. The third defendant’s house fronted on to Wordsworth Crescent; it had no traffic entrance on to the Wolseley Road, nor, so far as we were informed, had it any other access to it beyond a common passageway leading from Wolseley Road to Wordsworth Crescent. In one sense, however, it can properly be said that the Wordsworth Crescent houses backed on to Wolseley Road. Wordsworth

¹ [1971] RTR 417

² [1971] RTR at 420

a Crescent was an extremely narrow residential street and one in which it was quite impracticable to park a large lorry. The third defendant on this occasion had gone to his employer's, the second defendant's, premises some five miles away from his home at about 5.00 p m having in mind a long journey which he was going to make with the lorry the next day. He loaded the lorry in question and then drove it back towards his home with a view to making an early start on a drive to London the following morning at about 4.00 a m. He adopted that course for his own convenience, b as he preferred this way of doing his work to fetching the lorry from the second defendant's premises in the early morning. He parked it in Wolseley Road at about 6.00 p m and in due course he went and turned on the lights when lighting-up time came.

c So far as negligence is concerned, it is sufficient to say that the finding of the learned trial judge in favour of the defendants was right. To park a lorry, even of the size of the one under consideration, under a good street lamp on a one-way carriage track 24 ft wide with its tail lights on at the appropriate time cannot be said to be negligent, at any rate when there was no evidence of difficulties likely to be caused to traffic (the traffic was said to be light at the relevant time), or as to the risk of heavy mist or fog supervening. Moreover, the lorry was parked in that position on a bend which d is the more likely to be clear of other vehicles pursuing a normal course.

Accordingly, in this court the real challenge concerned the learned trial judge's finding on the issue of nuisance. He held that the leaving of the lorry on the highway did not constitute a nuisance; that even if it did, damage of the kind suffered was not a foreseeable consequence; and, moreover, that the nuisance was not in any event the cause of the accident.

e The first question to be answered is whether or not this lorry when left on the main road from 6.00 p m with a view to its not being moved until 4.00 a m constituted at 9.45 p m an obstruction of the highway which in law should be held to be a nuisance. It is at the outset to be observed that it was conceded by counsel for the second and third defendants, that there was no question in this case of the third defendant being able in relation to the road where the lorry was left to assert any special right as being the occupier of adjoining premises. That was an inevitable f concession, in view of the fact, already mentioned, that 37 Wordsworth Crescent had no traffic exit on to Wolseley Road; nor was the lorry parked on the Crescent side of the road. It follows that the question whether the lorry constituted an obstruction falls to be determined in the same way as if the driver was any other vehicle user who had no such special rights.

g The law on the question as to what constitutes a public nuisance in a highway is plain, despite the fact that in certain authorities cited to us dealing with wholly different sets of facts there can be found phrases apt to deal with those facts which, if taken out of context, could impair the clarity of the position. The relevant law is compactly stated in the judgment of Sir Raymond Evershed MR in *Trevett v Lee*³ where he said:

h 'The law as regards obstructions to highways is conveniently stated in a passage in SALMOND ON TORTS⁴: "A nuisance to a highway consists either in obstructing it or in rendering it dangerous" and then a number of examples are given. I will not take up time reading them, but a reference to these examples seems to me to show that prima facie, at any rate, when one speaks of an obstruction to a highway one means something which permanently or temporarily removes the whole or part of the highway from the public use altogether.'

The phrase there quoted from the 11th edition of Salmond on Torts is again to be

3 [1955] 1 All ER 406 at 409, [1955] 1 WLR 113 at 117

4 11th Edn, p 303

found in the current edition⁵, with a footnote accurately referring to the fact that it had been approved by Sir Raymond Evershed MR. a

Next one can find in the judgment of Denning LJ in *Morton v Wheeler*⁶ a statement which is relevant, although the case itself was concerned with danger arising from some 'sharp, fearsome-looking spikes' bordering the highway. There Denning LJ clearly recognised the existence of these two categories of nuisance affecting a highway when he said: b

'As all lawyers know, the tort of public nuisance is a curious mixture. It covers a multitude of sins. We are concerned today with only one of them, namely, a danger in or adjoining a highway. This is different, I think, from an obstruction in the highway. If a man wrongfully obstructs a highway, or makes it less commodious for others (without making it dangerous) he is guilty of a public nuisance because he interferes with the right of the public to pass along it freely. [Then a little later he said:] Danger stands, however, on a different footing from obstruction.' c

When looking at authorities concerned with highway nuisances it is important to remember that there are these two categories, because otherwise phrases relating to the second—danger—category may be read as necessarily applying to the first—simple obstruction. It is, however, *prima facie* common to both categories—which can in fact overlap—that in neither is it necessary to prove negligence as an ingredient (see per Lord Simonds in *Read v J Lyons & Co Ltd*⁷, per Devlin J in *Farrell v John Mowlem & Co Ltd*⁸, and per Denning LJ in *Morton v Wheeler*⁶); that in both proof of what is *prima facie* a nuisance lays the onus on the defendant to prove justification (compare *Southport Corporation v Esso Petroleum Co Ltd*⁹); and that, of course, neither is actionable—in the sense that a claim for damages can succeed—unless the plaintiff can establish that damage has actually been caused to him by the nuisance. d

Leaving on one side those in somewhat special positions, such as frontagers, the common law rights of users of highways are normally confined to use for passage and repassage and for incidents usually associated with such use, such as temporary halts and those emergency stops which often give rise to difficulties, and have had to be considered in a number of authorities. The leaving of a large vehicle on a highway for any other purpose for a considerable period (it is always a matter of degree) otherwise than in a lay-by *prima facie* results in a nuisance being created, for it narrows the highway. With all respect to the views expressed by the learned trial judge as to the ways of life today, I am unable to accept his conclusion that the parking for many hours for the driver's own convenience of a large lorry on a highway of sufficient importance to have a dual carriageway did not result in the creation of a nuisance. One has only to think of the effect of thus reducing the width of such a road to about 16 ft when two other large lorries or similar vehicles happen to be overtaking each other to appreciate why his conclusion cannot stand. The more vehicles that were to adopt the same tactics in these container lorry days, the worse the situation would become. e

The law on this point has not changed merely because nowadays one comes across large numbers of cases in which owners or users of vehicles 'obstruct the highway to a greater degree than is permissible hoping that no one will object', to adopt the phrase of Lord Reid in *The Wagon Mound (No 2), Overseas Tankship (UK) Ltd v The Miller* f

5 15th Edn, p 106

6 (1956) *The Times*, 1st February

7 [1946] 2 All ER 471 at 482, [1947] AC 156 at 182, 183

8 [1954] 1 Lloyd's Rep 437 at 440

9 [1954] 2 All ER 561, [1954] 2 QB 182 g

a *Steamship Co Pty Ltd*¹⁰. It follows that in my judgment the driver's convenience was no justification for the lorry being left in Wolseley Road by the third defendant. It thus constituted an actionable nuisance at the time when the first defendant drove into it.

b But the mere fact that a lorry was a nuisance does not render its driver or owner liable to the plaintiff in damages unless its being in that position was a cause of the accident. Counsel for the plaintiff strove manfully to get us to hold that once nuisance is established the usual rules as to causation do not apply. He urged that there existed some form of strict liability which does not obtain even when a breach of absolute statutory liability has been proved. That, in my judgment, was an untenable proposition.

Reference has already been made to the fact that the learned trial judge stated¹¹:

c 'I am quite satisfied on the evidence that this accident happened for one reason only, namely that the [first defendant] simply was not looking where he was going.'

d Moreover, towards the end of his judgment, when discussing what would be the position if he was wrong in holding that the lorry did not constitute a nuisance, he said¹²:

e 'It may in the end be a matter of causation, a matter simply of saying that even if this was a common law obstruction, nevertheless as such it was not causative of the present accident. The accident was, as I said in the first part of this judgment, wholly attributable to the fact that the [first defendant] as he rode along was watching the attractive young ladies on the pavement instead of looking ahead of him to see what conditions he was about to encounter.'

f That is in effect a finding that the sole cause of the accident was the first defendant's negligence. On the facts, that was in my judgment a correct conclusion. It entails a parallel conclusion that the nuisance was not a cause of the plaintiff's injuries; that, indeed, in the vast majority of cases is an inevitable conclusion once negligence on the part of the driver of a stationary vehicle is negatived, for only rarely will that which was found not to be a foreseeable cause of an accident also be found to have been in law the actual cause of it. For that reason, I would dismiss this appeal.

g It is thus not necessary to decide a further point inherent in much that was canvassed before us as to the ingredients of nuisance of the category under consideration. What would be the position if, even though the third defendant had not been negligent in leaving the lorry as it was in fact left, yet there had occurred some unexpected supervening happening—such as an onset of heavy weather, sea mist or fog, or, for instance, a sudden rear light failure (potent cause of fatalities)—which had so affected the situation that the lorry became the cause of an accident? Should the risk fall entirely on those using the highway properly? Or should some liability attach to the person at fault in creating a nuisance? It may well be that, as I am inclined to think, h he who created the nuisance would be under a liability—despite certain views expressed in *Parish v Judd*¹³ (a temporary emergency stop case—correctly decided as such), which I understand are about to be repeated by Edmund Davies LJ and with which, as at present advised, I am unable to concur. If he was thus liable this might be the only class of case in which an action in nuisance by obstruction of the highway could succeed where one in negligence would fail. That, however, on the facts j touching causation found by the learned trial judge remains an issue which can be decided on some other occasion.

10 [1966] 2 All ER 709 at 716, [1967] AC 617 at 639

11 [1971] RTR 417 at 420

12 [1971] RTR at 424, 425

13 [1960] 3 All ER 33, [1960] 1 WLR 867

EDMUND DAVIES LJ. I agree in the dismissal of this appeal but desire to add some observations of my own. I think I should first say something about my extempore (and unrevised) judgment in *Parish v Judd*¹⁴ which has been referred to in the course of argument. The facts there dealt with were substantially different from those of the present case. There the lorry and towed car which obstructed the highway had come to rest only a few moments before the car carrying the plaintiff crashed into them. In no sense had they been 'parked' on the carriageway as that term is generally understood and as happened in the present case. Again, the lorry and the car were stopped not simply as the result of an act of pure volition and choice on the lorry driver's part, but in an emergency and solely in order that he could ensure that all was well with the towed car and its driver. It was against the background of those facts that the court was called on to adjudicate on the alleged liability of the driver of the stationary car into which that carrying the plaintiff crashed, notwithstanding that the former vehicle was clearly visible 100 yards away. In saying¹⁵ that 'The mere fact that an unlighted vehicle is found at night on a road is not, in my judgment, sufficient to constitute a nuisance', I hope and believe it is clear from the immediately ensuing passages in the judgment that what I there had in mind was that, although the vehicle was so 'found', its driver might nevertheless be exculpated if, for example, it emerged, that it was only momentarily stationary and that without fault on his part. This emerges from the citation made from *Maitland v Raisbeck*¹⁶. It seems clear from that and other cases that it is the leaving of vehicles on the highway which constitutes the first of the two types of public nuisance dealt with by Sir Raymond Evershed MR in *Trevett v Lee*¹⁷. Thus, the examples of obstructions of the highway which amount to nuisance given in Salmond on Torts¹⁸ include 'leaving horses and carts, or motor-vehicles, standing in it for an unreasonable time or in unreasonable number', several reported cases being cited in support of the examples given. In *Maitland v Raisbeck*¹⁹ Lord Greene MR said:

'Every person . . . has a right to use the highway and, if something happens to him which in fact causes an obstruction to the highway but is in no way referable to his fault, it is quite impossible, in my view, to say that *ipso facto* and immediately a nuisance is created. It would be obviously created if he allows it to be an obstruction for an unreasonable time or in unreasonable circumstances, but the mere fact that it had become an obstruction cannot turn it into a nuisance . . . If that were not so, it seems to me that every driver of a vehicle on the road would be turned into an insurer in respect of latent defects in his own machine.'

Where a vehicle has been left parked on the highway for such a length of time or in such other circumstances as constitute it an obstruction amounting to a public nuisance, I remain of the view I expressed in *Parish v Judd*¹ that, in order that a plaintiff who in such proceedings as the present may recover compensation for personal injuries caused by a collision with that obstruction, he must establish that the obstruction constituted a danger. Nothing to the contrary was said by Devlin J in *Farrell v John Mowlem & Co Ltd*², which was strongly relied on by counsel for the plaintiff. What the learned judge there said of the pipe which the defendants had laid across the pavement was³:

¹⁴ [1960] 3 All ER 33, [1960] 1 WLR 867

¹⁵ [1960] 3 All ER at 36, [1960] 1 WLR at 869

¹⁶ [1944] 2 All ER 272 at 273, [1944] 1 KB 689 at 691, 692

¹⁷ [1955] 1 All ER 406 at 409, [1955] 1 WLR 113 at 117

¹⁸ 15th Edn, p 106

¹⁹ [1944] 2 All ER at 273, [1944] 1 KB at 691, 692

¹ [1960] 3 All ER at 36, [1960] 1 WLR at 870

² [1954] 1 Lloyd's Rep 437

³ [1954] 1 Lloyd's Rep at 440

a 'No doubt it is a comparatively harmless sort of nuisance in that most members of the public may be expected to see the pipe, and it will not cause them any grave inconvenience, but that does not prevent it being a nuisance in law,'

all of which connotes that the pipe nevertheless in fact constituted a danger to those less vigilant passers-by who are commonly to be found. Counsel for the plaintiff understandably stresses the further passage in which Devlin J observed⁴:

b '... it is no answer to say, "I laid the pipe across the pavement, but I did it quite carefully and I did not foresee and perhaps a reasonable man would not have foreseen that anybody would be likely to trip over it." He has created a nuisance, and consequently he is liable for what follows.'

c In *The Wagon Mound* (No 2), *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd*⁵, Lord Reid said of this decision:

'The only case cited where there is an express statement that liability does not depend on foreseeability is *Farrell v John Mowlem & Co Ltd*⁶ [and, regarding the passage just cited, Lord Reid added laconically:] He [the learned judge] cites no authority.'

d In *Morton v Wheeler*⁷ Denning LJ drew the same distinction between obstructions of and dangers on the highway as that referred to by Sir Raymond Evershed MR in *Trevett v Lee*⁸. But it is by no means always possible to allocate the facts of a particular case to only one or other of these two categories. It is notorious that what obstructs a highway may also create great danger to those who travel along it, while, on the other hand, danger unaccompanied by obstruction or obstruction giving rise to no danger may occur. In the present case counsel for the plaintiff, not surprisingly, contended that the second defendant's parked lorry did in fact constitute a danger. Denning LJ in *Morton v Wheeler*⁷ asked:

f 'But how are we to determine whether a state of affairs in or near a highway is a danger? [and answered] This depends, I think, on whether injury may reasonably be foreseen. If you take all the cases in the books, you will find that if the state of affairs is such that injury may reasonably be anticipated by persons using the highway, it is a public nuisance... but if the possibility of injury is so remote that he [the reasonable man] would dismiss it out of hand, saying "Of course, it is possible, but not in the least probable", then it is not a danger.'

g It goes without saying, however, that the person creating a highway obstruction must be alert to such sudden and unpredicted weather changes as those to which we are subject in this country at most seasons, to the possibility that the vehicular or highway lighting may fail or be interfered with in these days of rampant vandalism, and to other circumstances which may convert what was originally a danger-free obstruction into a grave traffic hazard. If he fails to exercise ordinary intelligence h in those and similar respects, he can make no proper claim reasonably to have anticipated the probable shape of things to come, and he must expect his conduct to be subjected to the most critical scrutiny in the event of an accident occurring.

Claims in nuisance for personal injuries sustained by colliding with vehicles obstructing highways do not affect the general rule that negligence is not a necessary element in nuisance. The tortious route which has led to an action for nuisance j being available in respect of personal injuries was admirably explored by Professor

4 [1954] 1 Lloyd's Rep at 440

5 [1966] 2 All ER 709 at 715, [1967] AC 617 at 638

6 [1954] 1 Lloyd's Rep 437

7 (1956) The Times, 1st February

8 [1955] 1 All ER 406, [1955] 1 WLR 113

Newark in his article 'The Boundaries of Nuisance'⁹. What he there calls the 'simple' principle, that negligence is not an element in the tort of nuisance, is well illustrated by the many reported cases of unlawful interference with a man's enjoyment of his land, it being no defence to say that no such interference was intended and even that all proper care was taken to avoid it. But in my judgment a different approach is called for where damages are sought to be recovered in respect of personal injuries said to have been caused by nuisance arising from the inexcusable presence of vehicles on highways. If deliberately created and clearly giving rise to danger to road users, fault is implicit and liability incontestable. But if an obstruction be created, here too, in my judgment, fault is essential to liability in the sense that it must appear that a reasonable man would be bound to realise the likelihood of risk to highway users resulting from the presence of the obstructing vehicle on the road. In this context it is interesting to recall the words used by Fitzherbert J in 1535 in the case¹⁰ which, in the words of Professor Newark, 'set the law of nuisance on the wrong track'. By way of illustrating that a man who has suffered special injury from a public nuisance may recover compensation therefor, Fitzherbert J said¹⁰:

'As if a man make a trench across the highway, and I come riding that way by night, and I and my horse together fall in the trench so that I have great damage and inconvenience in that, I shall have an action against him who made the trench across the road because I am more damaged than any other man.'

The nature of this illustration is itself significant. The trench being dug 'across' the highway, and the horseman 'riding that way by night' are the typical ingredients of a situation where any reasonable person must have realised that a danger to highway users was being created. That, as I see it, remains today an essential ingredient in cases for personal injuries brought in circumstances such as those existing in the present case. It is true that in the result, as Denning LJ said in *Morton v Wheeler*¹¹,

'Inasmuch as the test of danger is what may reasonably be foreseen, it is apparent that cases of public nuisance . . . have an affinity with negligence.'

Nevertheless, as he went on to point out:

'There is a real distinction between negligence and nuisance. In an action for private damage arising out of a public nuisance, the court does not look at the conduct of the defendant and ask whether he was negligent. It looks at the actual state of affairs as it exists in or adjoining the highway, without regard to the merits or demerits of the defendant. If the state of affairs is such as to be a danger to persons using the highway . . . it is a public nuisance. Once it is held to be a danger, the person who created it is liable unless he can show sufficient justification or excuse.'

Did this particular lorry, parked as it was in all the circumstances described by Sachs LJ, constitute a danger at any time? I deliberately restrict my question in that way, since I am far from desiring to give the slightest encouragement to the unnecessary and avoidable parking of vehicles for lengthy periods, especially on highways designed as Wolseley Road was, for (as the trial judge said) 'a substantial volume of traffic'. But, having so limited it, I have come to the clear conclusion that, although it constituted an obstruction, and, therefore, a public nuisance (having been deliberately and inexcusably left parked for several hours), it did not present a danger to those using the highway in the manner in which they could reasonably have been expected to use it.

⁹ (1949) 65 LQR 480

¹⁰ *Anon* (1535) Y B Mich 27 Hen 8, f 10, pl 10

¹¹ (1956) *The Times*, 1st February

a This question of danger is, of course, inextricably linked up with that of causation. Counsel for the plaintiff boldly submitted that, once it be found that this lorry so obstructed the highway as to amount to a nuisance, this created a situation of strict liability, with the result that the matter of causation is immaterial and the plaintiff must necessarily succeed. He was, therefore, driven to assert that, supposing in the present case the motor cyclist had for some reason lost control of his vehicle
b some distance back and thereafter in the course of its unchecked progress it happened to strike the parked lorry (when it might equally well have crashed into a house adjoining the highway), the lorry driver would be liable in nuisance for any personal injuries resulting from the collision. Counsel for the plaintiff appeared hesitant even as to whether there can be room for a finding of contributory negligence in such cases as the present, and this despite *Farrell v John Mowlem & Co Ltd*¹² itself, where
c Devlin J dealt with the components of such a defence to a claim based on highway nuisance. But he was unable to explain why, if he is right, his submissions should not apply equally to other cases of strict liability, such as those arising under *Rylands v Fletcher*¹³ and the Factories Act 1961. With all respect to learned counsel, I feel I need say no more by way of rejecting his submission that causation is here irrelevant than Sachs LJ has already said. To accede to it would have led to the creation of a new sort of tort, a legal freak. For my part, I am not prepared to act as its midwife.
d Granted that a highway be obstructed, it is still for the party suing to show that the existence of the obstruction played some part in bringing about the collision. For this purpose it is not enough to say baldly, as counsel for the plaintiff has done: 'There would have been no collision in the Wolseley Road that night had there been no parked lorry to collide with'. To submit that is to adduce in the most blatant form *causa sine qua non*, as an all-sufficient basis for a finding of liability.

e The learned judge held¹⁴, on ample evidence, that the lorry—

'was not causative of the present accident. The accident was... wholly attributable to the fact that the [first defendant] as he rode along was watching the attractive young ladies on the pavement instead of looking ahead of him to see what conditions he was about to encounter.'

f That was a conclusion to which he was fully entitled to come, and it was, of itself and regardless of all other points canvassed, fatal to the plaintiff's case. Accordingly, despite the attractively presented and valiant attempt of counsel for the plaintiff to persuade us to the contrary, I would concur in dismissing this appeal.

g **STEPHENSON LJ.** I agree that this appeal must be dismissed. In a clear and careful judgment the learned judge found that the accident which occurred to the plaintiff was wholly attributable to the negligence of the first defendant. How then can this plaintiff's appeal succeed? Only, in my judgment, by our holding that the third defendant created a nuisance by parking the second defendant's lorry on this road and that the happening of the collision between the lorry and the first defendant's motor cycle thereby entitles the plaintiff to recover from these defendants at least some damages for the injuries which he suffered as a result of that collision. For I agree with the learned judge, for the reasons that he gave and those given by Sachs LJ, that the plaintiff wholly fails to establish any negligence on the part of the third defendant in the manner in which the lorry was parked or in failing to foresee the form of folly which the first defendant's driving of his motor cycle took.

j On nuisance, I am, like Sachs LJ, unwilling to go as far as the learned judge in holding that the parking of this lorry, although careful and reasonable from the third defendant's point of view, was in the light of the realities of life today, as the

12 [1954] 1 Lloyd's Rep 437

13 (1868) LR 3 HL 330, [1861-73] All ER Rep 1

14 [1971] RTR 417 at 424, 425

learned judge puts it, inoffensive from the public point of view and could not possibly have inconvenienced or endangered anybody who looked where he was going. Although the risk of danger was not such as to make the third defendant negligent in parking it when and where and as he did, there might have been a worsening of traffic conditions of the kind indicated by Sachs LJ; and even if the risk of such worsening was remote, the parking of a lorry 7½ ft wide on a main highway for something like nine hours seems to me to constitute an unauthorised obstruction which in the present state of the authorities was *prima facie* a nuisance actionable at the suit of a person injured by it (whether foreseeably dangerous or not at the time when it was created), because it was not justified by any right to park it there in the third defendant as a user of the highway or as an occupier of adjoining premises or in any other capacity. I agree with Sachs LJ that there may still be rare cases when an injured plaintiff's claim in nuisance may succeed although his claim in negligence fails. However, I agree also that we do not have to decide that question, because I agree with the learned judge that even if the parking was tortious it was not causative of the plaintiff's accident. Counsel for the plaintiff boldly contended that that does not matter, and that once a public nuisance on a highway was created, the creator was in the uniquely unfortunate position of being unable to say that a collision with the obstruction constituting the nuisance was wholly the fault of another, such as the first defendant who drove the plaintiff into it. He conceded that, although worse off in this respect than defendants labouring under any other form of strict liability, such as an absolute statutory duty, the creators of such a nuisance were like other defendants able to avail themselves of a plea of contributory negligence. But, for some reason which even he did not make clear to me, or support by any authority, they could not, he submitted, escape liability altogether by proving the person who collided with the obstruction 99 per cent or 100 per cent to blame.

Like Sachs and Edmund Davies LJJ, I reject the attempt to confer this privilege on those who collide with an unauthorised obstruction in the highway, and I agree that the learned judge was right in dismissing the plaintiff's claim in nuisance against the second and third defendants and in finding that the first defendant was wholly to blame for the accident.

Appeal dismissed.

Solicitors: *Davies, Arnold & Cooper*, agents for *Geoffrey H Stevens & Sabel*, Plymouth (for the plaintiff); *Bond, Pearce & Co*, Plymouth (for the second and third defendants).

Mary Rose Plummer · Barrister.

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National Coal Board v Naylor

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, ASHWORTH AND GRIFFITHS JJ

10th DECEMBER 1971

- b *Agriculture – Agricultural holding – Notice to quit – Desirable in the interests of sound management of the estate – Meaning of ‘sound management’ – Personal financial interest of landlord not a matter of sound management – Purpose for terminating tenancy must be connected with way estate managed – Landlords giving notice to quit to enable them to re-negotiate letting on terms excluding their existing obligation to supply tenant with cheap electricity – Purpose of termination not desirable in interests of sound management – Consent to operation of notice to quit refused – Agricultural Holdings Act 1948, s 25 (1) (b).*

c

Under a clause in a tenancy agreement made in 1946, relating to a farm, the landlords were obliged to supply the tenant with electricity at a cheap rate. The clause did not restrict the quantity of electricity the tenant could use. In 1970 the landlords paid the electricity board some £88 in respect of mains electricity supplied by the board to the tenant, but could recoup from the tenant, because of the clause in the agreement, only £36. As electricity became more widely used on farms, the tenant's consumption of it was likely to double or treble. The landlords gave the tenant notice to quit the farm for the purpose of renegotiating a letting on terms more favourable to the landlords, i.e. terms which would exclude the obligation to supply cheap electricity. The tenant served a counter-notice; but the Agricultural Land Tribunal consented to the operation of the notice to quit, holding that the purpose

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for which the landlords proposed to terminate the tenancy was desirable in the interests of sound management of the estate, i.e. the farm, within s 25 (1) (b)^a of the Agricultural Holdings Act 1948. The tenant appealed.

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Held – Consent to the operation of the notice to quit would be refused, and the appeal allowed, because the reference to ‘sound management’ in s 25 (1) (b) referred to the landlord's obligation to manage the estate properly. A purpose for terminating a tenancy was not ‘desirable in the interests of sound management’ within s 25 (1) (b), unless the purpose was connected with the way in which the land was managed, and the personal financial interest of the landlord, in isolation, was not a matter of ‘sound management’. Accordingly, whether a particular purpose was in the interests of sound management depended on the effect it would have on the management of the estate. In the present case the purpose for which the landlords sought to terminate the tenancy would have no effect on the management of the farm, but merely concerned the landlords' pocket, and so was not a purpose within the contemplation of s 25 (1) (b) (see p 1157 e to h and p 1158 a d and h, post).

Notes

h

For giving or withholding consent to a notice to quit an agricultural holding, see 1 Halsbury's Laws (3rd Edn) 289, 290, para 607; for good estate management, see *ibid*, 339, 340, paras 714 and 716, and for cases on consent to a notice to quit, see 2 Digest (Repl) 16-18, 71-76.

For the Agricultural Holdings Act 1948, s 25, see 1 Halsbury's Statutes (3rd Edn) 709.

Cases cited

j

Bailey v Purser [1967] 2 All ER 189, [1967] 2 QB 500.

Davies v Price [1958] 1 All ER 671, [1958] 1 WLR 434.

Special case stated

This was a special case stated for the opinion of the court pursuant to s 6 of the

a Section 25 (1) (b) is set out at p 1156 h, post

Agriculture (Miscellaneous Provisions) Act 1954 by the Agricultural Land Tribunal, Yorkshire and Lancashire Area. a

By a tenancy agreement dated 26th November 1946 Manchester Collieries Ltd (the predecessors in title of the National Coal Board ('the landlords')) let Higher Barns Farm, Astley, in the county of Lancaster to the tenant, Joseph Smith Naylor. Clause 13 of the agreement provided:

'It is hereby agreed and declared that during the continuance of the above mentioned tenancy the Landlords will supply electricity for use on the farm in the farm house and buildings and the tenant shall pay a fixed minimum charge of £4 (Four pounds) a year with an additional charge of 3d per unit consumed as registered on the meter provided for all current consumed at the farm house and farm buildings; it is further agreed between the parties that in connection with the above supply of electricity the Tenant shall claim no compensation from the Landlords for anything upon or done to the property of the Landlords during the continuance of on or after the expiration of this Agreement and that the Landlords shall not be liable in any way for failure to supply in the event of a breakdown or other unforeseen circumstances.'

b

The landlords served on the tenant notice to quit the holding dated 16th November 1970 which was to have effect on 2nd February 1972 and the tenant served on the landlords a counter-notice dated 9th December 1970 requiring that s 24 (1) of the Agricultural Holdings Act 1948, as amended, should apply to the notice to quit. Accompanying the notice to quit was a letter from the landlords offering the tenant a new tenancy of the holding to commence with the expiration of the notice to quit, at a rent failing agreement to be settled by arbitration, the clause relating to the supply of electricity to be excluded, all other terms to be as in the current tenancy. The landlords applied to the tribunal for its consent to the operation of the notice to quit. d

The tribunal found that from the date of the agreement to 1958 the landlords and their predecessors supplied electricity under cl 13 at 110 volts from supplies generated by themselves at a nearby colliery, Nook Colliery, that in 1958 the landlords ceased to generate electricity at Nook Colliery whereupon electricity supplied by the North Western Electricity Board was provided to Nook Colliery via a 2,000 yard supply line from their Astley Green Colliery and thence to the tenant's farm, that in 1961 the farmhouse, farm buildings and the tenant's electrical apparatus were rewired and converted where necessary to use electricity at 230 volts and that from 1961 onwards the landlords had supplied electricity to the tenant at 230 volts. In 1969 the landlords decided to close Nook Colliery and Astley Green Colliery whereby no supply of electricity would be available to the farm from Nook Colliery; the landlords therefore caused the North Western Electricity Board to provide a direct supply of electricity to the farm and, since November 1969, the landlords had paid the North Western Electricity Board for electricity used at the farm and the tenant had paid the landlords for such electricity at the rate provided by cl 13 of the agreement. The tribunal found that in the year ending November 1970 the landlords paid to the North Western Electricity Board for the electricity consumed at the farm a total of £88 15s 1d for which they were able to charge the tenant £36 4s 10d under cl 13; the tribunal also found that by reason of their system of accounting the landlords had incurred work and (unquantified) extra expense in making payments quarterly to the North Western Electricity Board and recovering payments quarterly from the tenant which they would not have incurred if the tenant had paid the North Western Electricity Board for current used at the farm. The tribunal also accepted the landlords' contention that limitations on the possible consumption of electricity by the tenant from the 110 volts private supply available at the time of the original agreement did not apply to 230 volts mains electricity now installed and that the landlords should have some control over the extent of any obligation to provide the tenant e
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a with a commodity which in modern farming was subject to considerable variations in cost according to the nature and intensity of its use. The landlords gave an undertaking to relet the farm to the tenant on the same terms as theretofore, with the omission of cl 13, at a rent to be agreed or in default of agreement to be settled by arbitration.

b It was contended on behalf of the landlords that sound management of the estate which the tenancy constituted made it essential that the landlords should obtain possession of the land so that they could negotiate with the tenant or with any willing tenant a new tenancy at a fair rent with the obligation to supply electricity eliminated from the tenancy agreement.

c It was contended on behalf of the tenant that it did not amount to sound management for the landlords to use the jurisdiction of the tribunal to breach a pre-existing contract and that their proper procedure was to deal with the matter by means of seeking arbitration as to the proper rent to be paid in the existing conditions and also that there would be no significant difference between the existing regime and the new regime proposed by the landlords.

d The tribunal reached the conclusion that sound estate management necessitated the landlords obtaining possession of the land in order to put the management of the estate on a proper basis and accordingly the tribunal was satisfied that the carrying out of the purpose for which the landlords proposed to terminate the tenancy was desirable in the interests of sound management of the estate to which the notice related. The tribunal was also satisfied that a fair and reasonable landlord would insist on possession. The questions of law which the tribunal referred to the court were as follows: (i) whether the desire of a landlord of an agricultural holding to be relieved of a financially onerous obligation in the tenancy agreement constituted sound management of the estate when the remedy of demanding a reference to arbitration under s 8 of the Agricultural Holdings Act 1948 as to the rent payable was available to the landlord; (ii) whether the avoidance of extra work and unquantified expense created by the landlord's system of accountancy could amount to sound management of an estate for the purposes of s 25 (1) (b) of the Agricultural Holdings Act 1948, as amended.

f *M Kershaw* for the tenant.

Gerson Newman for the landlords.

LORD WIDGERY CJ. This is an appeal by special case from the Agricultural Land Tribunal for the Yorkshire and Lancashire area in respect of a decision reached by them on 13th May 1971 giving consent to the operation of a notice to quit given by the landlords to the tenant in respect of the holding known as Higher Barns Farm, Astley, in the county of Lancaster. The tenant appeals against the decision of the tribunal, alleging that it was wrong in point of law.

h The facts are these. The tenancy agreement relating to the farm was made as long ago as 26th November 1946. The tenant in those days was the same tenant as is currently the appellant before us today, Mr Joseph Smith Naylor. The landlords originally were a company called Manchester Collieries Ltd. In due course the reversion passed from Manchester Collieries Ltd to the National Coal Board, who remained the landlords, and are the respondents to the proceedings today.

The tenancy agreement is notable for one reason only, that it contains an unusual provision in cl 13. That provides:

i 'It is hereby agreed and declared that during the continuance of the above mentioned tenancy the Landlords will supply electricity for use on the farm in the farm house and buildings and the tenant shall pay a fixed minimum charge of £4 (Four pounds) a year with an additional charge of 3d per unit consumed as registered on the meter provided for all current consumed at the farm house and farm buildings; it is further agreed between the parties that in connection

with the above supply of electricity the Tenant shall claim no compensation from the Landlords for anything upon or done to the property of the Landlords during the continuance of on or after the expiration of this agreement . . .'

That clause was inserted in the agreement by reason of the fact that the landlords were the Manchester colliery, and by reason further of the fact that they owned a colliery called Nook Colliery which was some short distance from the farm buildings on this farm. Evidently it was convenient in 1946 for the landlords to supply electricity to the tenant from their own sources at Nook Colliery where they had their own generating equipment, and indeed this was done by means of the supply of electricity at 110 volts for some time.

After a time, however, Nook Colliery ceased to provide electricity, and the supply then came from another colliery called Astley Green Colliery, but in the fullness of time both these collieries were closed down and the landlords then provided a new supply of electricity to the farm from mains of the North Western Electricity Board. From about 1961 onwards the tenant has been enjoying ordinary mains electricity supply from the electricity board, but he has still paid to the landlords the amount required of him under cl 13, the landlords being responsible for settling the bill with the electricity board. The tribunal found that in 1970 the landlords had paid £88 odd in respect of the supply of this electricity, and had been able to recoup themselves only to the tune of £36. That margin itself might not be a very grave matter, but behind the landlords' concern about the continuance of this arrangement is the fact that as electricity becomes more widely used in farming, the consumption of electricity on this farm might double or treble itself, and there is, of course, no restriction in cl 13 as to the total quantity which is to be used. Accordingly, and not as it seems to me without reason, the landlords were concerned to put an end to this open ended obligation to supply cheap electricity to the tenant.

The only course open to them, as they saw it, was to give the tenant notice to quit with a view to negotiating a new lease, either with this tenant or another, but a new letting which would exclude from its terms the particular clause about the electricity supply to which I referred. Accordingly, notice to quit was duly given; the tenant gave a counter-notice under s 24 of the Agricultural Holdings Act 1948, and that meant that the landlords could not proceed to obtain possession without an order of the Agricultural Land Tribunal.

At this point one must turn to look at the legislation in a little more detail, because s 25 of the Act specifies precisely the circumstances in which the tribunal could, as a matter of law, give effect to the landlords' desire. The section as amended provides:

'(1) The Agricultural Land Tribunal shall consent under the last foregoing section to the operation of a notice to quit an agricultural holding or part of an agricultural holding if, but only if, they are satisfied as to one or more of the following matters, being a matter or matters specified by the landlord in his application for their consent, that is to say—(a) that the carrying out of the purpose for which the landlord proposes to terminate the tenancy is desirable in the interests of good husbandry as respects the land to which the notice relates, treated as a separate unit; or (b) that the carrying out thereof is desirable in the interests of sound management of the estate of which the land to which the notice relates forms part or which that land constitutes; or . . . (d) that greater hardship would be caused by withholding than by giving consent to the operation of the notice . . .'

In this case the landlords sought to proceed before the tribunal under paras (b) and (d) of the section which I have read. They failed under para (d) and no further reference to that paragraph is required, but they succeeded under para (b), and the issue before this court is whether as a matter of law the purpose which the landlord sought to achieve by giving notice to quit was a purpose within the terms of para (b).

a It is helpful, I think, to read para (b) again in the light of those considerations, and to read it as incorporating in it the relevant words in para (a). Thus it reads:

‘that the carrying out of the purpose for which the landlord proposes to terminate the tenancy is desirable in the interests of sound management of the estate of which the land to which the notice relates forms part or which that land constitutes.’

b It is common ground that the estate for present purposes is the farm alone, and it is not one of those cases in which the landlord owns a number of farms in a single unit and lets them to different tenants. Here we are concerned with one farm and one farm only which is the estate for the purpose of para (b). I ask myself: what is the purpose for which the landlords propose to terminate the tenancy, and the answer is very simple. Their purpose is to put themselves in a position in which they can renegotiate a letting of this farm on terms more favourable to themselves than the present; that undoubtedly is the purpose.

c Is the purpose one which could possibly be described as desirable in the interests of sound management of the estate? The argument for the landlords is that sound management includes such matters as seeing that the terms of the tenancy are appropriate, fair and proper, and that a landlord who seeks to eliminate from the tenancy agreement an unusual, burdensome and perhaps unfair clause, can fairly be described as saying that he is seeking to achieve a purpose desirable in the interests of sound management.

d On the other hand it is argued by counsel for the tenant that sound management relates to the management of the land, and that no purpose can be described as being desirable in the interests of sound management unless that purpose is connected with the way in which the land is managed. He says that the personal financial interest of the landlords looked on in isolation is not a matter of sound management of the estate for this purpose, and accordingly he contends that as a matter of construction of the section the purpose here that might be achieved is without the terms of s 25 (1) (b). I have come to the clear conclusion that the tenant’s contention in this case is right. The reference to sound management is a successor of a more familiar phrase ‘good estate management’, but it refers to the obligations of a landlord as one of the partners in a partnership which produces food from the land. The obligation of the tenant is to observe the rules of good husbandry; the obligation of the landlord is to manage the estate properly. In my judgment when we consider whether a particular purpose is in the interests of sound management in that sense, we cannot look simply to the landlord’s pocket, but must ask ourselves what effect the purpose would have on the management of the farm, and if, as in the present case, the answer is that the purpose would have no effect whatever on the management of the farm itself, it seems to me to exclude the purpose from those contemplated by s 25 (1) (b). In my judgment the tribunal erred in law, and I would allow the appeal.

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h **ASHWORTH J.** I agree, and I would only add a few words. In my judgment, when one is considering the conditions set out in s 25 (1), it is convenient to look at them all and read para (d) in its context. I do not propose to read them in full, but para (a) clearly relates to something which I will call physical, namely good husbandry; para (b) as the words ‘sound management of the estate’; para (c) is interesting because it refers to—

i ‘agricultural research, education, experiment or demonstration, or for the purposes of the enactments relating to smallholdings or allotments’,

plainly in this context a physical idea. Paragraph (d) it is true deals I think with greater hardship, and that is personal to the parties, but para (e) is not without significance:

'that the landlord proposes to terminate the tenancy for the purpose of the land's being used for a use, other than for agriculture . . .'

It seems to me that looked at in this way, sound management in para (b) is directly in context related to the management of the farm in the physical sense of the word and is something quite distinct from the financial result to the landlord himself.

Apart from that, I derive assistance from s 25 (5) to which counsel for the tenant referred, and that, as amended, provides:

'Where the Agricultural Land Tribunal consent under the last foregoing section to the operation of a notice to quit, the Tribunal may impose such conditions as appear to the Tribunal requisite for securing that the land to which the notice relates will be used for the purpose for which the landlord proposes to terminate the tenancy.'

In other words there is a purpose affecting the user of the land, and that is the purpose for which he proposes to terminate the tenancy.

In this case in my judgment the purpose for which the landlords propose to terminate has nothing to do with the user of the land. It merely concerns the financial result to the landlords. I note that at the conclusion of the case stated the tribunal said:

'[They] reached the conclusion that sound estate management necessitated the Landlords obtaining possession of the land in order to put the management of the estate on a proper basis . . .'

It seems to me that those words, in the context of the facts proved and the argument, can only mean that the tribunal took the view that a proper basis of sound management involved the removal of an onerous clause. With all respect to the tribunal, I think they misdirected themselves. This estate or land was being managed on a perfectly proper basis before even the notice to quit was given; all that was causing difficulty, so to speak, in the management at that time was the inclusion of an expensive clause regarding electricity. In that sense, too, I think the tribunal misdirected themselves. One possibility which might occur if counsel for the landlords is right would be that a landlord could say: I wish to sell this land with vacant possession because in the sound management of my estate I shall do more by getting the capital out of it. It seems to me that those approaches to the problem, namely those involving the landlord's financial position rather than the actual management of the farm, are not in accord with the intention of the section. For those reasons, in addition to those given by Lord Widgery CJ, I would allow this appeal.

GRIFFITHS J. I also agree.

Decision of the tribunal set aside. Order that consent to the operation of the notice to quit be refused. Leave to appeal granted.

Solicitors: *Ellis & Fairbairn*, agents for *Hodgson & Sons*, Preston (for the tenant); *Donald H Haslam*, agent for *P E Lissant*, National Coal Board, Warrington (for the landlords).

Francesca Durley Barrister.

Graham v White (Inspector of Taxes)

CHANCERY DIVISION

MEGARRY J

3rd DECEMBER 1971

Income tax – Emoluments of office or employment – Place of performance of duties – Duties treated as performed in United Kingdom – Duties of office or employment under the Crown of a public nature – Emoluments payable out of public revenue – Taxpayer permanent civil servant employed outside United Kingdom – Taxpayer without professional or technical qualifications – Implementing instructions handed down by superior officers – Subordinate position with limited duties – Whether employment ‘of a public nature’ – Finance Act 1956, Sch 2, para 6.

The taxpayer was at all material times employed as a permanent established civil servant of the industrial class, although he held a post in the technical class on a temporary basis. His duties were connected with Naval, Royal Air Force and Military establishments outside the United Kingdom and entailed the supervision of mechanical and engineering operations carried out by workmen in the industrial grades. These operations included work on air conditioning plant, airfield amenities for the Royal Air Force and the maintenance of electrical installations in service quarters and working areas. The taxpayer was responsible to professional engineers or superior officers in the technical class for the work carried out under his supervision. The Finance Act 1956, Sch 2, para 6^a, provided that for the purposes of Cases I and II of Sch E, the duties of any office or employment under the Crown ‘which [was] of a public nature’ and of which the emoluments were payable out of the public revenue of the United Kingdom were to be treated as performed in the United Kingdom. The taxpayer contended that because he had no professional or technical qualifications, had no power to make decisions on matters of policy or otherwise, but merely implemented instructions handed down to him by superior officers in the executive and higher technical grades, his duties were not of a public nature within para 6 which, he argued, were limited to those of Ministers, Permanent Secretaries or Directors of Ministries. It was not disputed that the taxpayer held an office or employment under the Crown or that his emoluments were paid out of the public revenue.

Held – The taxpayer’s employment was of a public nature because, whilst the statutory language contemplated that there might be offices or employment under the Crown, with emoluments payable out of the public revenue, which were not of a public nature (e.g. that of an ambassador’s valet), it was not arguable that the taxpayer’s employment was of a private nature or was one in which there was no public interest in the sense of a legitimate concern; the taxpayer’s duties were plainly of importance to the efficiency of an important branch of the public service and it made no difference that the taxpayer was in a subordinate position with very limited duties; the duties of a civil servant did not suddenly become of a ‘public nature’ on promotion but were *prima facie* of a public nature whatever the rank or grade of the servant (see p 1165 c to e, post).

R v Dr Burnell (1699) Carth 478 and *Inland Revenue Comrs v Hambrook* [1956] 3 All ER 338 applied.

Great Western Railway Co v Bater [1922] 2 AC 1 distinguished.

Notes

For the law relating to the charge to tax under Sch E where an office or employment under the Crown is of a 'public nature' and the emoluments are payable out of the public revenue, see 20 Halsbury's Laws (3rd Edn) 308, 309, para 567.

For the Finance Act 1956, Sch 2, see 36 Halsbury's Statutes (2nd Edn) 448.

In relation to the year 1970-71 and subsequent years of assessment, Sch 2 to the 1956 Act has been repealed by the Income and Corporation Taxes Act 1970, s 538 (1) and Sch 16, and replaced by s 184 (3) of the 1970 Act.

Cases referred to in judgment

A-G for New South Wales v Perpetual Trustee Co Ltd [1955] 1 All ER 846, [1955] AC 457, [1955] 2 WLR 707, 119 JP 312, 34 Digest (Repl) 224, 1631.

Bowers v Harding [1891] 1 QB 560, 60 LJQB 474, 64 LT 201, 3 Tax Cas 22, 28 (1) Digest (Reissue) 386, 1413.

Great Western Railway Co v Bater [1922] 2 AC 1, 91 LJKB 472, 127 LT 170, 8 Tax Cas 241, 28 (1) Digest (Reissue) 320, 1132.

Great Western Railway Co v SS Mostyn (Owners), The Mostyn [1928] AC 57, [1927] All ER Rep 113, 97 LJP 8, 138 LT 403, 92 JP 18, 30 Digest (Repl) 212, 544.

Inland Revenue Comrs v Hambrook [1956] 3 All ER 338, [1956] 2 QB at 658, [1956] 3 WLR 643; *affg* [1956] 1 All ER 807, [1956] 2 QB 641, [1956] 2 WLR 919, 34 Digest (Repl) 225, 1632.

R v Dr Burnell (1699) Carth 478, 90 ER 875.

R v Whitaker [1914] 3 KB 1283, 84 LJKB 225, 112 LT 41, 79 JP 28, 10 Cr App Rep 215, 14 Digest (Repl) 129, 913.

Case stated

At a meeting of the Commissioners for the General Purposes of the Income Tax Acts held on 20th January 1971 William James Graham ('the taxpayer') appealed against assessments to income tax made on him under Sch E for the years and in the amounts following:

Year	Made	Amount
		£
1959-60	23 10 61	969
1961-62	29 6 63	1,304
1962-63	29 6 63	1,239
1963-64	8 3 65	1,783
1964-65	6 4 70	2,406
1965-66	6 4 70	2,100
1966-67	9 6 69	1,653
1967-68	9 6 69	2,230
1968-69	9 6 69	1,919

Notice of appeal against the above assessments was submitted by the taxpayer outside the statutory period for appealing except in relation to the assessments for the years 1964-65 and 1965-66. The taxpayer had applied for an appeal for each of the years of assessment specified above to be admitted for consideration but the respondent inspector of taxes, David Sibbald White, pursuant to the powers in that behalf contained in s 49 (1) of the Taxes Management Act 1970, had indicated to the taxpayer that he was prepared to admit late appeals for the years of assessment 1966-67, 1967-68 and 1968-69 only and that he was unwilling to do so in respect of the years of assessment 1959-60, 1961-62, 1962-63 or 1963-64 without reference to the commissioners. After hearing the taxpayer and the inspector of taxes the commissioners decided that the appeals by the taxpayer in respect of all the years of assessment listed above which were made out of time, be admitted as late appeals and considered with the appeals against the other two assessments under appeal.

a The taxpayer did not dispute the amount of the assessment on him for any of the years under appeal and the only question at issue before the commissioners was whether or not the taxpayer was in each of the years under appeal performing the duties of an office or employment under the Crown which was of a public nature within the meaning of para 6 of Sch 2 to the Finance Act 1956 (now s 184 (3) of the Income and Corporation Taxes Act 1970).

b The following facts were agreed or proved. (1) Throughout the years of assessment under appeal the taxpayer was a permanent civil servant holding an established post and the certificate of the Civil Service Commissioners. (2) The taxpayer's established grade was in the industrial class but that, throughout the years under appeal, he was holding, on a temporary basis, a post in the technical class and was being paid the higher rate of salary attaching to that class. (3) The taxpayer, although still holding the temporary grading within the technical class, was liable at the discretion of the employing department to be returned to his established grading within the industrial class; this had not in fact happened to the taxpayer and on a date after 5th April 1969 his membership of the technical class was placed on a permanent basis. (4) During the years of assessment under appeal, the taxpayer was employed successively by the Air Ministry and the Ministry of Public Building and Works and he was performing his duties outside the United Kingdom throughout those years. (5) The taxpayer's duties were wholly connected with Naval, Royal Air Force and Military establishments of the Crown. Such duties were at all times performed within the confines of those establishments and entailed the supervision of mechanical and engineering operations carried out by workmen in the industrial grades. The operations included work on air conditioning plants, airfield amenities for the Royal Air Force and the maintenance of electrical installations in service quarters and working areas. The taxpayer was responsible to professional engineers or superior officers in the technical class for the work carried out under his supervision. (6) At all material times the emoluments received by the taxpayer were payable out of the public revenue of the United Kingdom.

f It was contended on behalf of the taxpayer that during the years of assessment under appeal he was not liable to pay income tax by virtue of the provisions of para 6 (a) of Sch 2 to the Finance Act 1956 for the reason that his duties in the course of his employment were not 'of a public nature'. The taxpayer was, at the material time, an established civil servant in the industrial class, and although he was in fact holding the temporary status of the technical class whilst abroad during the years under appeal and thus received the higher salary which such status attracted, he contended that he had no right to expect that he would remain in that class and was liable to be required to revert to his lower status in the industrial class at any time. Notwithstanding this, it was argued on behalf of the taxpayer that his work could be carried out, and his position held, by a person having no professional or technical qualifications whatever. He was thus in a subordinate position with very limited duties; he had no power to make decisions on matters of policy or otherwise but merely implemented instructions handed down to him by superior officers in the executive and higher technical grades and saw to it that work was carried out in accordance with the drawings and specifications by workers in the industrial class. The taxpayer submitted that the expression 'of a public nature' for the purposes of para 6 (a) of Sch 2 to the 1956 Act could only relate to a person holding a position of authority within a public body, namely, one having overall control and responsibility for the efficiency and profitability of such public body and invested with complete managerial status. In the context of the civil service, to bring duties within the category 'of a public nature', the holder of a post should be either Ministers in charge of Ministries, Permanent Secretaries or Directors of Ministries, i.e. that is to say persons of director status and above. Civil servants in the lower grades, which included the taxpayer's own established post in the industrial class and also his temporary grading within the technical class, lacked both the status and responsibility needed to bring the duties of office within the above-mentioned category 'of a public nature'.

It was contended on behalf of the inspector of taxes: (1) that the question whether the taxpayer's office or employment under the Crown was 'of a public nature' within the meaning of para 6 of Sch 2 to the Finance Act 1956 in each of the years in question depended on the nature of the office or employment and its duties; (2) that the taxpayer's office or employment under the Crown and its duties were concerned exclusively with bases and establishments of the armed forces; (3) that the taxpayer's office or employment under the Crown was therefore for each of the years in question 'of a public nature' within the meaning of para 6.

The commissioners who heard the appeal held that at all material times the taxpayer, as an established civil servant, was performing duties of an office or employment under the Crown which was 'of a public nature' within the meaning of para 6 (a) of Sch 2 to the Finance Act 1956. They therefore dismissed the appeal and confirmed the assessments.

The taxpayer appealed by way of case stated to the High Court.

The taxpayer appeared in person.

P W Medd for the Crown.

MEGARRY J. This is a case stated by the General Commissioners for the Abingdon Division of Berkshire. It concerns Sch E tax for the years 1959-60 to 1968-69 inclusive. The amounts range from just under £1,000 to rather under £2,500 for the various years in question. The taxpayer appealed against these assessments and the commissioners dismissed his appeal. The taxpayer was at all material times employed as a permanent established civil servant of the industrial class, although he held a post in the technical class on a temporary basis. He was first in the Air Ministry and later in the Ministry of Public Building and Works. His duties were performed outside the United Kingdom.

The question before me turns on the language of the Finance Act 1956, Sch 2, para 6. This, in dealing with Sch E, provides that:

'For the purposes of Cases I and II (including the purposes of this Schedule so far as it relates to those Cases), the following duties shall be treated as performed in the United Kingdom, namely—(a) the duties of any office or employment under the Crown which is of a public nature and of which the emoluments are payable out of the public revenue of the United Kingdom or of Northern Ireland...'

The argument has centred round the words 'which is of a public nature'. It has not been suggested that the words 'any office or employment under the Crown' were not satisfied; nor has there been any contention about the emoluments, which are admittedly within the phrase 'payable out of the public revenue of the United Kingdom or of Northern Ireland'. The sole question arises on the qualifying words that I have mentioned. The taxpayer contends that they do not apply, and the Crown that they do apply. The commissioners accepted the contention of the Crown and dismissed the taxpayer's appeal.

The case stated says of the taxpayer's duties that they were—

'wholly connected with Naval, Royal Air Force and Military establishments of the Crown. Such duties were at all times performed within the confines of the said establishments and entailed the supervision of mechanical and engineering operations carried out by workmen in the Industrial Grades. The operations included work on air conditioning plants, airfield amenities for the Royal Air Force and the maintenance of electrical installations in Service quarters and working areas. The [taxpayer] was responsible to professional engineers or superior officers in the Technical Class for the work carried out under his supervision.'

The main contention of the taxpayer has been that although in fact the work he

a carried out was at all times work within the technical class, he had no right to expect to remain in that technical class; he had no professional or technical qualifications whatsoever, and he was in a subordinate position with very limited duties. He had no power to make decisions on matters of policy or otherwise, but merely implemented instructions handed down to him by superior officers in the executive and higher technical grades, and saw to it that that work was carried out in accordance with the drawings and specifications by workers in the industrial class. On that foundation the taxpayer rested a contention that the expression 'of a public nature' b within the statute could relate only to a person holding a position of authority within a public body. The argument went to the extent of saying that in order to bring duties within the category 'of a public nature' the holders of the post should be—

c 'either Ministers in charge of Ministries, Permanent Secretaries or Directors of Ministries—that is to say persons of Director status and above.'

Those of lower grades lacked both the status and the responsibility needed to bring their duties of office within the phrase.

Now it is plain that there are three constituent elements in the statutory language. First, there is 'office or employment under the Crown', an expression which is admittedly satisfied; secondly, there are the words in dispute, 'which is of a public nature'; d and thirdly, there is the concluding phrase relating to the source of the emoluments, and that again is not in dispute. With the statute expressed in that language, it cannot have been contemplated that the disputed phrase should be defined in terms of who the employer is or whence the emoluments came, for these elements are explicitly provided for in the first and the third limbs. Further, the contemplation e of the language appears to be that there may be offices or employments under the Crown, with emoluments payable out of the public revenue, which are not within the statutory expression because they are not 'of a public nature': otherwise those words would be pleonastic. Counsel for the Crown was hard put to it to find any substantial body of examples of such a category, although he did contribute the suggestion of an ambassador's valet. His contention was that apart from excep- f tions of this kind, every civil servant, however exalted or however humble, would normally satisfy the statutory requirement. He understandably found difficulty in framing any test, but contended that an office or employment was 'of a public nature' if the public was interested in the discharge of the duties of that office or employment. In that proposition, derived from some words of Lawrence J used in a quite different context in *R v Whitaker*¹, the word 'interested' must be used in the g sense of legitimate concern rather than of the mere gratification of curiosity.

No authority is directly in point, for the language used by Parliament in successive fiscal Acts has changed. In *Bowers v Harding*², concerning the Income Tax Act 1853, ss 2 and 51, where the phrases were 'every public office or employment of profit' and 'any public office or employment', Pollock B said³ that a schoolmaster and school- mistress, married to each other, held such an office because, inter alia, they held it h 'in order that they may discharge a duty which is recognised as a part of the public service of the country'. In *Inland Revenue Comrs v Hambrook*⁴, which was concerned not with tax but with whether a government department could recover damages per quod servitium amisit in respect of an established civil servant in that department who had been incapacitated from duty by the defendant in a road accident, Lord Goddard CJ said⁵:

j 'An established civil servant, whatever his grade, is more properly described

1 [1914] 3 KB 1283 at 1296

2 [1891] 1 QB 560

3 [1891] 1 QB at 563

4 [1956] 1 All ER 807, [1956] 2 QB 641

5 [1956] 1 All ER at 810, 811, [1956] 2 QB at 653

as an officer in the civil employment of Her Majesty and I can see no ground on which different rules of law in respect of his employment can be applied according to the grade or position he may occupy. They apply to a junior clerical officer as they do to a Permanent Secretary, just as the Judicial Committee said in *A-G. for New South Wales v Perpetual Trustee Co. (Ltd.)*⁶, the same rules of law in this respect apply in relation to the armed forces to a field marshal as to a private soldier.' a

In the Court of Appeal, Parker LJ quoted this passage with approval⁷. Lord Goddard CJ⁸ also referred to *R v Dr Burnell*⁹, where it was said that: b

'... every man is a publick officer who hath any duty concerning the publick; and he is not less a publick officer where his authority is confined to narrow limits, because 'tis the duty of his office, and the nature of that duty, which makes him a publick officer, and not the extent of his authority.' c

The case that comes nearest to providing any assistance for the taxpayer is *Great Western Railway Co v Bater*¹⁰. This turned on the Income Tax Act 1842, Sch E, r 3, and the Income Tax Act 1860, s 6. The latter section provided for the deduction of tax by a railway company from all emoluments 'in respect of all offices and employments of profit held in or under any railway company'. Rule 3 of Sch E provided for tax on a long list of named categories of 'public offices and employments of profit', including Parliament, the armed forces and many things besides, and ended with the words 'and every other public office or employment of profit of a public nature'. With Lord Buckmaster dissenting, the House of Lords held that this phrase did not apply to a railway clerk engaged at an annual salary paid by fortnightly instalments, whose employment was determinable by one month's notice and who received payment during sickness and a pension at 60. It will be observed that, unlike the present statute, the Act did not in terms provide for the source of payment, nor did the general words at the end of r 3 expressly stipulate who the employer should be. These matters were left to be deduced from the language used, and in particular from, no doubt, the phrase 'of a public nature'. In consequence, those elements entered into the content of the meaning of the phrase in a way that is hardly possible under the present language. The speeches also reflect the old concept of an office or employment as something capable of being assessed as such, despite changes in the holder of that office or employment, a concept which I now understand to have disappeared from the taxing Acts. d

I do not propose to read the speeches in *Bater's* case¹⁰. I think that both the language and the context in that case differ materially from those in the case before me. I also have had, despite counsel for the Crown's assistance, considerable difficulty in ascertaining the real ratio decidendi of the case. In response to a question from the Bench, counsel for the Crown was unable to found any real propositions of law on that case. In those circumstances, I take comfort from the words of Viscount Dunedin (albeit uttered in dissent) in *Great Western Railway Co v SS Mostyn (Owners), The Mostyn*¹¹, that if the ratio decidendi of a case is not clear, e

'I do not think it is part of the tribunal's duty to spell out with great difficulty a ratio decidendi in order to be bound by it.' f

I return, then, to the statutory language before me. I have to bear in mind that g

⁶ [1955] 1 All ER 846, [1955] AC 457

⁷ [1956] 3 All ER 338 at 346, [1956] 2 QB at 670

⁸ [1956] 1 All ER at 810, [1956] 2 QB at 652

⁹ (1699) Carth 478 at 479

¹⁰ [1922] 2 AC 1

¹¹ [1928] AC 57 at 73, [1927] All ER Rep 113 at 121 h

a the words are words used in 1956 in a statute which is no mere consolidation Act, but makes new provisions in language which is no mere repetition of previous language. Read in this way, I think the words 'office or employment' must be read in a modern sense, unhampered by the ideas of the 18th and 19th centuries. If a man can fairly be said to be 'employed under the Crown', I do not see why his employment should not be 'employment under the Crown'. At that stage, with the phrase
b 'office or employment' not prefaced (unlike earlier statutes) by the word 'public', one simply looks to see whether the taxpayer can fairly be said to have 'employment under the Crown'; and beyond argument the answer here is 'Yes'. The source of the emoluments is also admittedly the appropriate public revenue, and so the one question is whether the employment is 'of a public nature'. I cannot see that it is even arguable that it is of a private nature. Nor could it very well be said that the
c employment was one in which there was no public interest, in the sense of a legitimate concern. The duties described in the case stated are plainly of importance to the efficiency of an important branch of the public service. I cannot see that it makes any difference that the taxpayer was, in the words of his argument before the commissioners, 'in a subordinate position with very limited duties', or that he did not occupy a status equivalent to director or above. I do not think that the duties of a
d civil servant suddenly become 'of a public nature' on promotion. The nature of the service and its duties seems to me to be at least *prima facie* public, whatever the rank or grade of the servant. Articles provided 'for the public service' are nonetheless legitimately used (subject always to civil service proprieties) because they are used by one who stands at the bottom of the ladder. Subject to the case of an ambassador's valet and any others whose office or employment has no substantial public content,
e I think the language of the Act *prima facie* applies to all civil servants. However, all I have to decide is whether on the facts as found the taxpayer in this case holds an office or employment within the Finance Act 1956, Sch 2, para 6. In my judgment, he does, and the decision of the commissioners was right. I am conscious that the path of caution might have been to follow the example of Lord Wrenbury in *Bater's* case¹² and say nothing by way of attempted explanation or definition. However,
f as the position of a number of taxpayers may be in doubt, I have attempted to say something that may be of some assistance (although I fear not much) to others faced with this sort of problem.

Let me add this. I think I can understand at least part of the taxpayer's grievance. This is that some unestablished civil servants abroad have apparently not been treated as being within the statutory language, and only recently have suffered something of the nature of a deduction equivalent to the tax not paid by them, the deduction
g being made from certain allowances. I can well perceive that it would be galling to an established civil servant to see his unestablished brother, doing similar work, escape the tax that the established have to pay. However, it is difficult to see why the remedy for the assumed immunity from tax of the unestablished should be to draw a line among the established according to rank or grade, and to say that below
h that line there shall be no liability to tax, and above it there shall be liability; that shifts the contrast without removing it. Nor can I find any warrant in the language of the present statute for any line of the sort drawn in *Bater's* case¹³. My task is simply to construe the statute, and for the reasons I have given this appeal must be dismissed.

Appeal dismissed.

j Solicitor: *Solicitor of Inland Revenue.*

K Buckley Edwards Esq Barrister.

12 [1922] 2 AC at 35

13 [1922] 2 AC 1

Gething and others v Kilner and others

CHANCERY DIVISION

BRIGHTMAN J

9th, 10th NOVEMBER 1971

Company – Take-over bid – Duty of directors of offeree company – Duty to be honest and not to mislead shareholders as to acceptability of offer – Remedy for breach of duty – Offer by company for stock of offeree company – Terms negotiated by boards of offeror and offeree companies – Agreement by board of offeree company to recommend acceptance to stockholders – Board of offeree company subsequently obtaining independent advice on offer – Advice that offer should not be recommended to stockholders – Board of offeree company recommending acceptance – Recommendations making brief reference to adverse advice without full particulars – Plaintiffs dissenting stockholders of offeree company – Whether plaintiffs entitled to interlocutory injunctions restraining board of offeree company from recommending acceptance and offeror company from declaring acceptance unconditional.

R Co owned a considerable mileage of canals, mostly derelict, and valuable land in the centre of Manchester. A property development company, T C Ltd, sought to acquire R Co's assets for development purposes. After negotiations the chairman of T C Ltd reached agreement in July 1971 with R Co that on the basis of an offer by T C Ltd of £200 for every £100 of R Co stock, the directors of R Co would recommend acceptance of the offer to the R Co stockholders. A joint announcement was made by the companies on 1st September. Later in September the directors of R Co belatedly called in a firm of stockbrokers, H C & Son, to advise the board of R Co on the merits of the offer. Concurrently the boards of R Co and T C Ltd co-operated in the preparation of a draft joint offer document including a letter from the chairman of R Co recommending the offer to R Co stockholders and stating that the directors had carefully considered the offer in consultation with their financial advisers, H C & Son, and considered the terms fair and reasonable. On 8th October H C & Son advised the board of R Co that the offer was inadequate and that its acceptance should not be recommended to the stockholders. In view of the advice received R Co and T C Ltd were unable to send out their circular letters to stockholders as drafted. Instead T C Ltd sent out their circular on 18th October, making no mention of H C & Son's report, but stating that R Co's directors had irrevocably accepted the offer in respect of their holdings and had undertaken to recommend other stockholders to accept the offer. On 29th October R Co issued a circular letter advising that H C & Son had reached the conclusion that the terms of the offer represented too large a discount on the current value of the company's net assets, that the directors disagreed with that view and continued to recommend all stockholders to accept the offer. The plaintiffs, who were stockholders of R Co who dissented from the offer, sought interlocutory injunctions to restrain the board of R Co from taking further steps to recommend the offer and T C Ltd from declaring or purporting to declare the offer unconditional.

Held – The directors of an offeree company owed a duty to their shareholders which included the duty to be honest and not to mislead; any minority shareholders of such a company could properly complain if they were being wrongfully subjected to the power of compulsory purchase by the offeror company under s 209 of the Companies Act 1948 as a result of a breach of duty on the part of the board of the offeree company. In the absence of bad faith, however, on the part of the boards of R Co and T C Ltd, or of conduct so unreasonable as to approach bad faith, and as the directors of R Co held and could reasonably hold that the offer was advantageous to stockholders, the interlocutory injunctions should not be granted (see p 1170 d and g to j, post).

Note

- a For the making of schemes of arrangement, reconstruction and amalgamation of companies, see 6 Halsbury's Laws (3rd Edn) 764-776, paras 1547-1562.

Motion

- By a writ dated 5th November 1971 the plaintiffs, Edward Gething, Dora Cowcill, Mary Jackson and John Gordon Rigg, who were stockholders of the Rochdale Canal Co ('Rochdale'), claimed against the defendants, Edward Kilner, P E Warrington, J K Mitchell, D E M Hawkins, Town Centre Securities Ltd ('Town Centre') and Rochdale, a declaration that the despatch by Town Centre to the stockholders of Rochdale of a letter of offer dated 18th October 1971 and/or the despatch by the first four defendants ('the Rochdale directors') acting as directors of Rochdale to the stockholders of Rochdale of a circular letter dated 28th October 1971 (i) involved a breach or breaches by the Rochdale directors of the duties owed by them to Rochdale and/or the stockholders of Rochdale, (ii) a breach or breaches by the Rochdale directors and/or by Town Centre of the Prevention of Fraud (Investments) Act 1958, (iii) was effected pursuant to a conspiracy between the Rochdale directors and the directors of Town Centre against Rochdale and/or the stockholders of Rochdale. The plaintiffs also claimed, inter alia: (1) an injunction restraining the Rochdale directors and Rochdale from (i) taking any further step to recommend to any of the stockholders of Rochdale the acceptance of the offer by Town Centre contained in the letter of 18th October 1971 to purchase all of the stock of Rochdale (other than that already owned by Town Centre), and (ii) taking any other step calculated or intended to persuade or cause any of the stockholders to accept the offer; (2) an injunction restraining Town Centre from (i) declaring or purporting to declare the offer unconditional, (ii) taking any steps calculated or intended to persuade or cause any of the stockholders to accept the offer. By notice of motion dated 5th November 1971 the plaintiffs sought interlocutory injunctions in the terms of the injunctions claimed in the writ. The facts are set out in the judgment.
- e

J L Arnold QC and W F Stubbs for the plaintiffs.

- Sydney Templeman QC and R A K Wright for the second and fifth defendants.*
- f *John Lindsay for the first, third, fourth and sixth defendants.*

BRIGHTMAN J. This application relates to a take-over bid by Town Centre Securities Ltd (which I shall call 'Town Centre') for the issued stock of Rochdale Canal Co (which I shall call 'Rochdale'). It raises an important and, as far as I am concerned, a novel question, which can be put shortly in this way: whether a shareholder in an offeree company who is dissatisfied with the manner in which an intended take-over is being conducted can, as it were, stop the take-over in mid-stream on the ground, in substance, that other shareholders are being misled into accepting the offer. No reported authorities were cited to me in argument.

g

The story shortly is this. Since 1964 or thereabouts Town Centre have been availing themselves of opportunities to acquire stock in Rochdale. Rochdale is a canal undertaking which was established some 200 years ago. It owns 35 miles of canal in Yorkshire and Lancashire, mostly derelict, plus six acres of land near the centre of Manchester known as the Dale Street Basin. In 1970 Town Centre bought a substantial holding of stock in Rochdale at 175 per cent and later in that year further stock at a somewhat lower figure. It built up its holding to about 30 per cent of the issued Rochdale stock. The six acre site which I have mentioned was then currently being used and, as far as I am aware, is still being used as a car park; it was gradually being cleared for development.

h

i

In 1969 Rochdale, acting, according to the evidence, in conjunction with Town Centre, obtained outline planning permission for a comprehensive redevelopment; the outline planning permission was due to expire in 1972. Clearly it was this site which was the attraction as far as Town Centre was concerned, Town Centre being a property development company. In July 1971 the chairman of Town Centre

approached the Rochdale board and intimated that Town Centre would like to make a take-over bid for Rochdale stock at 175 per cent; the Rochdale board were asking 225 per cent. Some bargaining ensued. In the end the chairman of Town Centre agreed to raise the bid to 200 per cent on condition that the Rochdale board would recommend the offer to its shareholders. The Rochdale board agreed to do this; a joint announcement by the two boards to that effect was made on 1st September 1971. a

Towards the end of September a firm called Messrs Henry Cooke & Son, who were stockbrokers of Manchester, were retained, somewhat belatedly, to advise the Rochdale board on the merits of the offer to which, of course, the Rochdale board had already committed themselves in principle. Concurrently the Rochdale and Town Centre boards co-operated in the preparation of the draft offer document. The offer was intended to be dated 5th October and it was intended to consist of two circular letters; a letter over the name of the chairman of Rochdale recommending the offer to the Rochdale stockholders and a letter over the name of the chairman of Town Centre containing the terms of the offer. The letter from the chairman of Rochdale was going to conclude with this paragraph: b

'Your Directors have carefully considered the terms of the Offer in consultation with their financial advisers for the purposes of the Offer, Henry Cooke & Son, members of the Northern Stock Exchange, and consider such terms to be fair and reasonable.' c

The second paragraph of the Town Centre circular was going to contain these words: d

'There is set out on page 2 [that is of the bundle of offer documents] a letter from your Chairman, Mr. J. P. Wilkinson, which forms part of this Offer Letter. As stated therein your Directors recommend you to accept the Offer which they themselves have agreed to accept or have undertaken to obtain acceptance of in respect of holdings amounting in total to approximately 13.2 per cent. of the capital of Rochdale.' e

Unfortunately Messrs Henry Cooke & Son did not think that the proposed offer was good enough. On 6th October they addressed a letter to the Rochdale board: f

'You have asked us to act as your financial advisers for the purposes of the Offer for all the issued consolidated ordinary stock by Town Centre Securities Limited at the price of £200 cash for each £100 nominal of the stock. In reaching our conclusion as to whether we feel the bid can be recommended by you we have taken into account the following: a) Information supplied to our representative at a meeting in your offices with . . . b) A valuation of the quoted investments of [Rochdale] prepared by ourselves on Monday 4th October 1971. c) A valuation of the [Rochdale's] land at Dale Street by Messrs. W. H. Robinson & Co., dated 5th October, 1971. d) An informal valuation of [Rochdale's] other land and building provided to us by Mr. Hawkins. Having given due consideration to the foregoing it is our opinion that the bid from Town Centre Securities Limited of £200 in cash for each £100 of consolidated ordinary stock of your company is inadequate and its acceptance should not be recommended to the Stockholders.' g

The valuation of the land referred to dated 5th October under the heading 'Dale Street Basin' is by Messrs Robinson & Co. The first paragraph reads: 'As requested we have given consideration to the value of this property, the extent of which' is identified on a plan. . . And then, a little later, this paragraph: h

'Outline planning permission was granted on 30th April 1969 under reference TP 55575 for comprehensive development including offices, shops, car parking, hotel/motel, living accommodation, showrooms, pedestrian gardens and lagoon j

a for boats. Ten conditions were imposed, in particular restricting the overall plot ratio to 2 and the shopping content to a maximum 15,000 ft. It is to be noted that any application for approval of reserved matters must be made within three years of the date of the outline permission i.e. only a short time is available for working up the details of any scheme within the context of the present approval.'

b And the final two paragraphs:

c 'It is in our opinion a very speculative proposition and we would put its value around £750,000 (SEVEN HUNDRED AND FIFTY THOUSAND POUNDS) but we would add that this might be substantially increased should it prove possible to obtain a pre-letting of say 200,000 sq. ft. of office space prior to development starting: from past experience only Government Departments or nationalised industries are capable of absorbing so much space. [And then, finally:] We would again draw attention to the time limit on the outline planning permission.'

d The Town Centre board decided nevertheless to go ahead with its offer but with two variations: first, to omit the proposed letter of recommendation from the Rochdale board; and, secondly, to rephrase the second paragraph of its own circular letter to read:

e 'Your Directors have irrevocably undertaken to accept or obtain acceptance of the Offer in respect of holdings amounting in total to approximately 13.2 per cent. of the issued capital of Rochdale, and they have also undertaken to recommend other Stockholders to accept the Offer.'

The circular letter from Town Centre was dated 18th October.

f Other provisions to which I should refer were that the offer was to be conditional on 90 per cent acceptance in value and 75 per cent acceptance numerically of Rochdale stockholders, thus reflecting the provisions of s 209 of the Companies Act 1948. Town Centre could, however, be satisfied with smaller percentages but not less than 50 per cent in value. It was also provided that the offer would remain open until 8th November, unless extended by Town Centre down to but not after 9th December. The offer document described in general terms the fixed assets of Rochdale, which of course included the Dale Street Basin, and specified them at a book value of £276,000. No mention was made in the offer document of the adverse advice tendered to the Rochdale board by Messrs Henry Cooke & Son.

g On 28th October, however, the Rochdale board—again belatedly, in my view—issued a circular to the Rochdale shareholders. It recommended the Town Centre offer but concluded with this passage:

h 'Since Town Centre is a major stockholder in Rochdale, it was decided to consult Henry Cooke & Son, who have reached a conclusion that the terms of the Offer represent too large a discount on the current value of [Rochdale's] net assets. Your Directors disagree with this view and continue to recommend all Stockholders to accept the Offer, and they have undertaken to accept or obtain acceptances of the Offer in respect of £71,725 Consolidated Ordinary Stock (approximately 13.2 per cent. of the issued capital).'

i The complaint against the Rochdale and Town Centre boards is that the offer document ought not to have been sent out with the recommendation of the Rochdale board without concurrent disclosure of the fact that the financial advisers of Rochdale advised rejection and without a reasoned explanation from the Rochdale board of the grounds on which they turned down the advice of their financial advisers.

The plaintiffs in the action are four Rochdale stockholders, one of whom accepted the Town Centre offer, the other three of whom have not. They are expressed to

be suing on behalf of themselves and other Rochdale stockholders except the defendants and their nominees. But I was told that for the purposes of this motion the plaintiffs were not seeking to sustain a representative capacity. The defendants are four Rochdale directors, Town Centre and Rochdale. a

The writ was issued on 5th November and claimed relief based on a breach of duty on the part of the Rochdale board and relief based on the existence of an alleged conspiracy between the Rochdale and Town Centre boards. The notice of motion seeks an injunction to restrain the Rochdale board from recommending the offer in any further way to the stockholders of Rochdale and also an injunction—and this is the principal relief sought—restraining Town Centre until judgment or further order from declaring or purporting to declare the offer unconditional. b

The argument of counsel for the plaintiffs—with whom I have some sympathy—is this, that the directors of Rochdale had a duty towards the Rochdale stockholders to provide them with proper information. The Rochdale directors were in breach of that duty when they permitted the Town Centre offer to go out with their expressed recommendation, without disclosure of the contrary advice of Messrs Henry Cooke & Son. Town Centre was clearly implicated in that wrongful act on the part of the Rochdale board. Therefore Town Centre should be enjoined against declaring their offer unconditional, thus freeing any assenting stockholders of Rochdale from the assent which they have already given. c

I accept that the directors of an offeree company have a duty towards their own shareholders, which in my view clearly includes a duty to be honest and a duty not to mislead. I also accept that a shareholder in an offeree company may be prejudiced if his co-shareholders are misled into accepting the offer. I express this view because as soon as the appropriate percentage of shareholders have been misled and have assented, the minority become subject under s 209 of the Companies Act 1948 to statutory powers of compulsory purchase. It therefore seems to me that a minority could complain if they were being wrongfully subjected to that power of compulsory purchase as a result of a breach of duty on the part of the board of the offeree company. d

In the case before me, in my judgment, having considered the evidence as a whole, it is clear to me that the Rochdale board honestly believed that an offer of £200 for £100 of Rochdale's stock was advantageous and ought to be recommended to the stockholders; and on considering the figures before me it is also clear to me that a director could reasonably hold that belief. In such circumstances it does not seem to me to be right that this court should interfere by way of interlocutory relief so as to prohibit the offeror company from declaring the offer unconditional if it so decides. The plaintiffs have other remedies if they do not wish to accept the Town Centre offer, if they wish to resile from an acceptance already given and if they are able to sustain that any wrong has been done. But I see no reason whatever on the facts of this case why the court should interfere with the conditional offer and the acceptances now subsisting between Town Centre and other Rochdale stockholders. e

I appreciate that the plaintiffs may be disenchanted with the offer made by Town Centre and dissatisfied with the explanation given by Rochdale for recommending it. On the other hand there may be many stockholders not parties to this action who are perfectly satisfied with Town Centre's offer and I see no sufficient reason why their contract should be placed in peril in the absence of bad faith on the part of the two boards or conduct so unreasonable as to approach bad faith. f

In those circumstances I decline to grant the relief sought by this motion. g

Motion dismissed. h

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk*, agents for *Whitworths*, Manchester (for the plaintiffs); *Nabarro, Nathanson & Co* (for the second and fifth defendants); *Lewin, Gregory, Mead & Sons*, agents for *Jackson & Co*, Rochdale (for the first, third, fourth and sixth defendants). i

Richard J Soper Esq Barrister.

Nast v Nast and Walker

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, KARMINSKI AND ORR LJJ

24th, 25th, 26th JANUARY 1972

Divorce – Practice – Interrogatories – Adultery – Interrogatories inviting answers which tend to prove adultery allowable – Interrogatories which may properly be administered – Interrogatories necessary for disposing fairly of cause or matter or for saving costs – Interrogatory asking direct question whether couple had sexual intercourse – Civil Evidence Act 1968, s 16 (5) – RSC Ord 26, r 1.

In 1967 the husband petitioned for divorce on the ground of the wife's adultery with the co-respondent. After the Divorce Reform Act 1969 came into force, he lodged a further petition on the ground of irretrievable breakdown of the marriage. The husband alleged that the wife had committed adultery on a holiday and also at the matrimonial home. He sought to administer interrogatories to the wife and to the co-respondent to prove adultery. He did not want to bring his daughter to court to prove that her mother had admitted adultery, or to incur the costs of an enquiry agent. The registrar allowed a number of interrogatories submitted by the husband but, on appeal, the judge disallowed these and himself drafted a set of interrogatories which he would be prepared to give leave to administer, including questions designed to discover whether the wife and co-respondent had occupied the same bedroom, but he refused to allow the question: did you have sexual intercourse? The judge did not however order that those interrogatories should be administered. The husband appealed seeking an order to administer the interrogatories drafted by the judge and the further interrogatory asking whether the couple had had sexual intercourse.

Held – The appeal would be allowed for the following reasons—

(i) it was permissible to administer interrogatories in a divorce case with the object of getting the respondent to answer whether or not he had committed adultery; the privilege afforded by the ecclesiastical courts to parties of refusing to answer questions tending to show that they had committed adultery had been replaced and supplanted by the statutory privilege contained in s 3^a of the Evidence Further Amendment Act 1869; since that statutory privilege had been abolished by s 16 (5)^b of the Civil Evidence Act 1968 there could be no objection to the administration of interrogatories, or to discovery of documents, in a suit charging adultery (see p 1174 b and p 1175 b and h, post); dictum of Lord Hodson in *Skone v Skone* [1971] 2 All ER at 587 applied; dictum of Ormrod J in *A v A and H* [1962] 2 All ER at 575 disapproved;

(ii) since the whole object of interrogatories was to make the party interrogated speak to the very matters which it was necessary for the party interrogating to prove in order to establish his case, the interrogatory asking the direct question whether the wife and the co-respondent had had sexual intercourse should be allowed in addition to those which the judge had stated were permissible; it could not be argued that they were not necessary for fairly disposing of the matter or for saving

^a Section 3 is set out at p 1173 e, post. The section was repealed, so far as it related to the High Court, by the Supreme Court of Judicature (Consolidation) Act 1925, s 226 and Sch 6, and replaced by s 198 of that Act. Section 198 was repealed by the Matrimonial Causes Act 1950 and subsequently re-enacted in s 43 (2) of the Matrimonial Causes Act 1965

^b Section 16 (5) provides: 'A witness in any proceedings instituted in consequence of adultery, whether a party to the proceedings or not, shall not be excused from answering any question by reason that it tends to show that he or she has been guilty of adultery; and accordingly the proviso to section 3 of the Evidence Further Amendment Act 1869 and, in section 43 (2) of the Matrimonial Causes Act 1965, the words from "but" to the end of the subsection shall cease to have effect.'

costs within the meaning of RSC Ord 26, r 1^e, for the husband did not wish to bring his daughter to court to prove the adultery, and it would be a waste of time and money to employ enquiry agents if the wife and co-respondent were ready to admit adultery (see p 1175 d e and h, post); dictum of A L Smith LJ in *Kennedy v Dodson* [1895] 1 Ch at 341 applied.

Per Curiam. The proper course when a judge does not accept the interrogatories as drafted by the party, but thinks that they would be permissible if drafted in a different form, is for the amendments to be made then and there by the judge, and for the judge to order them in the amended form (see p 1175 f and h, post); *Nash v Layton* [1911] 2 Ch 71 followed.

Decision of Payne J, p 95 ante, reversed in part.

Notes

For leave to deliver interrogatories generally, see 12 Halsbury's Laws (3rd Edn) 77, 78, para 111, and for cases on the subject, see 18 Digest (Repl) 208, 209, 1808-1819.

For discovery of documents and interrogatories in divorce suits, see 12 Halsbury's Laws (3rd Edn) 361, 362, para 776, and for cases on the subject, see 27 Digest (Repl) 251, 2022-2027.

For the Civil Evidence Act 1968, s 16, see 12 Halsbury's Statutes (3rd Edn) 929.

Cases referred to in judgment

A v A and H [1962] 2 All ER 573, [1962] P 196, [1962] 3 WLR 212, Digest (Cont Vol A) 767, 4546b.

Campbell v Campbell [1939] 4 All ER 529, [1940] P 90, 109 LJP 37, 162 LT 152, 27 Digest (Repl) 511, 4537.

Cavendish v Cavendish [1926] P 10, [1925] All ER Rep 96, 95 LJP 18, 134 LT 414, 27 Digest (Repl) 510, 4532.

Hulbert v Hulbert [1957] 2 All ER 226, [1957] P 174, [1957] 2 WLR 808, Digest (Cont Vol A) 767, 4546a.

Kennedy v Dodson [1895] 1 Ch 334, 64 LJCh 257, 72 LT 172, 18 Digest (Repl) 176, 1516.

Nash v Layton [1911] 2 Ch 71, 80 LJCh 636, 104 LT 834, 18 Digest (Repl) 206, 1798.

Redfern v Redfern [1891] P 139, [1886-90] All ER Rep 524, 60 LJP 9, 64 LT 68, 55 JP 37, 18 Digest (Repl) 16, 103.

Skone v Skone [1971] 2 All ER 582, [1971] 1 WLR 812.

Spokes v The Grosvenor and West End Railway Terminus Hotel Co Ltd [1897] 2 QB 124, 66 LJQB 572, 598, 76 LT 677, 679, 18 Digest (Repl) 11, 68.

Tilley v Tilley [1948] 2 All ER 1113, [1949] P 240, [1949] LJR 929, 27 Digest (Repl) 405, 3346.

Interlocutory appeal

This was an appeal by the husband, Peter Lawrence Nast, the petitioner for divorce on the ground of the wife's adultery, to vary the order of Payne J dated 30th July 1971 and reported at p 95 ante, whereby it was ordered that the appeal of the wife, Simone Nast, and the co-respondent, Arthur Walker, against the decision of Mr Registrar Stranger-Jones dated 7th May 1971 whereby the wife and co-respondent were ordered to answer certain interrogatories, should be allowed save that the judge settled a number of interrogatories relating to adultery alleged to have been committed by the wife and the co-respondent at an hotel in Devon which he ruled the husband was at liberty to administer if so advised. The facts are set out in the judgment of Lord Denning MR.

Leonard Caplan QC and *Jonathan Sofer* for the husband.

Ian Percival QC and *Walter Blum* for the wife.

The co-respondent did not appear and was not represented.

RSC Ord 26, r 1 (3), provides, so far as material: 'On the hearing of an application under this rule, the Court shall give leave as to such only of the interrogatories as it considers necessary either for disposing fairly of the cause or matter or for saving costs . . .'

LORD DENNING MR. The husband, Mr Nast, petitions for divorce against his wife, Mrs Nast. Originally, in 1967, the petition was on the ground of cruelty, but later on, by amendment, on the ground of adultery. Since the Divorce Reform Act 1969 another petition has been lodged on the ground of irretrievable breakdown of the marriage. The only question today is whether the husband should be allowed to administer interrogatories to the wife and also to the co-respondent in order to prove the adultery. It is alleged that they committed adultery on a holiday at Babbacombe in Devon, and also at the matrimonial home at Welling in Kent. A number of interrogatories were submitted to Payne J¹. He did not allow any of them. He made suggestions of his own², but did not order them to be answered. The husband appeals to this court. He seeks to administer interrogatories in the form suggested by Payne J² but with an additional one.

In the course of the hearing before us, counsel for the wife has raised a point of principle. He says that even today interrogatories are not admissible in the divorce court in order to prove adultery. Before 1851 the parties to a suit were not competent to give evidence themselves in it at all. So there was no question of interrogatories being allowed to prove adultery. By a series of statutes from 1851 to 1869 it was enacted that parties were competent and compellable to give evidence. But there was an exception in s 3 of the Evidence Further Amendment Act 1869 which provided:

‘The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.’

That section only says the parties shall be ‘competent’ to give evidence in any such proceedings. It does not say ‘compellable’. But this was implied. Several years ago I looked into all these statutes, and I stated the result in *Tilley v Tilley*³:

‘...every party to a divorce suit instituted in consequence of adultery is competent and compellable to give evidence, save only in so far as he can claim the privilege.’

I referred, of course, there to the statutory privilege, and not to any ecclesiastical or other privilege. In saying that a party is ‘compellable’ I meant that he was compellable not only to give evidence, but also to come to the court for the purpose.

Such was the law from 1869 onwards; the parties themselves were competent and compellable to give evidence and to answer any questions save insofar as they could claim the protection of that statutory privilege. In *Redfern v Redfern*⁴ the Court of Appeal considered the question of discovery in a divorce case. It was held that discovery of documents was not permissible in order to prove adultery. Equally, of course, interrogatories were not permissible. Counsel for the wife submitted to us that the reason for that decision was because adultery was an ecclesiastical offence, and that, as the ecclesiastical courts did not permit discovery in order to prove it, their practice was inherited by the divorce courts. I realise that there are some statements in that case which point in that direction. But I think that the decision is to be supported, not on any ecclesiastical privilege, but on the statutory privilege contained in s 3 of the 1869 Act. Many distinguished judges have since explained the decision in that way, notably Lord Esher MR in *Spokes v The Grosvenor*

1 See pp 96, 97, ante

2 See p 103 ante

3 [1948] 2 All ER 1113 at 1122, [1949] P 240 at 259

4 [1891] P 139, [1886-90] All ER Rep 524

and *West End Railway Terminus Hotel Co Ltd*⁵, Sir Wilfrid Greene MR in *Campbell v Campbell*⁶ (explaining *Cavendish v Cavendish*⁷) and Karminski J in *Hulbert v Hulbert*⁸. In *A v A* and *H*⁹ Ormrod J expressed a contrary view; he said that the practice of refusing discovery is not derived from the statutory privilege, but—

‘is derived from the rules of the ecclesiastical courts which invariably refused to compel a party to convict himself of adultery ...’

But, after the discussion we have had in this court, I do not think that he was correct. No doubt there was in former times a privilege which was recognised by the ecclesiastical courts. But that privilege was replaced and supplanted by the statutory privilege contained in s 3 of the 1869 Act. After that Act the ecclesiastical privilege disappeared. Only the statutory privilege remained.

The statutory privilege remained on the statute book for years and years. In 1912 the Royal Commission¹⁰, presided over by Lord Gorell, recommended its abolition. In 1956 Lord Morton of Henryton’s commission¹¹ did likewise. In 1967 the Law Reform Committee¹², presided over by Lord Pearson, also recommended its abolition, saying¹³:

‘This privilege may have made good sense in 1869 when adultery (with or without other matrimonial offences) was the only ground for divorce *a vinculo*, and was also regarded as a serious social offence. Under the modern law and practice in matrimonial causes, it operates in an irrational and arbitrary fashion and is, in our view, a hindrance to the administration of justice in those cases to which it applies. The judges of the Probate, Divorce and Admiralty Division are not in favour of retaining it any longer; we too think that the sooner that it is abolished the better.’

In 1968 the recommendation was implemented. By s 16 (5) of the Civil Evidence Act 1968 the privilege was abolished. After its abolition, there could be no objection to the administration of interrogatories, or to discovery of documents in suits which charged adultery.

This is borne out by the recent decision of the House of Lords in *Skone v Skone*¹⁴. A husband petitioned for divorce on the ground of his wife’s adultery. He failed, but afterwards found a bundle of love letters. He sought a new trial. The Court of Appeal refused it, but the House of Lords allowed it. Lord Hodson said¹⁵:

‘The Court of Appeal seems wrongly to have been under the impression that discovery could not be had on an issue of adultery: see *Redfern v Redfern*¹⁶ where the rule based on the practice of the ecclesiastical courts and until recently embodied in s 43 (2) of the Matrimonial Causes Act 1965 was held to exclude discovery. This rule has, however, now been abrogated by s 16 of the Civil Evidence Act 1968, which came into force on 26th October 1968.’

After citing the abrogation, he said¹⁷:

⁵ [1897] 2 QB 124 at 132

⁶ [1939] 4 All ER 529 at 533, [1940] P 90 at 95

⁷ [1926] P 10, [1925] All ER Rep 96

⁸ [1957] 2 All ER 226 at 228, [1957] P 174 at 178

⁹ [1962] 2 All ER 573 at 575, [1962] P 196 at 198

¹⁰ Royal Commission on Divorce and Matrimonial Causes, Report 1912, Cd 6478

¹¹ Royal Commission on Marriage and Divorce, Report 1951-1955, Cmd 9678

¹² Law Reform Committee Sixteenth Report (Privilege in Civil Proceedings, Cmd 3472)

¹³ At p 19

¹⁴ [1971] 2 All ER 582, [1971] 1 WLR 812

¹⁵ [1971] 2 All ER at 587, [1971] 1 WLR at 816

¹⁶ [1891] P 139 at 144, [1886-90] All ER Rep 524 at 526

¹⁷ [1971] 2 All ER at 587, [1971] 1 WLR at 817

a 'The position is, therefore, that the husband could have obtained discovery from both the wife and the co-respondent . . .'

That shows that, since the 1968 Act, the court will order discovery of documents relating to adultery. So *Redfern v Redfern*¹⁸ is no longer law. The same must apply to interrogatories. Now that the statutory privilege has gone, interrogatories can be administered in a divorce case, with the object of getting the respondent to answer whether or no he has committed adultery.

b The old ecclesiastical privilege arose at a time when adultery was regarded as equivalent to a criminal offence. A party in this answer could object that it tended to incriminate him. Nowadays the thunders of the Church have lost their force. Even society does not condemn adultery as once it did. It is still a grave moral offence but not one which enables a person to object to answering questions about it.

c The next question is: what interrogatories should be allowed? Payne J formulated¹⁹ a number of interrogatories, which seem to be reasonable, to discover whether or not the wife and the co-respondent occupied the same bedroom; but the judge stopped short of allowing the direct question: did you have sexual intercourse the one with the other? I think that question should be allowed as well. The whole object of interrogatories is to make the party interrogated speak to the very matters

d which it is necessary for the party interrogating to prove in order to establish his case: see per A L Smith LJ in *Kennedy v Dodson*²⁰. It would be quite in order for the interrogatories simply to ask whether the couple went on holiday together to Devon, whether they occupied the same bedroom, and whether they had sexual intercourse together. Similar interrogatories would be permissible in regard to the matrimonial home. But counsel for the wife says that these interrogatories do not come within RSC Ord 26, r 1. He says that they are not necessary for fairly disposing of the matter or for saving costs. I cannot accept this argument. The husband does not wish to bring his own daughter to court to prove that her mother committed adultery. And it would be a waste of time and money to employ enquiry agents to inspect hotel registers, and so forth, if the couple are ready to admit adultery.

e Finally, a question was raised as to the proper course when the judge, as here, does not accept the interrogatories as drafted by the party, but thinks that they would be permissible if drafted in a different form. The practice, as I have always understood it, is for the amendments to be made then and there, and for the judge to order them in the amended form. Such was done in *Nash v Layton*¹.

f I would, therefore, allow this appeal. Interrogatories can be administered as drafted by Payne J¹⁹ but with the addition of the one which was asked for by counsel g for the husband.

KARMINSKI LJ. I am entirely of the same opinion as Lord Denning MR. Although this is a matter which raises some interesting points of principle, I do not think I can usefully add anything to what has fallen from Lord Denning MR in his judgment, and I agree that the order which he proposes should be made.

h ORR LJ. I also agree.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Batchelor, Fry, Coulson & Burder*, agents for *R L W Roß & Co*, Bexleyheath (for the husband); *Habershon, Watts, Powell & Robinson* (for the wife).

j L J Kovats Esq Barrister.

18 [1891] P 139, [1886-90] All ER Rep 524

19 See p 103 ante

20 [1895] 1 Ch 334 at 341

1 [1911] 2 Ch 71

Thomas v Notts Incorporated Football Club Ltd ^a

CHANCERY DIVISION

GOFF J

1st, 2nd DECEMBER 1971

Guarantee – Right of surety to exoneration from liability – Demand by creditor – Liability of surety only to arise on demand by creditor – No demand made – Guarantee by director of company's overdraft with bank – Director resigning and notifying bank to determine guarantee – No demand made by bank against director – Whether director entitled in equity to require club to exonerate him from liability to bank by paying off overdraft. ^b

The plaintiff, who was a director of the defendant club, an incorporated football club, guaranteed the club's overdraft with its bankers up to £5,000. His liability under the guarantee was to arise on demand on him of all money and liabilities whether certain or contingent. A paragraph in the guarantee provided that it should be a continuing security until receipt by the bank from him of a notice in writing to discontinue it. As a result of a difference of opinion with his fellow directors in 1966 the plaintiff resigned from the board of the club on 7th February 1967. He then gave notice to the bank which was received by them on 12th February; they then closed the account for which he was liable. The plaintiff claimed a declaration that he had a right in equity to require the club to exonerate him from his liability under the guarantee by paying it off. ^c

Held – Once an account had been closed and there was an accrued fixed liability, a surety was entitled to be discharged from all liability under his guarantee by calling on the debtor to pay off the amount due. It was immaterial that the creditor was bound to make a demand on the surety before he could proceed against him and that no such demand had in fact been made. Accordingly the plaintiff was entitled to the declaration sought (see p 1182 d e and g h, post). ^d

Ascherson v Tredegar Dry Dock and Wharf Co Ltd [1908-10] All ER Rep 510 applied. ^e

Bradford v Gammon [1924] All ER Rep 766 distinguished. ^f

Notes

For rights of surety to exoneration from liability, see 18 Halsbury's Laws (3rd Edn) 476, 477, para 876, and for cases on the subject, see 26 Digest (Repl) 129-132, 909-932. ^g

Cases referred to in judgment

Anderson-Berry, Re, Harris v Griffith [1928] Ch 290, [1927] All ER Rep 143, 97 LJCh 111, 138 LT 354, 23 Digest (Repl) 236, 2850.

Ascherson v Tredegar Dry Dock and Wharf Co Ltd [1909] 2 Ch 401, [1908-10] All ER Rep 510, 78 LJCh 697, 101 LT 519, 16 Mans 318, 26 Digest (Repl) 130, 915. ^h

Bradford v Gammon [1925] Ch 132, [1924] All ER Rep 766, 94 LJCh 193, 132 LT 342, 26 Digest (Repl) 132, 932.

Cook v Lister (1863) 13 CBNS 543, 1 New Rep 280, 32 LJCP 121, 7 LT 712, 6 Digest (Repl) 324, 2360.

Hirachand Punamchand v Temple [1911] 2 KB 330, 80 LJKB 1155, 105 LT 277, 6 Digest (Repl) 323, 2355. ⁱ

Morrison v Barking Chemicals Co Ltd [1919] 2 Ch 325, 88 LJCh 314, 122 LT 423, 26 Digest (Repl) 131, 930.

Nisbet v Smith (1789) 2 Bro CC 579, 29 ER 317, 26 Digest (Repl) 186, 1393.

Ranelagh (Earl) v Hayes (1683) 1 Vern 189, 2 Cas in Ch 146, 23 ER 405, 26 Digest (Repl) 130, 911.

- a* *Tate v Crewdson* [1938] 3 All ER 43, [1938] Ch 869, 107 LJCh 328, 159 LT 512, 26 Digest (Repl) 130, 917.
Watt v Mortlock [1963] 1 All ER 388, [1964] Ch 84, [1963] 3 WLR 626, Digest (Cont Vol A) 508, 2819a.
Wooldridge v Norris (1868) LR 6 Eq 410, 37 LJCh 640, 19 LT 144, 26 Digest (Repl) 131, 921.

b **Action**

This was an action by Stanley Thomas against the Notts Incorporated Football Club Ltd, of which he was formerly a director, whereby he claimed a declaration that he was entitled to be discharged and exonerated from his liability under a guarantee of the defendant club's current account, given to their bank, Lloyds Bank Ltd, Nottingham, by payment by the defendants to the bank of £17,233 11s 10d or such other sum as was due on that account on the date when the bank closed the account together with the interest thereon and an order that the defendants pay to the bank such sum and interest and obtain cancellation and return of the plaintiff's guarantee. The facts are set out in the judgment.

- d* *Michael Albery QC and Michael Essayan* for the plaintiff.
Leolin Price QC and Gavin Lightman for the defendants.

GOFF J. The facts on which this case turns are few, clear and indeed admitted, but the relevant law is a more difficult matter.

- e* The plaintiff was a director of the defendant company and as such he guaranteed the defendants' overdraft with their bankers, limited to £5,000. By that guarantee, his liability was made to arise on demand on him of all money and liabilities, whether certain or contingent and so forth, together with interest. Paragraph 2 of the guarantee said that it should be a continuing security binding him and his personal representatives until the receipt by the bank from him or them of notice in writing to discontinue it.

- f* In March or April 1966 a difference of opinion arose between the plaintiff and his fellow directors, or some of them, concerning the chairmanship and vice-chairmanship of the defendant company. As a result, the plaintiff lost his enthusiasm for the company. I am not in this action concerned with the rights or wrongs of that difference of opinion, but the result of it was that the plaintiff, after failing to attend meetings for some considerable time, finally resigned from the board on 7th February 1967. It appears that there might be some doubt as to the regularity of the meeting on that day, but no point is made of that, and it is accepted that the plaintiff did in truth retire.

- g* Having so retired, the plaintiff then exercised his undoubted right under cl 2, to which I have referred, to determine his guarantee. That, of course, did not exonerate him from liability on it in respect of the position as it then stood, but it made it cease to be operative for the future. The relevant notice for that purpose was received from the plaintiff by the bank on 12th February 1967 and they closed the old account for which he was liable. They had indeed closed it earlier, when certain other retiring directors had taken the same course. Some doubt appears to exist as to the precise figure for which the plaintiff is liable on the guarantee, and that is made a little more difficult by the fact that after closing the account on 31st March 1966, when other directors determined their guarantees, the bank went on debiting cheques already drawn but not yet presented. That, however, is a question of machinery only. It is common ground that the liability is fixed, accrued and ascertainable; and, if the plaintiff is otherwise right, the uncertainty at this precise moment as to the true figure is irrelevant.

i Those being the facts, the plaintiff claims that he has a right in equity to require the defendants to exonerate him from his liability under the guarantee by paying it

off. He founds that on the case of *Ascherson v Tredegar Dry Dock and Wharf Co Ltd*¹, and later cases in which *Ascherson*¹ has been followed and applied. The defendants, on the other hand, say that *Ascherson's* case¹ does not apply, because in that case either it was unnecessary for the creditor to make a demand on the surety before he could proceed against him, or, if it were necessary, such a demand had been made; whereas in the present case it is clear, as I have read, that a demand had to be made, and it is equally clear that had not been done; and the defendants say that that makes all the difference. In the submission of the defendants, there is no case inconsistent with that distinction and one case, *Bradford v Gammon*², which is, they say, an express decision in their favour, or, if it be not, is at least an authority which supports them. I have, therefore, to look at the line of cases and see exactly where they lead.

Starting with *Ascherson*¹, whilst it is said³ that the bank had claimed the sum in question by their letter of 5th December 1908, the statement of facts shows, in my view, that they had not demanded payment. The surety in that case had died, and the bank gave formal notice of liability to the executors, but, as is expressly stated⁴, they did not, at that time at all events, demand payment of the overdraft. Later the executors, wishing to know the financial position, enquired of the bank, which replied by the letter of 5th December 1908⁴:

"The balance due to the bank on June 30 last, the date on which we received notice of the death of Mr. Edward Ascherson, was 17,219l. On that day the account was stopped, and all transactions have gone through a new account since that date, so that our claim against the estate of the late Mr. Edward Ascherson is 17,219l. with interest thereon from June 30 last."

In the context in which that letter was written, I do not regard that as a demand for payment. Turning to the judgment, I look to see on what principle it proceeded, and I find that in a passage where Swinfen Eady J said⁵:

"It has been the law of the Court for very many years that a surety is entitled to come into equity to compel the principal debtor to pay what is due from him, to the intent that the surety may be relieved. In *Ranelagh v. Hayes*⁶ the Lord Keeper "compared it to the case of a counter-bond; where although the surety is not troubled or molested for the debt, yet at any time after the money becomes payable on the original bond, this Court will decree the principal"—that is, the principal debtor—"to discharge the debt; it being unreasonable that a man should always have such a cloud hang over him". Then in *Nisbet v. Smith*⁷ the Lord Chancellor says: "It is clear and never has been disputed that a surety, generally speaking, may come into this Court, and apply for the purpose of compelling the principal debtor for whom he is surety to pay in the money, and deliver him from the obligation."

Those words express the principle in perfectly general terms.

The next case which arose in this matter was the case of *Morrison v Barking Chemicals Co Ltd*⁸. In that case, the action failed, on any view of the matter, because the guarantee was still continuing and there was no ascertained, ascertainable or accrued liability. But Sargant J made certain relevant observations. Having adverted to the all-important point that the guarantee was continuing, he then went on⁹:

1 [1909] 2 Ch 401, [1908-10] All ER Rep 510

2 [1925] 1 Ch 132, [1924] All ER Rep 766

3 [1909] 2 Ch at 406, [1908-10] All ER Rep at 511

4 [1909] 2 Ch at 402, [1908-10] All ER Rep at 511

5 [1909] 2 Ch at 406, 407, [1908-10] All ER Rep at 512

6 (1683) 1 Vern 189

7 (1789) 2 Bro CC 579 at 582

8 [1919] 2 Ch 325

9 [1919] 2 Ch at 330

a '... and it [i.e. the *Ascherson* case¹⁰] also differs in another point on which counsel for the defendant company laid much stress, but which hardly seems to me vital—namely, that there the bank, in taking the initiative in recovering from the surety, had not to make a previous demand, while here it would have to do so.'

b The guarantee in the *Ascherson* case¹⁰ does not appear from the report. It seems from that passage that it was a case in which demand was not necessary; but it will be seen that Sargant J did not think the distinction vital. Then, at the end of his judgment, he said this¹¹:

c 'I desire to add that I have not to deal with the case, which was much debated before me, of what would happen if the bank took the initiative in closing the current account and then abstained from making a demand on the surety. The case is not a probable one. But I must not be assumed to acquiesce in the argument of counsel for the defendant company that in such a case the surety could not clear himself, as in *Ascherson v Tredegar Dry Dock and Wharf Co.*¹⁰. The surety might be in as great peril [and then it says "as in the case supposed", but I think that "as" must be an error, and it should read: The surety might be in as great peril] in the case supposed, although there might be no complete cause of action until demand. I am assuming, of course, that the guarantee was not determined, or liable to be determined, by the surety.'

d Those last words, I think, are explained by the fact that under the terms of that guarantee there was immediate liability on determination by the surety of the guarantee. That passage clearly saves the point which the defendants have argued in this case; but it also, in my judgment, clearly expresses a grave doubt whether the point is right.

e Then the matter arose again in *Bradford v Gammon*¹², which was a case of an indemnity given by surviving partners to the personal representatives of a deceased partner, and it was a case in which no demand for payment was ever made. The head-note, which is accurate in this respect, states¹³:

f 'In an action by the plaintiff as legal personal representative of the deceased partner against his four co-partners as defendants claiming specific performance of the partnership agreement and requiring a proper discharge and release from all the liabilities of the partnership, particularly in respect of the overdraft at the bank:—*Held*, that the ordinary covenant contained in the agreement to indemnify the estate of a deceased partner did not entitle the plaintiff to insist upon the immediate payment of debts for which no demand had been made. The obligation to make good the indemnity by payment and the right to enforce the covenant arose when the demand for payment was made and not before. *Ascherson v. Tredegar Dry Dock and Wharf Co.*¹⁴ distinguished.'

g Eve J in his judgment said¹⁵:

h 'The question between the parties does not arise in this case upon any implied obligation imposed upon the surviving partners as purchasers, but upon the construction of the clause I have read from the partnership articles.'

And he took up the *Ascherson* case¹⁴ with these words¹⁶:

- i 10 [1909] 2 Ch 401, [1908-10] All ER Rep 510
11 [1919] 2 Ch at 332
12 [1925] Ch 132, [1924] All ER Rep 766
13 [1925] Ch 132
14 [1909] 2 Ch 401, [1908-10] All ER Rep 510
15 [1925] Ch at 137, [1924] All ER Rep at 767
16 [1925] Ch at 138, [1924] All ER Rep at 767

'[Counsel for the plaintiff] has mainly relied on the case of *Ascherson v. Tredegar Dry Dock and Wharf Co.*¹⁷, but in one important respect the position there differed essentially from what it is here. The plaintiff there was the executor of a surety and the defendant was the principal debtor. The creditors were bankers, and, as here, so soon as they learned of the death of the surety they closed the account, and later on informed the surety's executor of the amount owing and, as the learned judge found, made a demand upon him for payment.'

Pausing there, with respect, for the reasons which I have given, I think that was an error; but, at the same time, it was a case in which demand was not required, and therefore that particular error may not be very significant. Eve J continued¹⁸:

'In these circumstances it was held that the surety's executor was entitled to an order upon the principal debtor to pay the debt. But here the creditors have made no demand for payment, and the position existing is that referred to by Sargant J. in the concluding paragraph of his judgment in *Morrison v. Barking Chemicals Co.*¹⁹, where he says [and he then quotes from *Morrison*¹⁹. He goes on:] He adds: "The case is not a probable one," but it happens to be this very case, and I have now to decide whether in the absence of any demand for payment by the creditor the circumstances are brought within the principle of the two cases I have referred to. I do not think they are. It may be of course that the plaintiff could pay off the bank and then sue the defendants, and by these means get rid of the liability; but that is a possibility which does not touch the problem with which I have to deal in this action, which can be stated thus. [It is pertinent to observe how he does state it:] Does the ordinary covenant to pay partnership debts and to indemnify the outgoing partner or the estate of the deceased partner against debt and liabilities entitle the retiring partner or the legal personal representative of the deceased partner to insist upon the immediate payment of debts for which no demand for payment has been made? I do not think it does. So long as the covenantee is kept indemnified he cannot in my opinion insist upon the covenantor discharging debts for which no demand has been made; the obligation to make good the indemnity by payment and the right to enforce the covenant arises when the demand is made and not before.'

Now, if that be a decision in principle, apart from the particular contract, then it is, as the defendants say, an express decision in their favour, and the only question is whether it be right or wrong. But it was suggested later, as will appear, that in truth it was not a decision on general principle, but on the particular contract then before the court. I accept that view; and, therefore, in my judgment, this is not an express authority in favour of the defendants.

I pass on to see what has been said since. I will next refer to the case of *Re Anderson-Berry*²⁰. That was a case of a different character. The plaintiffs were sureties under an administration bond, and the administrator was actually threatening to commit a devastavit. It was therefore a clear ground for anticipating jeopardy, and a proper case for quia timet relief. But Sargant LJ made observations on the matter with which I have to deal. He said¹:

'In such cases as that of *Ascherson v. Tredegar Dry Dock and Wharf Co.*¹⁷ the jurisdiction which was exercised was to a considerable extent quia timet, because there the position was this, that the five directors of the company had given a guarantee; then one of them died and the bank were quite satisfied to rest on

¹⁷ [1909] 2 Ch 401, [1908-10] All ER Rep 510

¹⁸ [1925] Ch at 138, 139, [1924] All ER Rep at 767, 768

¹⁹ [1919] 2 Ch 325 at 332

²⁰ [1928] Ch 290, [1927] All ER Rep 143

¹ [1928] Ch at 307, 308, [1927] All ER Rep at 149

a the guarantee. The deceased director had left a large estate and they were perfectly satisfied with his guarantee together with the other guarantees and they were prepared to let the guarantee go on indefinitely. They had ascertained the amount and the result would have been that the company could have gone on trading with the benefit of the guarantee on which this sum of 17,000l. had already accrued and it would not have been necessary for the new directors
b or directors who came in, to join in any guarantee to the same extent to which the original guarantor had joined in the guarantee. I only mention those facts, because I was counsel in that case, and I have some special acquaintance with the facts, for the purpose of pointing out that there was no probability at all at that time of the debt of the executors of the testator being due within any measurable distance of time [it has been suggested that the words "being due" there really mean "being demanded"], and yet it was held that they were entitled to come to the Court and get an order on the company to pay the bank, because this cloud should not be left hanging over the estate. That is an instance of quia timet.²

That reinforces that the principle of *Ascherson*² was that the surety was entitled to remove the cloud, and that in that case he was allowed to do it where there was no immediate jeopardy and indeed no probability at that time of the debt being due or demanded within any measurable distance of time. Then Sargant LJ continued³:

e 'The case of *Wooldridge v. Norris*⁴, which is relied on very much by the learned judge in *Ascherson v. Tredegar Dry Dock and Wharf Co.*², was an even clearer case of the application of the doctrine of quia timet. That being so, and the doctrine being applied in cases of guarantee, I think there could hardly be a clearer instance of a case in which that doctrine is applicable'.

Then he goes on to say that in that case there was a definite threat. The actual case is clearly distinguishable and was not relied on by the plaintiff as a decision, but it is relevant to this examination of the authorities because of the observations made by Sargant LJ on the *Ascherson* case².

f Then I come to *Tate v Crewdson*⁵, in which the case of *Bradford v Gammon*⁶ was expressly considered by Morton J. That was a case in which there was no demand; but, in any event, there the surety was liable without a demand because, whilst as between himself and the other borrower he was to be considered as a surety only, as between himself and the creditor he was a principal; and it is well settled that in the case of a direct creditor-debtor relationship, as distinct from a surety, the provision that the money shall be payable on demand does not import the necessity of giving a demand before action. But Morton J said⁷:

h 'In the case which was decided between *Ascherson's* case² and *Re Anderson-Berry, Harris v. Griffith*⁸—*Bradford v. Gammon*⁶—EVE, J., held that the plaintiff in that case was not entitled to have a certain overdraft on the partnership account at the bank paid off. I need not deal with the case in detail, because I think it was a decision upon the construction of a clause in the partnership articles which was in question [and I respectfully agree with Morton J in that conclusion]; but EVE, J., referred to *Ascherson's* case², and distinguished it, on the ground that there was in *Ascherson's* case² a demand for payment by the bank. I think that that particular ground of distinction cannot be relied upon,

j 2 [1909] 2 Ch 401, [1908-10] All ER Rep 510

3 [1928] Ch at 308, [1927] All ER Rep at 149

4 (1868) LR 6 Eq 410

5 [1938] 3 All ER 43, [1938] Ch 869

6 [1925] 1 Ch 132, [1924] All ER Rep 766

7 [1938] 3 All ER at 49, [1938] Ch at 880

8 [1928] Ch 290, [1927] All ER Rep 143

and no doubt if EVE, J., had had before him at that time the information which was subsequently given by SARGANT, L.J., in *Re Anderson-Berry*⁹, he could not have distinguished *Ascherson's* case¹⁰ on that ground, though no doubt he would have arrived at the same conclusion on the construction of the particular document before him.' a

There we find another judge criticising the distinction which the defendants seek to draw. b

The only other case is that of *Watt v Mortlock*¹¹. There, of course, there had been a demand, since that was a case of a security given by the surety, and the bank had threatened to enforce its security. Wilberforce J, at first blush, doubted whether the court was justified in granting relief; but then he considered the cases to which he had been referred—namely, *Ascherson*¹⁰, *Tate v Crewdson*¹², and *Anderson-Berry*⁹—and concluded¹³: c

'On those authorities, it seems to me that the court should grant a surety in the position of the present plaintiff the relief which is asked'.

Then he went on to deal with the form of order.

Now, such being the state of the authorities, there is, as I see it, no concluded decision on the question whether there is any difference between the case where it is unnecessary to give a demand, or a demand has been made, on the one hand, and the case where a demand is required and not given, on the other; and, in my judgment, that is not a valid distinction. It seems to me clearly contrary to the general principle on which *Ascherson*¹⁰ was decided, a principle which had been noted in ancient cases before that. The principle is that the surety is entitled to remove the cloud which is hanging over him. It would be strange indeed, as it seems to me, if he can do that where no demand is required, notwithstanding there is no present likelihood of any attempt to recover against him, and yet when his liability arises as between himself and the creditor only on demand, he cannot seek to remove the cloud until it has started to rain, especially as the provision in the contract of suretyship that the creditor must make a demand on the surety is clearly a provision for the benefit of the surety. It would be odd, I think, if that provision served as between himself and the principal debtor to put himself in a much worse position than that in which he would stand if it was not there. d
e
f

I therefore say and hold that the *Ascherson*¹⁰ principle is not dependent on demand being made where the suretyship contract requires a demand. Of course, there may be particular cases where, as a matter of contract, as in *Bradford v Gammon*¹⁴, the right is not available to the surety; but as a general principle, in my judgment, once the account is closed and there is an accrued fixed liability, the surety is entitled to this quia timet relief, whether the case be one in which no demand was required to be made, or one in which it was and a demand has been made, or one in which it was and no demand has been made. I distinguish *Bradford v Gammon*¹⁴ as having turned on the particular contract in that case; but, if necessary, if I am wrong as to that, then I respectfully agree with my predecessors who have cast doubt on it, and I say that it was wrong in drawing a distinction based on no demand; and, with respect, I decline to follow it. g
h

In my judgment, therefore, the plaintiff has established the right on which he sues. But I have to consider another matter, because the defendants have a substantive j

⁹ [1928] Ch 290, [1927] All ER Rep 143

¹⁰ [1909] 2 Ch 401, [1908-10] All ER Rep 510

¹¹ [1963] 1 All ER 388, [1964] Ch 84

¹² [1938] 3 All ER 43, [1938] Ch 869

¹³ [1963] 1 All ER at 390, [1964] Ch at 88

¹⁴ [1925] Ch 132, [1924] All ER Rep 766

a defence of their own. They say that, granted that the principle on which the plaintiff relies is as I have held, still this particular plaintiff is not, in the circumstances of this case, entitled to relief. They base that on the fact that, whilst he was a director, the defendant company issued a prospectus to support an issue of further shares in order to raise money then much needed by the club. Indeed, the prospectus said: 'An immediate and substantial response to this issue is vital to the club's security and prosperity'.

b A substantial number of shares were taken up in response to that prospectus, and I have no doubt that some (if not all) of the applications were made whilst the plaintiff was still a director. In any event, he was responsible for the prospectus, because he was a director when it was issued; and, apart from whatever the general law would say, it was specifically stated on the front cover that the directors collectively and individually accepted full responsibility for the accuracy of the information given.

c Now, unfortunately, one of the statements in the prospectus was not wholly accurate, because item 12 in Part II was as follows:

d 'The Directors of the Company do not have any interest in the promotion of the issue of this capital apart from their general interest as Directors and Shareholders.'

e That was of necessity qualified, because in Part I, where the defendant company's liabilities were set out, it was stated that the present directors had loans of £24,600. But the point is taken that the plaintiff (and I think other directors at the time also, but it does not matter) had an interest in the promotion of the issue of this capital, which was not disclosed, because of the guarantee and the right which it carried to require payment off of the overdraft, and the existence of the guarantee was nowhere stated. Mr Hopcroft, the present vice-chairman of the defendants, was called to give evidence to support this defence, but that does not help me, because it was quite clear that he knew all about the guarantees and relied on some independent assurance, which he says he had received, that the guarantees would not be called in; and so I have to decide the case apart from that evidence.

f Now, any shareholder who could satisfy the court that he applied for an allotment of shares on the faith of the prospectus and that he was misled by the non-disclosure of the guarantees would have an action against the defendants, possibly to set aside the allotment, or for damages. If fraud were established—and this is not, let me say, a case of fraud—then he would have a direct action against the directors; and, for all I know, he might possibly be able to mount some action against the directors in the absence of fraud. What is said is that the plaintiff having been, without any moral turpitude, party to this inaccurate statement, is not only exposed to such action (if any) as the shareholders may have against him, but wholly forfeits his right to require the guarantee to be paid off.

g Reliance is placed on the case of *Hirachand Punamchand v Temple*¹⁵. This appears to me to be an extravagant and alarming proposition, for it would follow that if h the directors' loans had been wrongly stated, they would be precluded from ever recovering the money. Be that as it may, the case of *Hirachand Punamchand*¹⁵ is, in my judgment, very different. There, creditors applied to the debtor's father in the hope of getting him to pay the debt which they could not get out of the son, and he paid them part of what was due, making it clear in terms that he did so on the footing that it should discharge the whole debt. They did not raise any query; j they accepted the money, and they cashed the cheque. The money was therefore paid and received on that express footing. Then they turned round and said 'Now we will sue the son for the balance'; and, not surprisingly, the Court of Appeal refused to allow them to do so. They put it on various grounds; and the defendants

rely, as indeed is all they can do, on certain passages in the respective judgments. First, 'Vaughan Williams LJ said¹⁶:

'Having said thus much, I desire to add a word or two with regard to the case of *Cook v. Lister*¹⁷ in the Common Pleas. If the judgments in that case are looked at, it will be found that Willes J. said, in explaining the grounds of his judgment, that, under circumstances like those of the present case, the debt is gone, because it would be a fraud upon the stranger who pays part of a debt in discharge of the whole, that an action should be brought for the debt. I have founded my judgment upon the grounds which I have already expressed, but I do not wish to be understood as thereby negating the proposition that a defence might be set up on the alternative basis mentioned by Willes J.'

Then Fletcher Moulton LJ said¹⁸:

'It is perfectly clear from the previous correspondence that this was an offer made for the full settlement of the claim. The plaintiffs, with knowledge that this was the money of the father, sent to them in full settlement of the claim, took the draft, and cashed it, and kept the money. They must be taken to have known that they could only do this rightly, if they agreed to the terms that it should be in full settlement of the debt. Their action was inconsistent with the duty of an honest man, unless, at the time when they took the money, they accepted the terms on which it was offered . . . I decline to accept the conclusion of fact suggested by the plaintiffs that they dishonestly possessed themselves of the father's money, and shall presume that they did so honestly, and therefore that they accepted it in settlement of their claim against the son on the promissory note.'

Finally, Farwell LJ said¹⁹:

'I agree with Fletcher Moulton L.J. that the plaintiffs cannot be heard to say that they have acted dishonestly when an honest construction can be put upon their conduct by treating their acceptance and retention of the money as being upon the terms on which it was offered.'

That is an altogether stronger case. There is no semblance of a representation here that the money would not be used to discharge the overdraft, or even that it would not be so used at the instance of the directors. I cannot come to the conclusion that it would be dishonest to allow the plaintiff to exercise his right which, apart from this defence, is a right which I have held to be good in equity.

It is unfortunate that this paragraph was not wholly accurate and, as I have said, the shareholders may have their remedies, although I am a little inclined to doubt whether it would have made any difference if the guarantees had been stated. But I am quite satisfied that it would be going much too far and would be an inaccurate application of the principle in the *Hirachand* case²⁰ were I to hold that what has happened in this case has wholly deprived the plaintiff of his right in equity to require the defendants to pay off the overdraft and so remove the cloud hanging over his head.

The plaintiff is therefore entitled to a declaration; and, having regard to the doubt about the precise figure and the fact that the account was closed because of other directors' actions before the plaintiff determined his guarantee, it occurred to me

16 [1911] 2 KB at 337, 338

17 (1863) 13 CBNS 543

18 [1911] 2 KB at 338, 339

19 [1911] 2 KB at 342

20 [1911] 2 KB 330

a —and I suggested to counsel and understand that they agree—that the right form of order would be: ‘A declaration that the plaintiff is entitled to be discharged and exonerated from all liability under the plaintiff’s guarantee by payment by the defendants to the bank of the sum of £17,233. 11. 10 or such other sum as was due to the bank on the defendants’ said account on the 12th February, 1967, being the date when the bank received notice determining his guarantee, together with such interest as may be or become due until the date of payment; an order that the defendants do pay forthwith to the bank such sum and interest as aforesaid and obtain the cancellation and return of the plaintiff’s guarantee and take any other steps necessary for such discharge and exoneration as aforesaid’, with liberty to apply. But I will hear counsel on the precise form of order, or, alternatively, I will direct a minute to be signed and circulated, with liberty to mention the matter to me should any difficulty as to the form of order arise when counsel come to settle the minute.

c Order accordingly.

Solicitors: *G Howard & Co* (for the plaintiff); *Shelton, Cobb & Sumpters*, agents for *Rorke, White & Holbrook*, Nottingham (for the defendants).

d R W Farrin Esq Barrister.

e R v Barnet and Camden Rent Tribunal, ex parte Frey Investments Ltd

COURT OF APPEAL, CIVIL DIVISION

SALMON, EDMUND DAVIES AND STAMP LJJ

26th, 29th, 30th NOVEMBER 1971

f *Rent tribunal – Reference of contract – Jurisdiction – Reference by local authority – Validity of reference – Test – Whether reference made mala fide or frivolously, capriciously or vexatiously – Relevance of factors taken into or left out of account – Views of tenants – Likelihood of reductions of rent – Block references without individual consideration – Court’s power to review administrative decision – Rent Act 1968, s 72 (1).*

g Pressed by a local housing action group to exercise their powers under s 72 (1)^a of the Rent Act 1968 to refer contracts of tenancy to the rent tribunal in respect of furnished properties, Camden London Borough Council sent their valuation officers to make enquiries about certain tenancy agreements and the premises to which they related. The valuation officers interviewed 22 tenants and reported that the rents were a little high, but on hearing of the council’s action the landlords took steps to prevent the officers interviewing tenants of their other houses. At a meeting of the housing committee the town clerk reported what he had learned from the valuation officers and advised that as the decision in *R v Paddington and St Marylebone Rent Tribunal, ex parte Bell London and Provincial Properties Ltd*^b had rather stultified the effect of s 72, there was in the circumstances little chance of success in any such reference. Representatives of the action group attending gave reasons for differing from that view and urged the council to exercise their powers. At a subsequent meeting to which the matter was adjourned the committee had before them counsel’s opinion in favour of action being taken, a report from a councillor against a reference as not being in the best interests of the tenants, and a statement by the chief legal officer summing up the feelings of the tenants as conveyed to the valuation officers as being that the council would receive a measure of support from

a Section 72 (1) is set out at p 1188 a, post

b [1949] 1 All ER 720

tenants in making the reference, although some tenants were against it and others supporting it would not attend at the rent tribunal to say so. Particulars of the sizes of the rooms let (they were all small), of the numbers of persons occupying each room, the rent, the condition of the premises, the standard of furnishing, and the facilities were all before the committee. The committee resolved to exercise the council's powers under s 72 and the council ratified that decision. The landlords applied for an order of prohibition to prevent the rent tribunal from considering the 22 agreements on the ground that the council had exceeded their powers in making the reference, and supported it with affidavits by tenants that they did not want their tenancy agreements referred and by affidavits of three councillors that they had no recollection of the views of tenants being brought to their attention at the committee meeting.

Held – The council's reference to the rent tribunal must be upheld for the following reasons—

(i) (per Salmon and Edmund Davies LJJ) it was impossible to say that the council had acted *ultra vires* in making the reference to the rent tribunal unless it could be shown that they were acting *mala fide* (which had not been suggested) or that they were acting frivolously, capriciously or vexatiously (the onus of proving which was on the landlords); having regard to the fact that the council's decision did not affect the basic rights of the landlords, the decision would not necessarily be vitiated by reason of the fact that the council had taken into account some irrelevant factor or had failed to consider some relevant matter (see p 1189 b to e, p 1192 c and p 1194 f to p 1195 a and e f, post);

(ii) (per Salmon and Edmund Davies LJJ) the landlords had failed to discharge the onus of proving that the council had acted other than properly in making the reference; they had gone carefully into the facts and had before them the details of each of the 22 tenancies; they had taken counsel's opinion and acted in accordance with it; although the council had made a single decision with regard to all the tenancies, the reference could not be described as a 'block reference'; the evidence showed that the council had taken the tenants' views into account, and in any event the council were entitled to make the reference even though the tenants themselves did not want references to be made; furthermore it could not be objected that there was no likelihood of the rents being reduced, for (per Salmon LJ) there was ample material on which they could conclude that there was something for the tribunal to consider and a reasonable likelihood that it might reduce the rents and (per Edmund Davies LJ) other circumstances might in any event justify the reference (see p 1190 h, p 1191 b to g, p 1192 d, p 1193 a, p 1195 h, p 1196 a and b, p 1197 a and p 1198 f to h, post);

(iii) (per Stamp LJ) in the absence of any allegation that the council had been acting *ultra vires* or *mala fide* the proceedings were misconceived; the court had no power to examine purely administrative decisions of local authorities not affecting rights to see if all factors had been properly taken into account; s 72 of the 1968 Act conferred the same unrestricted right to refer a tenancy agreement to the rent tribunal on the council as it did on the tenant and the landlord and it was wrong in principle for the High Court, on an application for prohibition, to go into the merits of the reference or into whether the council had made mistakes in coming to their conclusion (see p 1197 d to g and h to p 1198 a and d, post).

Associated Provincial Picture Houses Ltd v Wednesbury Corp'n [1947] 2 All ER 680 and *R v Paddington and St Marylebone Rent Tribunal, ex parte Bell London and Provincial Properties Ltd* [1949] 1 All ER 720 distinguished.

Decision of the Queen's Bench Divisional Court [1971] 3 All ER 759 affirmed.

Notes

For right to a reference of rent, see 23 Halsbury's Laws (3rd Edn) 861, 862, paras 1664, 1665, and for cases on the subject, see 31 Digest (Repl) 729, 730, 8118-8129.

a For the Rent Act 1968, s 72, see 18 Halsbury's Statutes (3rd Edn) 858.

Cases referred to in judgments

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1947] 2 All ER 680, [1948] 1 KB 223, 177 LT 641, 112 JP 55, 45 Digest (Repl) 215, 189.

Biddulph v St George's, Hanover Square (1863) 3 De GJ & Sm 493, 33 LJCh 411, 8 LT 558, 27 JP 579, 38 Digest (Repl) 39, 200.

b *Dormer v Newcastle-upon-Tyne Corpn* [1940] 2 All ER 521, [1940] 2 KB 204, 109 LJKB 708, 163 LT 266, 104 JP 316, 38 Digest (Repl) 41, 214.

Hall & Co Ltd v Shoreham-by-Sea Urban District Council [1964] 1 All ER 1, [1964] 1 WLR 240, 128 JP 120, 45 Digest (Repl) 342, 61.

Hanks v Minister of Housing and Local Government [1963] 1 All ER 47, [1963] 1 QB 999, [1962] 3 WLR 1482, 127 JP 78, Digest (Cont Vol A) 656, 135b.

c *R v Brighton Corpn, ex parte Thomas Tilling Ltd* (1916) 85 LJKB 1552, 114 LT 800, 80 JP 219, 33 Digest (Repl) 67, 406.

R v Paddington and St Marylebone Rent Tribunal, ex parte Bell London and Provincial Properties Ltd [1949] 1 All ER 720, [1949] 1 KB 666, 113 JP 209, 31 Digest (Repl) 730, 8125.

d Appeal

The landlords, Frey Investments Ltd, appealed against an order of the Queen's Bench Divisional Court (Lord Widgery CJ, O'Connor and Lawson JJ) made on 28th July 1971 and reported at [1971] 3 All ER 759 dismissing the landlords' application for an order prohibiting the rent tribunal for Barnet and Camden from hearing and determining 22 references to it made by Camden London Borough Council under

e Part VI of the Rent Act 1968. The references related to four tenancies at 36 Bartholomew Villas, and 18 tenancies at several addresses in Patshull Road, namely two at No 9, five at No 11, one at No 13, nine at No 37 and one at No 42, all in London NW 5.

The grounds of appeal were as follows: the Divisional Court was wrong in law in holding that the references made by Camden London Borough Council to Barnet and

f Camden Rent Tribunal were properly made in accordance with the provisions of Part VI of the Rent Act 1968, on the evidence and for the following reasons (so far as relied on before the court): the 22 references were invalid because they were not

made in the bona fide exercise of the powers conferred on the council by s 72 of the Rent Act 1968 in that: (i) the council had not received any complaint from any of the 22 tenants referred to in the references that their rents were unreasonable; (ii) the

g council had not received any statement or other indication from any of the 22 tenants that they desired to refer their tenancies to the tribunal but feared the consequences of so doing; (iii) the council had not made any or any proper or sufficient enquiry whether the rents payable by the 22 tenants were unreasonable; (iv) the council by

their duly authorised servants or agents had gained access to certain of the premises by deception and had interfered with the lawful right of at least one tenant to refrain

h from completing form FR5 sent to him by the tribunal or to complete such form after taking proper advice in relation thereto. The facts are set out in the judgment of Salmon LJ.

Ronald Bernstein QC and E J Prince for the landlords.

J S Colyer for the council.

The tribunal did not appear and was not represented.

j

SALMON LJ. The appellants (whom I will refer to as 'the landlords') applied to the Divisional Court for an order of prohibition to prevent the Barnet and Camden Rent Tribunal from considering 22 tenancy agreements which had been referred to it by Camden Borough Council for consideration. The basis of the application for an order of prohibition was that the borough council had exceeded their powers in

referring these tenancy agreements to the rent tribunal. The Divisional Court¹ refused the order, and against that decision the landlords now appeal. a

The section under which the reference was made by the council is s 72 of the Rent Act 1968. Section 72 (1) provides:

‘Either the lessor or the lessee under a Part VI contract or the local authority may refer the contract to the rent tribunal for the district in question.’ b

Then sub-s (2) provides that when there has been such a reference the tribunal may require the landlords to supply it with such information as the tribunal reasonably requires. Subsection (3) provides for penalties which can be exacted from the landlords in the event of their failing to supply the information without reasonable cause.

Section 73 (1), omitting the immaterial words, provides as follows: c

‘(1) Where a Part VI contract is referred to a rent tribunal . . . the tribunal shall consider it and then, after making such inquiry as they think fit and giving to each party to the contract . . . an opportunity of being heard or, at his or their option, of submitting representations in writing, the tribunal, subject to subsections (2) and (3) below,—(a) shall approve the rent payable under the contract, or (b) shall reduce the rent to such sum as they may, in all the circumstances, think reasonable, or (c) may if they think fit in all the circumstances, dismiss the reference, and shall notify the parties and the local authority of their decision.’ d

I need not read sub-ss (2), (3) or (4). Subsection (5) is in these terms:

‘Notwithstanding anything in this Part of this Act, a rent tribunal shall not be required to entertain a reference made otherwise than by the local authority if they are satisfied . . . that the reference is frivolous or vexatious.’ e

I consider it of the utmost importance to uphold the right, and indeed the duty, of the courts to ensure that powers shall not be exercised unlawfully which have been conferred on a local authority or the executive, or indeed anyone else, when the exercise of such powers affects the basic rights of an individual. The court should be alert to see that such powers conferred by statute are not exceeded or abused, and I hope that nothing that I say in this judgment will be construed as in any way casting doubt on the principle which I have just enunciated. f

Counsel for the landlords in the course of his most interesting argument has referred us to a number of authorities on this topic and he cites in particular the judgment of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corp*². The passage on which he relies sums up Lord Greene MR’s opinion: g

‘. . . the court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it.’ h

It is, I think, important to observe that in that particular case the question was j

¹ [1971] 3 All ER 759, [1971] 3 WLR 985

² [1948] 1 KB 223 at 233, 234, cf [1947] 2 All ER 680 at 685

a whether the local authority had come to a right conclusion when considering an application to allow cinemas owned by the plaintiffs to be opened on a Sunday.

There have been a number of other cases to which we have been referred such as *Hanks v Minister of Housing and Local Government*³ and *Hall & Co Ltd v Shoreham-by-Sea Urban District Council*⁴. Cases such as these in which a licence is being sought for the purpose of enabling the applicant to carry on his business and earn his living or in which town planning permission is sought or a compulsory purchase order is being challenged vitally affect the basic rights of the persons concerned and seem to me to differ very substantially from the case which we are now considering. In a case such as the present, no decision is taken by the authority invested with a power which vitally affects the basic rights of the individual. The only decision taken by the council is to refer the matter to the rent tribunal so that the tribunal may consider whether or not the rent is too high. The party concerned (i.e. the landlords) have every opportunity of appearing before the tribunal, and it is the decision of that tribunal which affects their basic rights.

b For my part I doubt whether the principle laid down by Lord Greene MR applies, or was intended to apply, to cases of the present kind. For example, I think it would be difficult to suppose that, if the council referred the matter to the rent tribunal without having considered some material matter, that would necessarily vitiate the reference. I say that particularly because under the Act the local authority, in contradistinction to the tribunal, have no powers to demand information in relation to the tenancy agreements and necessarily may be in a position where all the material facts cannot be known to them. It is of course conceded that the local authority must act bona fide. It is not here suggested that there has been any mala fides on the part of the local authority. Moreover, I consider that it is implicit in this Act that when the local authority make a reference to the tribunal they shall not act frivolously or vexatiously. In my judgment, unless the landlords can show either mala fides or that the council acted frivolously or vexatiously it is impossible to say that the council in referring the matter to the rent tribunal were acting ultra vires.

e I do not think that it has been seriously suggested that what the council did was either frivolous or vexatious. The complaint made against them by counsel for the landlords in the course of his most persuasive argument was that they referred the matter to the tribunal without taking into account the views of the tenants or whether there was any real likelihood of the rents being reduced. Counsel further argued that the council wrongly took into account the landlords' refusal to allow inspection of certain premises which were not the subject-matter of the tenancy agreements in question. These tenancy agreements referred to 22 rooms in seven houses belonging to the landlords, each of which the landlords had let to a tenant. There are now, in effect, only 12 applications because the tenants have moved out of the rooms which were the subject-matter of the other ten tenancy agreements.

g The object of the legislature in giving the local authority the power to refer the tenancy agreements to the rent tribunal was clearly conferred so as to take care of cases in which tenants, perhaps of working class dwellings, were not in a position to look after themselves, or were afraid of making a reference to the tribunal. There are many districts—and Camden is apparently one—where there is a great shortage of reasonably priced working class dwellings, and a tenant who applied to the tribunal might well consider that if he offended the landlord by so doing he might find himself in the street or compelled to go and live in a district which was inconvenient for his purposes. I would not like to be understood as making any criticism of the landlords whatsoever. It is not for us to decide whether they are good or bad landlords. It is only fair to say that much of the evidence which was placed before the court went to show that they are good landlords. That, however, is not, as I say, the issue for us to consider.

In Camden there exists a body which calls itself Camden Housing Action. Again it is not for us to say whether this body performs a useful function. They have busied themselves with presenting arguments and facts to the council with a view to persuading the council to exercise the powers conferred on them by the 1968 Act. In the summer of 1970 they were urging the council to exercise its powers in relation to property belonging to the landlords and let to tenants. The council attempted to obtain information in relation to a number of properties belonging to the landlords by sending its valuation officers to make such enquiries as they could about the tenancy agreements and the premises to which they referred. The valuation officers succeeded in interviewing 22 tenants. These officers reported that they felt that the rents were a little high.

The matter, I think, was first considered by the council, or its housing committee, on 2nd July 1970. It came before the same committee again on 15th September when a report from the town clerk was considered. The town clerk reported what he had learned from the valuation officers. In that report the town clerk also referred to *R v Paddington and St Marylebone Rent Tribunal, ex parte Bell London and Provincial Properties Ltd*⁵, and suggested that the judgment of the Divisional Court in that case had rather stultified the effect of s 72 of the 1968 Act; his advice was that in the light of that case and the present circumstances, there would be little chance of success in respect of the complaints which were in substance that the rents were too high and that the accommodation was inadequate. Representatives from the Camden Housing Action Group attending that meeting of the committee advanced reasons for differing from the view expressed by the town clerk and urged the council to exercise its powers under s 72 on the basis that there was a real chance that the tribunal might reduce the rents in question.

At that meeting—which apparently lasted some time—the council adjourned the matter so that the opinion of counsel might be taken; and the opinion of counsel was taken. He advised, or expressed the hope, that the council should take action. The committee met again on 27th October and further considered the matter, and on 1st December, when they met again to consider the problem, counsel's opinion, or a resumé of counsel's opinion, was before them. The committee then decided to exercise their powers under s 72 and that decision of the committee was ratified by the council on 6th January. It is quite plain that there were some councillors who were against any action being taken, and there was an illuminating written report from Councillor Colin Jaque urging the council not to refer. I do not propose to read the report, but it really came to this, that in his opinion it would not be in the best interests of the tenants to refer the tenancy agreements in question.

It is quite obvious that the council did not act precipitately. Indeed, it is plain that the council went into this matter with the most meticulous care and, having considered all the matters before them, came to the conclusion that it would be right to refer the tenancy agreements in question to the tribunal. It is said that they did not take into account the tenants' views, but an affidavit has been sworn by Mr Kosky, the chief legal officer to the council, and according to his evidence he stated:

'At the meeting on the 15th September I summed up the feelings of the tenants as conveyed to the Valuation Officers, that the council would receive a measure of support from the tenants if it referred their contracts to the Rent Tribunal although some of them were against this and others who would support the action were not prepared to attend at the Rent Tribunal to say so. I knew these facts from seeing the Valuation Officers' notes of their interviews with the tenants.'

It is right to say that before the Divisional Court there were affidavits from the

a tenants who said that they did not want their tenancy agreements referred, but those affidavits were not before the council. Three of the councillors have sworn affidavits to the effect that they have no recollection of the views of the tenants (which the legal adviser says he put before the council) having been brought to their attention. It may be they have no recollection, but there has been no application to cross-examine the legal adviser and no reason to suppose that what he stated in his affidavit is other than accurate.

b It is suggested that the council approached the problem that confronted them on the basis that the tenants were not making any complaint and, presumably, were not supporting a reference by the council. I do not think, however, that the powers of the council to refer can conceivably be inhibited by the fact that the tenants themselves do not want references to be made. The reasons why they do not want reference to be made are sometimes obscure and may be very difficult to discover. No doubt the wishes of the tenants are something which the council should bear in mind, but, even if the tenants are against references being made, there is nothing to prevent the council from taking a different view. I cannot think that there is any substance in the contention that the council came to their decision without taking the tenants' views into account. If Mr Kosky's affidavit is accepted—as I think it should be—obviously the tenants' views as reported by the valuation officers were taken into account. But even in the absence of any affidavit from Mr Kosky the council approached the case on the basis that the tenants were making no complaint and did not wish reference to be made. So whether the negative evidence of the three councillors to whom I referred is correct or whether the positive evidence in Mr Kosky's affidavit is correct, the council were taking the views of the tenants into consideration—although they may have misunderstood them.

e As far as the argument that the council did not consider whether there was any likelihood of the rents being reduced is concerned, in my judgment there is equally little substance in that contention. They had the opinion of the council's officers that the rents were a little too high, i.e. that they were a little higher than what would have been the reasonable rent. It would be for the tribunal to decide whether or not the rents in those circumstances should be reduced, and there would be nothing to prevent the tribunal from coming to a decision that they should be reduced. On the material before this court it seems to me that there was ample material on which the council could reasonably come to the conclusion that there was something for the tribunal to consider and a reasonable likelihood that it might reduce the rents.

f As to the allegation that they wrongly took into account the landlords' refusal to allow inspection of certain premises of the landlords, I am afraid that, in spite of the argument that has been addressed to us, I consider that this contention also is ill-founded. It is quite true that after the 22 tenants in question had been interviewed and it was discovered by the landlords that they had been interviewed, the landlords took steps to prevent the council's officers interviewing the tenants of the remaining houses about which a complaint had been made by the Camden Housing Action. This, of course, may have been out of consideration for the other tenants and to spare them the necessity of having to meet the council's officers and of being questioned about their tenancy agreements and their premises. On the other hand, I should have thought that the council were perfectly entitled to take the view that that might have been because the landlords were most unwilling for the council to be fully informed about the tenancies. It is a factor which might justifiably have strengthened the impression of those members of the council who thought there was something to refer to the tribunal. If the landlords had said to the council: 'We don't mind what enquiries you make; we are not at all nervous about our rents being thought to be too high, go ahead and get all the information you want'; that, I imagine, would have told in their favour. The fact that they were, apparently, unwilling that the council should be apprised of the facts is a point—not a very important point, but a point—which the council would be entitled to take into consideration in deciding whether

or not there was a case to refer to the tribunal. I naturally agree that if the landlords could show, for example, that the council were referring the tenancy agreements to the tribunal out of spite because they disliked the landlords and did not genuinely believe that there was anything of substance in the information that the rents were too high, then that would have been an excess of power. It would also have been capricious and vexatious, and might well have come within the classification of being *mala fides*. But there is not any ground that I can discern on which the Divisional Court could have come to such a conclusion, and it clearly did not do so. Nor do I.

I recognise that when a reference is made by the council to the tribunal, although it is true that no decision has been taken against the landlords which affects their basic rights in the sense that I have indicated, it follows that they may be put to expense and inconvenience. Nevertheless, in my judgment, the landlords are given all the protection which is reasonably necessary if the Act requires, as in my view it does require, only that the council shall act *bona fide* and not make a decision capriciously or vexatiously. The assumption must be, until the contrary is proved—and the onus of proving the contrary is on the landlords—that the council did act properly. I cannot discern any evidence from which it would be possible to draw the inference that the council in this case acted other than properly, I do not mean by that in the slightest to influence the tribunal in the decision at which it arrives. The council may have come to a wrong conclusion. It may be that the tribunal will find that the rents are such that they ought not to be reduced. It may come to a different conclusion. It will not take the fact that the council have referred the rents as an indication that the rents are too high, any more than it would take into consideration the fact that the landlords have thought it worth spending the money involved in going to the Divisional Court and coming to this court as an indication that the landlords wish to prevent the tribunal from considering these tenancy agreements because they recognise that the rents are too high.

Before I part with the case it is important that I should refer to *R v Paddington and St Marylebone Rent Tribunal, ex parte Bell London and Provincial Properties Ltd*⁶. This decision turned on its own very special facts. If, as has been suggested, this decision has inhibited councils from referring cases in which they considered that there was a reasonable prospect of the tribunal reducing the rent, then it can only be because *Bell's case*⁶ has been misunderstood. That case concerned a large block of flats of which Lord Goddard CJ said that the tenants enjoyed all the amenities usually afforded in high class blocks of flats in the West End of London and were people well able to look after themselves: a very different class of accommodation and a very different type of tenant from the accommodation and the tenants with which we are concerned. In that case the council in question had referred 302 tenancy agreements to the rent tribunal merely because the rent tribunal had reduced the rents of two flats in this block. The decision is correctly set out in the headnote in this way⁷:

... the method of reference adopted by the local authority indicating, as it did, that no investigation or inquiry could have been made by them into the nature of the contracts of tenancy referred by them to the tribunal, did not constitute a valid and *bona fide* exercise by the local authority of the powers conferred on them by Parliament. It was never intended by the Act⁸ that a local authority should refer cases of contracts in respect of which they had neither received a complaint from the tenant, nor had themselves made any inquiry to see whether there was a *prima facie* case or anything to indicate that there was any unfairness in the rent charged.⁹

⁶ [1949] 1 All ER 720, [1949] 1 KB 666

⁷ [1949] 1 KB at 666

⁸ I.e. the Furnished Houses (Rent Control) Act 1946

a The present case is entirely different, not only because we are dealing with a different class of property and a different type of tenant, but because in this case there was an investigation and a careful investigation, and enquiry by the council into the relevant facts. Indeed, one of the complaints made by the landlords is that the council made too many enquiries, not that they made none. Lord Goddard CJ said⁹:

b 'No doubt, the reason why it was provided that cases might be referred by a local authority was because it was recognised that there might be tenants who would hesitate themselves to refer the case for fear of the consequences that might befall them, but it could never have been intended that local authorities could refer cases respecting which they had neither received complaint from the tenant nor had made any inquiry whether there was a *prima facie* case . . . The borough council in question have decided as a matter of policy that in the case of
c any property in respect of which two or more reductions in rent had been made, all the contracts of letting to which the Act applied relating to such property should be referred to the tribunal.'

d Then he said this, which points the difference—or one of the many differences—between that case and the present⁹:

e 'This may be a perfectly proper course to take in respect of certain cases, as, for instance, one or two houses [and he might have said even seven] in the same ownership all of which are let out in separate tenements to poor or working class persons, but to apply this policy to 555 flats without any inquiry, or, indeed, knowledge, whether the Act applies or not is an entirely different matter.'

He goes on to point out that any other view might lead to the conclusion that the council without any information or enquiry as to the tenancies in question could refer all the flats within their jurisdiction to the rent tribunal, which would clearly be highly inconvenient for the landlords and equally inconvenient for the tribunal.

Lord Goddard CJ also said¹⁰:

f 'In our opinion, the action of the borough council in referring the whole of these flats in the manner they have done is not a genuine exercise of the powers conferred on them by the Act, and we cannot refrain from saying that it is regrettable that in the form of reference information purports to be given to the tribunal which is quite inaccurate and has been given without the slightest attempt to see that it was accurate.'

g In the present case the fullest information was given to the council. The size of the room let—and they were all very small—the number of persons occupying each room, the rent, and the condition of the premises, the standard of furnishing and the facilities were all given. In the great majority of cases, these were assessed as fair to poor. So obviously the most careful enquiries had been made. It is not suggested that
h any of the information contained in the references is wrong. This case is entirely different from *Bell's* case¹¹.

i There are two sentences in the judgment of Lord Goddard CJ that have been seized on. The first sentence is⁹: 'It was never intended that this Act should provide for general rent fixing throughout a district.' That, of course, is correct, and if all the flats in a district could be referred to the rent tribunal by the council without making
j any enquiry, it might be said that the council were being used as a general rent fixing tribunal, but nothing of the kind happened here. The second sentence is⁹:

9 [1949] 1 All ER at 726, [1949] 1 KB at 680

10 [1949] 1 All ER at 726, 727, [1949] 1 KB at 681

11 [1949] 1 All ER 720, [1949] 1 KB 666

'[It] is to deal with individual cases where hardship exists or may be reasonably supposed to exist.' Those words could, perhaps, be given a very wide meaning. I think, however, that all that Lord Goddard CJ intended to lay down was that if the council referred tenancy agreements to the tribunal in circumstances in which no reasonable council could have done so, then the council were acting *ultra vires*. In that particular case no reasonable council could have properly referred the tenancy agreements to the tribunal, having made no enquiry about them. It seems to me that it is of paramount importance that the decision in the *Bell* case¹²—which, if I may respectfully say so, was clearly a correct decision on its facts—should be applied only to special facts similar to those which existed in that case. The decision should not be extended or understood so as to inhibit a council from referring tenancy agreements to the tribunal in circumstances such as exist in the present case.

For these reasons, I would dismiss the appeal.

EDMUND DAVIES LJ. It is generally agreed that the vast majority of members of local authorities perform without fear or favour tasks in the public service, yet experience shows that they receive as a result more brick-bats than bouquets. It is frequently insufficiently recognised that without their voluntary service local government as we know it in this country would be impossible. That is but one of the many reasons why, as I think, adopting the words of Lord Reading in *R v Brighton Corpn, ex parte Thomas Tilling Ltd*¹³, the court ought to be very slow in interfering with their decisions.

Here we are concerned with the manner in which Camden Borough Council have applied s 72 of the Rent Act 1968, which empowers them to refer, in appropriate cases, contracts of furnished lettings to a rent tribunal. The prime question involved is: since prohibition of the reference in 22 contracts is sought by the landlords, what test should be applied in considering whether or not the references were right and proper?

*R v Paddington and St Marylebone Rent Tribunal, ex parte Bell London and Provincial Properties Ltd*¹², is, as Salmon LJ has already said, widely different in its facts from the present case. But, properly understood, I think there is nothing in the decision of Lord Goddard CJ which should inhibit local authorities from taking steps, in circumstances which appear to them proper, from referring furnished letting contracts to the statutory body. For the test which Lord Goddard CJ enunciated was¹⁴:

'In considering whether there has been a valid reference by the local authority, it is necessary, in our opinion, to consider whether on the facts of this case there has been a valid and *bona fide* exercise of the powers conferred by Parliament on them.'

The question has been canvassed whether the test enunciated in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn*¹⁵ by Lord Greene MR is appropriate to cases such as the present. For my part, I would think, having regard to the limited powers of a local authority to glean relevant information under the Rent Acts, that it would be imposing on them a hardship which they ought not properly to bear if a reference which they had conscientiously and *bona fide* made could be impeached simply by pointing out that they appeared to have taken into consideration a factor which was not properly relevant, or that they had omitted to take into consideration every relevant factor. Certainly the failure to have regard to proper circumstances and the fact that improper considerations were taken into mind may help those who attack the decision of the council along the road towards the goal that they have to

¹² [1949] 1 All ER 720, [1949] 1 KB 666

¹³ (1916) 85 LJBK 1552 at 1555

¹⁴ [1949] 1 All ER at 725, [1949] 1 KB at 678, 679

¹⁵ [1947] 2 All ER 680 at 685, [1948] 1 KB 223 at 233

a attain; but the fact that the council may conceivably, in the judgment of some, or indeed all, have paid some attention to a factor which is not strictly relevant ought not, in my judgment, to be ipso facto sufficient to enable a reference made by them in a case such as the present to be prohibited.

b The reason I think that the strict *Wednesbury* approach¹⁶ would be a hardship is that, while the local authority have to do the best they can to glean information relating to furnished lettings, their ability to gain it is limited and quite unassisted by the statute. Once a reference has been made to the tribunal, on the other hand, it is vested with a power, under s 72 (2) of the Act, to obtain a great deal of information essential to enable it to come to its determination in the particular case. I look, for example, at the statutory form which is to be found in Sch 1 to the Furnished Houses (Rent Control) Regulations 1946¹⁷, headed 'Particulars concerning which lessors may by notice be required to give information', and there are not less than 11 paragraphs of particulars which should furnish the tribunal with the sort of information necessary to come to a decision. I repeat that the local authority have no such power to glean information and they have to do the best they can. It may come from a variety of sources. It may come from the tenants themselves, and, indeed, as Lord Goddard CJ said in the *Bell* case¹⁸, the wishes of the tenants surely ought at least to be taken into account. They may gain some information from outside bodies. They must, of course, be careful not to act on gossip or rumour which may be maliciously inspired or honestly mistaken. In most cases one would hope that a landlord, on being approached, would co-operate with them in his own interest and give the information they were seeking, although there is no shadow of doubt he is under no obligation to co-operate in any way.

e Like Salmon LJ, I think that the proper test to apply is whether or not in resolving to refer a Part VI contract to the rent tribunal there are grounds for concluding that the council were actuated by mala fides or were acting capriciously or vexatiously. As I have already said, in considering that matter the demonstration (if such be forthcoming) that they have taken irrelevant matters into consideration or omitted relevant factors may be of the greatest assistance, but that latter aspect is not conclusive. Nevertheless, out of respect to the able and helpful submissions of counsel f for the landlords, I feel that I too should make quite short comments on the four matters falling into two groups which counsel relied on as showing that the *Wednesbury* test¹⁶, if applied to this case, ought to result in prohibition being granted.

g He said that the council failed in two respects. They failed to take into account the views of the tenants. I have already adverted to Lord Goddard CJ's observation in the *Bell* case¹⁹ that they ought surely to be taken into consideration. Well, the exact position in relation to that matter is, I think, obscure on the conflicting affidavits and it is impossible for this court to resolve such conflict as existed. But I think and hope that I am right in concluding that, putting it at its lowest, most members of the council's housing committee must have been aware of the fact that very few, if any, of the tenants of the 22 Part VI contracts with which we are concerned wanted a reference at all. Accordingly, I do not think that that first ground h of complaint urged by counsel for the landlords is established, and established it, like all other complaints, must be by the applicants. For at the end of the day it is for them to satisfy the court that the council have acted in a manner which ought to be impeached.

j The second factor which it was urged should have been taken into consideration by the council and was in fact ignored was that in the circumstances obtaining it was unlikely, to put it at its highest, that any of these 22 references to the rent tribunal would result in a reduction in the rent. Well, I do not know what is to be said about

¹⁶ [1947] 2 All ER 680, [1948] 1 KB 223

¹⁷ SI 1946 No 781

¹⁸ [1949] 1 All ER 720, [1949] 1 KB 666

¹⁹ [1949] 1 All ER at 726, [1949] 1 KB at 680

the action taken by Mr Kosky, the chief legal officer to the council, and the town clerk. One thing that is quite clear is that the town clerk conveyed to the housing committee, in unmistakable terms, the view formed by Mr Kosky that the prospects of success were extremely tenuous. But even though that view was expressed, that is by no means the end of the matter. Certainly that is a relevant factor in considering whether a council acted capriciously or vexatiously, but there may still be circumstances where the public weal requires that when, for example, rumours are going about, the air should be clarified by a reference to a tribunal which can establish in an authoritative manner where the truth lies. a

Counsel for the landlords went on to say that the council wrongly took into consideration at least two classes of irrelevant matters. First, that they were actuated by resentment of the landlords refusing inspection of premises other than the 22 furnished dwellings which were the subject-matter of the references. I know it is said by Mr Frey in one of his memoranda (and doubtless with a determination to express as best he could his view of what happened) that in his belief the hostility or irritation so engendered was, as it were, a turning point in the ultimate decision formed by the council. But other views are expressed and, like Salmon LJ, I am not satisfied that this council in the last resort did not act responsibly, despite the action of the landlords which, although wholly understandable, may perhaps in all the circumstances have been a little unwise. But they must not think that by this observation I am criticising them in any respect, for we do not know all the facts. There is a faint suggestion that the council's officers did not act as courteously as they might have done. I do not know the truth about that either. There may be a number of reasons why the landlords took the attitude they did, but in the last resort I am not satisfied that this in turn influenced the decision of the council to refer. b

It is lastly said by counsel for the landlords that the council wrongly allowed themselves to be influenced by the persistent and sustained pressure of the small body of, I think, six persons known as Camden Housing Action, who had expressed quite strongly worded views critical of the Part VI contracts in respect of which the landlords were the lessors. That the housing committee were impressed by the activities of that group Lord Widgery CJ thought beyond question, for in the course of his judgment he said²⁰: c

'As a result of this pressure—and it seems to me there is no doubt it was as a result—the housing committee of Camden decided to make investigations of the terms of letting in the houses with which Messrs Frey were associated.' d

For my part I am quite prepared to accept this view expressed by Lord Widgery CJ, but who is to say that it is wrong for a council to allow their determination to be affected by the view expressed—it may be persistently and vociferously and strongly—by a pressure group? Is that enough of itself to indicate that the council are allowing themselves to be overborne and persuaded to make a decision which is mala fide or vexatious or capricious? Answering the question I have myself posed, I would have thought it must depend on what the action group say and how they say it, and, insofar as their assertion could be tested, the extent to which it appeared to have some foundation? If it was manifestly baseless, if there were suspicion of some ulterior motive, be it financial or political or inspired solely by personal aggrandisement, then of course the council should dismiss it from their minds. But if what was said by the action group provided food for thought, and if it appeared to have at least some reasonable degree of support, for my part I reject the idea that it would be improper to be influenced by what the action group said. In this particular case and in relation to this particular pressure group, I am not satisfied that the council, when (as I am prepared to accept) they were impressed by what they said, were thereby led into doing something which they ought not to do. e

a Despite the lack of anything like an amplitude of knowledge on the part of the council, there was, in my judgment, sufficient material to enable them to arrive at the conscientious conclusion, uninfluenced by any unworthy considerations, that these references should be made. Unlike *Bell's* case²¹, they had information of the size of rooms, of rents, and they had particulars of the extent of the furnishings. They had the view expressed by those who had visited the premises that the rents were a little high. They had their own knowledge of the pressing need of furnished accommodation in the district. When all those matters are considered in combination, as I take it the housing committee considered them, and when I ask myself the question, 'In the light of all that material, is it established that they acted capriciously or vexatiously?'—for lack of bona fides is expressly disclaimed by counsel for the landlords—the answer to which I am driven is that it is not so established.

c I assiduously refrain from hinting at even the approach to the outline of a shadow of an idea as to what I think ought to be, or probably will be, the conclusion of the rent tribunal in any one of these 22 cases, but that the statutory body should have an opportunity to adjudicate on this matter of considerable public interest I have no doubt. For those reasons, I concur with Salmon LJ in holding that this appeal should be refused.

d **STAMP LJ.** I reach the same conclusion by a somewhat different route. Were the matter untouched by authority I would take the view that just as s 72 of the Rent Act 1968 plainly confers an unrestricted right on the tenant and landlord to refer a tenancy agreement to the rent tribunal, so it confers an unrestricted right on the local authority to do so; and a right which the council, as the housing authority, had a duty, in a proper case, to exercise. One may search the Act in vain to find any condition or provision which fetters or limits the council's action in this regard. It is to be observed that all that is done when resort is had to s 72 is to refer to the competent statutory body the fixing of the rent. I would have thought it wrong in principle for the High Court, on an application for an order of prohibition to prevent the council from referring a rent or rents to the appropriate statutory tribunal, to go into the merits of the decision to refer; for if the reference is without merit it must be assumed that the rent tribunal will take no action on it. In determining whether or not to invoke the section the council are in no sense exercising a judicial function and they are not even, as I see it, exercising such a discretion as a licensing authority exercise, or as a local authority exercise in relation to Acts such as the Town and Country Planning Act or as has to be exercised in determining whether to make a compulsory acquisition.

g In my view, such cases as *Associated Provincial Picture Houses Ltd v Wednesbury Corp*¹ are different sorts of cases. In cases such as those the authority in reaching a decision have to weigh, and have an obvious duty to weigh, one thing against the other, and there is a body of legislation guiding them in the performance of their powers or duties. Here there is no such body of legislation and, as I have said, I find nothing in the Rent Act 1968 which suggests to me that the council have any duty to the landlords in determining whether to exercise their right to refer or not.

h If, therefore, the matter was res integra, I would myself take the view that in the absence of any allegation that the council had been acting ultra vires or mala fide, the present proceedings were misconceived and failed in limine. Reliance, however, was placed on the decision of the Divisional Court in *Bell's* case²⁰, which has already been referred to by Salmon and Edmund Davies LJ. So far as the decision in that case rested on the view that the local authority there were not acting bona fide, it is, so I will assume without expressing an opinion, perhaps not open to criticism; but I cannot accept, as appears to be suggested in a part of the judgment heavily relied on by the landlords in this case, that the court has a general power to examine the

²¹ [1949] 1 All ER 720, [1949] 1 KB 666

¹ [1947] 2 All ER 680, [1948] 1 KB 223

proceedings of local authorities to see whether in coming to a purely administrative decision not affecting rights they have taken into account all those factors which ought to be taken into account in order to arrive at a wise or correct decision. The authorities cited by the court in *Bell's case*² in support of the general proposition that the court can interfere with the exercise of powers by local authorities were *Biddulph v St George's, Hanover Square*³, and *Dormer v Newcastle-upon-Tyne Corpn*⁴. In both of those cases the plaintiff was complaining that the action of the defendants constituted a tort, and read in that context the dicta in those cases relied on by the court in *Bell's case*² do not, in my judgment, support the general proposition. Manifestly there can be no general rule that the court can in any case, and on the application of whomsoever, interfere with the exercise of the local authority's powers. As is pointed out in Professor de Smith's *Judicial Review of Administrative Actions*⁵, the administrative process is not, and cannot be, a succession of justiciable controversies. Public authorities are set up to govern and administer and if their every act or decision were to be reviewable by a judicial body the business of administration could be brought to a standstill. Aliter if the act or decision affects a right.

There being no evidence in this case that the council acted *ultra vires* or dishonestly, so that that situation does not fall to be considered, I would not enter into the question of whether they did or did not make mistakes in coming to the conclusion to refer to the tribunal the tenancy agreements here in question. I too would dismiss the appeal.

Ronald Bernstein QC. My Lord, if I may be allowed to mention one point in my argument which none of your Lordships has mentioned, and that is that in the circumstances shown in the additional affidavits which your Lordships gave me leave to read, in fact the authority did not consider each of the 22 cases separately but considered them as a block and made a block reference. If I may say so with respect, that point is in effect comprised within Stamp LJ's judgment, but not within the judgments of Salmon and Edmund Davies LJ.

SALMON LJ. Thank you Mr Bernstein for drawing our attention to it, but I thought it followed from what I said—at least I intended it to—that to my mind it is not established that this was a block reference within the meaning of 'block reference' as used in *Bell's case*². The details of each particular tenancy were before the council and, although they may not have voted on each case separately, I do not think it follows that that is a block reference.

EDMUND DAVIES LJ. I too am sorry that I wholly failed to carry out my intention of dealing with the important point of counsel for the landlords that here there was a block reference and that, in accordance with *Bell's case*², this was a wrong thing to do. Like Salmon LJ I had it clearly in mind, for I also thought that the council, with the material before them, must have separately considered each of the cases. I do not accept any proposition to the effect that unless they severally announce a decision in respect of each of the cases in turn but reserve the announcement of their conclusion until they have considered all of them, a block reference such as that condemned in *Bell's case*⁶ is the result. Had I done what I intended, that is what I would have said.

STAMP LJ. And I would have agreed with Salmon and Edmund Davies LJ.

Appeal dismissed. Leave to appeal refused.

Solicitors: *M S Marks & Co* (for the landlords); *Town Clerk, London Borough of Camden.*

F A Amies Esq Barrister.

2 [1949] 1 All ER 720, [1949] 1 KB 666

3 (1863) 3 De GJ & Sm 493

4 [1940] 2 All ER 521, [1940] 2 KB 204

5 2nd Edn (1968), p 3

a Crawford and another v A E A Prowting Ltd

QUEEN'S BENCH DIVISION

BRIDGE J

3rd DECEMBER 1971

- b *Arbitration – Practice – Want of prosecution – Dismissal of claim – Power of arbitrator to dismiss claim for want of prosecution – Prolonged and unwarranted delay by claimants to prosecute claim – No failure by claimants to comply with order of arbitrator to take interlocutory step before a given date.*

A firm of builders constructed a house for the claimants pursuant to a contract containing an arbitration clause in common form. The claimants complained that the work was defective and in 1966 an arbitrator was appointed. Requests were made by the builders' solicitors for particulars of the damage claimed but without success. In November 1970 the builders applied to the arbitrator to strike out the proceedings and dismiss the claim for want of prosecution. The arbitrator found that there had been prolonged and unwarranted delay in the prosecution of the arbitration wholly or mainly caused by the claimants, but he declined to strike out. On a special case stated for the court to determine whether the arbitrator should or should not strike out the proceedings and dismiss for want of prosecution,

- c **Held** – In the absence of any default on the part of the claimants in complying with an order to take some interlocutory step by a given date, the arbitrator had no power to dismiss the claim for want of prosecution, for in arbitration proceedings it was for both parties, having agreed that the arbitrator should resolve their differences, to obtain such interlocutory directions as were appropriate to enable the matter to be prepared for trial; accordingly it was not within an arbitrator's jurisdiction to order that the claim be dismissed for a mere delay on the part of the claimants independently of any failure to comply with an order made by the arbitrator (see p 1203 j to p 1204 a c and j, post).

f Notes

For dismissal of actions for want of prosecution, see 30 Halsbury's Laws (3rd Edn) 410, 411, para 771.

For the implied powers of an arbitrator, see 2 Halsbury's Laws (3rd Edn) 32, para 70.

Cases referred to in judgment

- g *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 1 All ER 543, [1968] 2 QB 229, [1968] 2 WLR 366, Digest (Cont Vol C) 1091, 2262b.
Crighton and The Law Car & General Insurance Corp'n Ltd, Re [1910] 2 KB 738, 80 LJKB 49, 103 LT 62, 2 Digest (Repl) 575, 1078.
Wood v Leake (1806) 12 Ves 412, 33 ER 156, 2 Digest (Repl) 562, 964.

Special case stated

- h This was a special case stated for the decision of the High Court pursuant to s 21 (1) (a) of the Arbitration Act 1950 by the arbitrator (George Fairweather Esq) on a question of law which arose in the course of the reference of a dispute between Anthony Davenport Crawford and Jean Margaret Crawford ('the claimants') and A E A Prowting Ltd ('the builders').

- i The arbitrator found the following facts. The dispute arose out of a building contract to erect a dwelling-house for the claimants. The work provided for by the contract was completed by the builders in December 1960. The letter before action was dated 4th June 1965. The arbitrator was appointed on 5th April 1966. The points of the claim were served on 17th May 1966. The lists of documents were exchanged by 17th October 1966. In spite of repeated promises to do so, the claimants' solicitors failed to provide to the builders' solicitors particulars of the damage

claimed, to which the builders were plainly entitled. These particulars were first requested by the builders' solicitors on 29th March 1967 and were repeatedly requested thereafter. On 10th January 1968, at an appointment for directions, the arbitrator made no order and it was left to the parties to arrange a fresh appointment to fix a date for the hearing. Neither party arranged a fresh appointment for this purpose and no date was fixed. Between 10th January 1968 and 10th November 1970 no steps whatever were taken in the arbitration except by the builders who on 10th November 1970 applied to the arbitrator to strike out the proceedings and dismiss the claim for want of prosecution. There was prolonged and unwarranted delay in the prosecution of the arbitration from 17th October 1966 to 10th November 1970 when the arbitrator heard the builders' application. This delay was wholly or in the main caused by the claimants. The builders alleged that their position had been seriously prejudiced in the conduct of their defence to the claim by the delay in proceeding to arbitration.

The builders contended before the arbitrator that he ought, following the principles laid down in *Allen v Sir Alfred McAlpine & Sons Ltd*^a and other authorities, to strike out and dismiss the claim for want of prosecution, but the arbitrator declined to do so. The question for the decision of the court was whether or not the arbitrator should have struck out the proceedings and dismissed the claim for want of prosecution.

D J Blunt for the claimants.

P D J Scott for the builders.

BRIDGE J. These proceedings take the form of an application to the court to determine a question of law raised by a special case stated by an arbitrator pursuant to s 21 of the Arbitration Act 1950. The matter arises in this way. In 1960 the present applicants to the court, that is, A E A Prowting Ltd ('the builders'), who are building contractors, entered into an agreement with Mr and Mrs Crawford, the respondents in this court, claimants in the arbitration, to build a house for them. They built a house and after it was built complaints were made by the claimants that the work had been defectively done. The contract under which the house had been built contained an arbitration clause. Although this does not appear from the case stated, I have been shown the document. It is an arbitration clause in common form referring to arbitration any dispute or difference arising between the parties touching and concerning the agreement, which was the building contract. Nothing turns on its particular provisions.

After the dispute arose the arbitrator was appointed in April 1966. The points of claim were served in May. Lists of documents were exchanged in October. Then the case finds that there were repeated requests by the builders' solicitors for particulars from the claimants of the damage claimed, and although such particulars were promised, they were never given. Apart from correspondence passing in relation to that matter, nothing appears to have been done by either party following the exchange of documents until 10th January 1968, when there was an appointment for directions before the arbitrator who (and I quote from the case) 'made no order and it was left to the parties to arrange a fresh appointment to fix a date for the hearing'.

Neither party arranged a fresh appointment for this purpose and no date was fixed. The next thing that happened was that on 10th November 1970 the builders applied to the arbitrator to strike out the proceedings and dismiss the claim for want of prosecution. This the arbitrator declined to do, and it is because the builders are aggrieved at his refusal to accede to their application to dismiss the claim for want of prosecution that they bring the matter before this court.

^a [1968] 1 All ER 543, [1968] 2 QB 229

a Now apart from the bare outline of the history of the proceedings which I have related, the only finding of fact in the case relevant to the question whether or not it would have been proper to dismiss the claim for want of prosecution is a statement that there was prolonged and unwarranted delay in the prosecution of the arbitration from 17th October 1966 (which, it will be remembered, was the date when documents were exchanged) to 10th November 1970 (the date of the hearing of the application to dismiss) and that this delay was wholly or in the main caused by the claimants.

b As regards prejudice to the builders, the case contains a paragraph in these terms:

‘The [builders] say that their position has been seriously prejudiced in the conduct of their defence to the Claim by the delay in proceeding to arbitration.’

The question for the decision of the court is expressed as:

c ‘... whether or not I ought to strike out the proceedings and dismiss the claim for want of prosecution.’

It is at once apparent from those features of the case stated, as counsel for the builders was the first to recognise in opening his case before me, that the case does not embody any question of law in a form which he could possibly ask the court to decide

d on the factual materials contained within the case. Accordingly, the most he can invite me to do, and what he does invite me to do, is to remit the matter to the arbitrator, requiring him to make a finding one way or the other whether or not the builders have been prejudiced by the delay which has occurred in their defence to the claim, and I think he would say also, to indicate, if his decision not to dismiss the claim was a purported exercise of discretion, the basis on which he thought it proper,

e having regard to the prolonged and unwarranted delay, and prejudice (if he finds there was prejudice), to exercise discretion in the builders’ favour.

Now it appears that when the matter was argued before the arbitrator on the hearing of the builders’ application no submission was made to him to the effect that in the circumstances there was no power available to him to dismiss for want of prosecution. That submission was, however, made at a later stage when the parties

f appeared before the arbitrator to argue the question whether or not he should state a case. I suppose it is conceivable, although it seems unlikely, that the arbitrator’s decision might have been based on a view of his own that he had no power, but certainly the language of the case does not suggest that. Nevertheless, the main ground on which counsel for the claimants resists the application that this case stated should be remitted to the arbitrator by the court for a further and better statement of the

g case, is that, as he says, there is in any event no power in an arbitrator in such circumstances as these, no express power to that effect having been conferred on him by the arbitration agreement, to dismiss a claim for want of prosecution. Accordingly, it would be futile to remit the case to the arbitrator seeking to discover the basis of facts on which he exercised his discretion if in truth he had no discretion to exercise but was bound as a matter of law and as a matter of jurisdiction to dismiss the

h builders’ application.

It is common ground that the power to dismiss for want of prosecution is not found expressly in the terms of the arbitration agreement, nor can it be collected from any provision of the Arbitration Act 1950. I have been referred to the provisions in particular of s 12 of that Act which embodies a relatively elaborate code embracing what one may call the ancillary and interlocutory powers of arbitrators amplified

j by s 12(6) of that section. One of the most important provisions of s 12 which I bear in mind throughout is that:

‘(1) Unless a contrary intention is expressed [in the arbitration agreement], every ... agreement shall ... be deemed to contain a provision that the parties to the reference ... shall ... do all other things [other, that is, than matters

specifically enumerated earlier in the subsection] which during the proceedings on the reference the arbitrator or umpire may require.' a

The arbitrator, therefore, is put fairly and squarely in a position to control, as regards the interlocutory steps, the conduct of an arbitration.

Now the submission of counsel for the builders rests first on a number of passages from the well-known decision of the Court of Appeal in *Allen v Sir Alfred McAlpine & Sons Ltd*¹, the locus classicus as to the principles which govern the exercise by the court of its undoubted power to dismiss for want of prosecution any proceedings in court. Those principles are well known. It is also well known that the primary foundation for the exercise of the court's jurisdiction to dismiss for want of prosecution is a default on the part of a plaintiff in complying with one or more of the numerous rules of court which at different stages in the process of litigation put an obligation fairly and squarely on the plaintiff and on the plaintiff alone to take the next step, and to take it in due time, which is necessary to secure the progress of the litigation. But counsel for the builders submits that the jurisdiction of the court does not depend on a default in compliance with the rules alone; there is also an inherent jurisdiction in the courts to act where there has been unreasonable delay on the part of the plaintiff even though not involving any specific default under the rules. The submission is, I think, well founded. It can be gathered by considering first a short passage from the argument of counsel who appeared for the first defendants in one of the three actions which were before the court on that occasion. He submitted in terms² 'This is not a case where one could proceed for breach of any one express rule'; but he argued: b

'The court can act under its inherent jurisdiction notwithstanding that there has been no breach of any express rule where it is satisfied that there has been excessive delay...'

Then there is a passage from the judgment of Lord Denning MR³, which I need not read, which shows what was the particular delay in that case on which counsel for the first defendants relied, not involving any specific breach of rule, which was nevertheless held to be such a delay as gave a good ground for exercising the court's jurisdiction. Finally, there is a passage from the judgment of Salmon LJ which deals with the matter in terms, where he says⁴: c

'A defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff's failure to comply with the Rules of the Supreme Court or (b) under the court's inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply.'

Then there follows Salmon LJ's well-known statement of what those principles are. d

The next step in counsel's argument is to draw attention to a passage from a decision of the Divisional Court in *Re Crighton and The Law Car & General Insurance Corpn Ltd*⁵ where Scrutton J said: e

'A dispute or difference having arisen, a member of the Bar was appointed arbitrator, and he ordered the parties to define the difference by delivering to each other points of claim and defence. In my view he had a right to do that, both by his inherent powers as a judicial officer and under s. 2 coupled with the First Schedule, clause f, of the Arbitration Act, 1889.'

1 [1968] 1 All ER 543, [1968] 2 QB 229

2 [1968] 2 QB at 236

3 [1968] 1 All ER at 551, [1968] 2 QB at 252

4 [1968] 1 All ER at 561, [1968] 2 QB at 268

5 [1910] 2 KB 738 at 745 f

a So it is submitted the court has an inherent power, for delay independently of default under the rules on the part of a plaintiff, to dismiss an action for want of prosecution when there has been inordinate and inexcusable delay on the plaintiff's part causing prejudice to the defendant; so by parity of reasoning, since an arbitrator has inherent power as a judicial officer, at all events, to do all such things as are necessary to the proper conduct of the litigation before him and as do not require the intervention of the court with its wider powers, accordingly, an arbitrator must be taken to have
b inherent power to dismiss for want of prosecution a claim in an arbitration made by a claimant. It is put on this basis, that one of the fundamental duties of an arbitrator is to act fairly and if there has been inordinate and inexcusable delay on the part of a claimant, such that the respondent to the claim in the arbitration is seriously prejudiced in his defence, then unless one supposes that the arbitrator has the inherent
c power contended for, there is no means whereby he can act fairly because it must be unfair for him to permit a claim in the arbitration to proceed at a time when by the claimant's delay the respondent is seriously prejudiced in his defence to it.

Now this, if I may say so, seems to me to be a very powerful argument, but in the end I reject it and I reject it basically for one reason. Its validity rests on the assumption that in an arbitration, as in proceedings in court, and apart from any express
d obligation being put on him, there is a duty on the claimant to the exclusion of the respondent to promote the progress of the arbitration and correspondingly it is assumed as the basis of counsel for the builders' argument, that the respondent to the arbitration can sit by and do nothing, letting the sleeping claimant dog lie until he is ready to wake him up with his application to dismiss for want of prosecution. In support of the contention that I should assume that in this respect an arbitration
e stands on all fours with an action in the courts, counsel for the builders has relied particularly on a passage, again from *Allen's case*⁶, this time from the judgment of Diplock LJ, where, having referred to particular features of litigation, his Lordship continued⁷:

f 'It is thus inherent in an adversary system which relies exclusively on the parties to an action to take whatever procedural steps appear to them to be expedient to advance their own case, that the defendant, instead of spurring the plaintiff to proceed to trial, can with propriety wait until he can successfully apply to the court to dismiss the plaintiff's action for want of prosecution on the ground that so long a time has elapsed since the events alleged to constitute the cause of action that there is a substantial risk that a fair trial of the issues will not be possible.'

g For my part, I do not believe that their Lordships in *Allen's case*⁶ ever had the conduct of arbitrations in contemplation; and once one considers the position it does seem to me that there is a fundamental difference between the nature of the duties on the parties in relation to interlocutory progress in an action on the one hand and in an arbitration on the other. Even though it be right to say that this power when exercised by the court may be exercised because of delay as such on the part of a plaintiff
h independently of his default under the rules, the whole pattern of behaviour in litigation in court is conditioned by the pattern which the rules lay down, and it must be primarily from those rules that the position arises that the onus is put fairly and squarely on the plaintiff to keep the litigation moving. It must be primarily from those rules, although not necessarily exclusively, that the defendant derives his
j relatively privileged position of being able to sit back and do nothing and then, if such a long time has elapsed that he is prejudiced thereby, to come along and secure the dismissal of the action. But it is essentially different, to my mind, in an arbitration when, although in a sense there may be a heavier duty on the claimant to pursue his

⁶ [1968] 1 All ER 543, [1968] 2 QB 229

⁷ [1968] 1 All ER at 555, [1968] 2 QB at 258

claim than on the respondent to take steps for his part, nevertheless it is for both parties, having agreed that the arbitrator shall resolve their differences, to obtain from the arbitrator such interlocutory directions as are appropriate to enable the matter to be prepared for trial. I am particularly impressed, although my decision is one of principle, by the facts stated here which illustrate well the foundation for the principle. The parties came before the arbitrator for directions in the ordinary way in January 1968; no directions were given. One does not know why, but if the builders had wanted directions to be given at that stage, they could have pressed for them and, it may be, got them, and again it accords with one's common experience and recollection of how an arbitration is conducted that after that appointment it was left to the parties—not to the claimants but to the parties—to arrange a fresh appointment to fix a date for hearing, and no such appointment was ever suggested by either party. a
b
c

It seems to me that in that state of affairs, this being an ordinary arbitration where interlocutory obligations could only arise from specific orders made by the arbitrator, it was not within the arbitrator's jurisdiction for a mere delay on the part of the claimants independently of any failure to comply with an order made by the arbitrator to order that the claimants' claim be dismissed. c

It is unnecessary for me to go further and reach a conclusion as to what would be the position arising if there had been a default in such compliance and what would be the sanction available to an arbitrator to enforce compliance with his interlocutory orders. Counsel for the claimants has drawn my attention to a passage from Russell on Arbitration⁸, where it is stated that 'Every arbitrator is authorised, by the nature of his office, to proceed *ex parte* for good cause'. And authority is referred to in support of that in an old case of *Wood v Leake*⁹, where Lord Erskine LC giving judgment observed: d
e

'. . . every arbitrator had the power to proceed *ex parte*; if one of the parties, though duly summoned, will not attend, with a view to prevent justice, and defeat the object of the reference. The arbitrator is to judge of the discretion of it.'

It is suggested with force by counsel for the claimants here that that is the ultimate sanction whereby an arbitrator may effectively enforce compliance with his interlocutory orders or give an award against the party in default if the default persists. Counsel for the builders submits that that will not do in that if a claimant fails to comply with an order to particularise his claim adequately, it would be absurd to appoint a day for hearing and require the other party to come along with all his witnesses when he does not yet know what the claimant's claim is. I think there is force in that, but it seems to me the answer may well be (and it is unnecessary to decide it) that an arbitrator can require that some interlocutory step—the delivery of a pleading, for example—shall be taken by a certain date, intimating that failure on the claimant's part to take the step by that date will result in an *ex parte* hearing on that date which, in the absence of proper particularisation of the claimant's claim, would necessarily result in an award in favour of the respondent. That may be rather a cumbrous way of achieving the same effect as the courts achieve more directly by the exercise of their power to dismiss for want of prosecution. f
g
h

For the reasons I have sought to explain, I am not satisfied that, at all events in the absence of any default on the part of the claimants in complying with any order made by the arbitrator that they should take some interlocutory step by a given date, there is any power in the arbitrator to dismiss their claim. For those reasons, I have reached the conclusion that counsel for the claimants is right in submitting that it j

⁸ 18th Edn (1970), p 222

⁹ (1806) 12 Ves 412

a would be idle to remit this case to the arbitrator for further and better findings to elucidate the grounds on which he thought, assuming that he had a power, that his discretion should be exercised against using it.

Judgment for the claimants. Leave to appeal to the Court of Appeal granted.

b Solicitors: Milners, Curry & Gaskell (for the claimants); Vincent & Vincent (for the builders).

Janet Harding Barrister.

Inland Revenue Commissioners v Helical Bar Ltd

c HOUSE OF LORDS

LORD WILBERFORCE, VISCOUNT DILHORNE, LORD PEARSON, LORD CROSS OF CHELSEA AND LORD SALMON

1st, 2nd, 22nd MARCH 1972

d *Income tax – Accounting period – Alteration of period of account of company – Decision and direction of Commissioners of Inland Revenue fixing periods of account – Appeal to Special Commissioners – Hardship – Power of Special Commissioners to grant such relief as just – Effects of alteration in accounting period – Double use of nine month period of profits in assessment to tax – Increase in liability to corporation tax – Income Tax Act 1952, s 127 (2) (b), (3), as amended by the Income Tax Management Act 1964, s 17 (3), Sch 4.*

e The taxpayer company, which had previously made up its accounts to 31st January in each year, decided to change its accounting date to 30th April. The first new accounting period was 31st January 1964 to 30th April 1965. In consequence the Commissioners of Inland Revenue ('the board') made a decision under s 127 (2) (b)^a of the Income Tax Act 1952 (which was unappealable) that in respect of the year of assessment 1965-66 the company's basis period should be the year ending 30th April 1964. The board further decided, under s 127 (3), that the basis period for 1964-65 should be the year ending 30th April 1963. The taxpayer company appealed to the Special Commissioners against an assessment to income tax for 1964-65, the appeal

a Section 127, so far as material, provides:

g '(1) Subject to the provisions of this and the three next following sections, tax shall be charged under Cases I and II of Schedule D on the full amount of the profits or gains of the year preceding the year of assessment.

h '(2) Where, in the case of the trade, profession or vocation, an account has or accounts have been made up to a date or dates within the period of three years immediately preceding the year of assessment—(a) if an account was made up to a date within the year preceding the year of assessment and that account was the only account made up to a date in that year and was for a period of one year beginning either at the commencement of the trade, profession or vocation, or at the end of the period on the profits or gains of which the assessment for the last preceding year of assessment was to be computed, the profits or gains of the year ending on that date shall be taken to be the profits or gains of the year preceding the year of assessment; (b) in any case to which the provisions of paragraph (a) do not apply, the Commissioners of Inland Revenue shall decide what period of twelve months ending on a date within the year preceding the year of assessment shall be deemed to be the year the profits or gains of which are to be taken to be the profits or gains of the year preceding the year of assessment.

j '(3) Where the Commissioners of Inland Revenue have given a decision under paragraph (b) of subsection (2) of this section and it appears to them that in consequence thereof the tax for the last preceding year of assessment in respect of the profits or gains from the same source should be computed on the profits or gains of a corresponding period, they may give directions to that effect and an assessment . . . or repayment of tax shall be made accordingly . . .'

being brought under s 127 (3) of the 1952 Act, as amended by s 17 (3)^b of, and Sch 4 to, the Income Tax Management Act 1964. The commissioners noted that the direction given under s 127 (3) of the 1952 Act as to the basis period for 1964-65 resulted in the basis periods for 1963-64 and 1964-65 overlapping by nine months (1st May 1962 to 31st January 1963) and that in consequence of the decision under s 127 (2) (b), the charge to corporation tax under the Finance Act 1965 became effective from 1st May 1964 rather than 31st January 1965 (the date on which the basis period for 1965-66 would have ended if the taxpayer company had not changed its accounting date). They stated that 'looking at the overlap in the light of the Board's decision relative to 1965-66' and the consequential charge to corporation tax from 1st May 1964 'the profits of the nine months' overlap were being in a real sense charged to tax twice over'. The commissioners held this to be unjust and therefore deducted £78,798 from the amount of the 1964-65 assessment, in effect reducing the overall amount of tax to which the taxpayer company was liable to that which would have been payable if the 1965-66 basis period had ended on 31st January 1965 and the charge to corporation tax had commenced from that date.

Held – The commissioners' decision was wrong in law and no basis had been shown for reducing the assessment; in granting 'such relief, if any, as is just' under Sch 4 to the 1964 Act, the commissioners had to consider whether there was any injustice in the assessment for 1964-65 and, if so, how it was to be relieved against; the double use of profits for 1st May 1962 to 31st January 1963 for two years of assessment could not in itself result in injustice; furthermore any hardship arising from the overlap in 1964-65 of corporation tax and income tax was inherent in the nature of the corporation tax itself and the taxpayer company was in no worse position than any other company whose 1965-66 basis period ended on 30th April 1964 rather than later; if the injustice lay, not in the date itself but the change to that date, this arose not from the board's determination under s 127 (3) but from the decision under s 127 (2) (b) which was unappealable; in either case the impact of corporation tax and its remoter consequences had no bearing on the justice or injustice of the assessment under appeal (see p 1208 e f and h and p 1209 c to j, post).

Decision of the Court of Appeal [1971] 2 All ER 447 reversed.

Notes

For changes in accounting periods as affecting income tax, see 20 Halsbury's Laws (3rd Edn) 127, 128, para 225.

For the Income Tax Act 1952, s 127, see 31 Halsbury's Statutes (2nd Edn) 122, and for the Income Tax Management Act 1964, s 17, Sch 4, see 44 Halsbury's Statutes (2nd Edn) 422, 428.

In relation to the year 1970-71 and subsequent years of assessment, the Income Tax Act 1952, s 127, and the relevant provisions of the Income Tax Management Act 1964, Sch 4, have been replaced by the Income and Corporation Taxes Act 1970, s 115.

Appeal

This was an appeal by the Crown against an order of the Court of Appeal (Sachs and

^b Section 17 (3) of the Income Tax Management Act 1964 provides: 'The enactments mentioned in Schedule 4 to this Act shall have effect subject to the amendments there specified ...' Schedule 4, so far as material, provides:

'Section 127 (3) (Basis period for tax under Schedule D, Cases I and II)

'1. The decision whether or not to give a direction under the subsection shall be subject to an appeal to the General or Special Commissioners who shall grant such relief, if any, as is just. Subject to paragraph 2 below, the appeal shall be brought within thirty days of receipt of notice of the decision.

'2. If the decision is to give a direction, and an assessment is made in accordance with the direction, the appeal against the decision shall be by way of an appeal against the assessment.'

a Buckley LJJ, Russell LJ dissenting) dated 9th December 1970 and reported [1971] 2 All ER 447 allowing an appeal by the taxpayer company, Helical Bar Ltd, against a decision of Pennycuik J dated 3rd December 1969 and reported [1970] 1 All ER 1149 allowing an appeal by the Crown by way of case stated against a decision of the Special Commissioners of Inland Revenue. On an appeal by the taxpayer company against an assessment to income tax of £114,099 less capital allowances for the year 1964-65, b brought under the Income Tax Act 1952, s 127 (3), as amended by the Income Tax Act 1964, s 17 (3) and Sch 4, the Special Commissioners had held that £78,798 should be deducted from the profits of the taxpayer company assessable to income tax for that year. The facts are set out in the opinion of Lord Wilberforce.

c C N Beattie QC and P W Medd for the Crown.
Heyworth Talbot QC, H Major Allen QC and A E W Park for the taxpayer company.

Their Lordships took time for consideration.

22nd March. The following opinions were delivered.

d **LORD WILBERFORCE.** My Lords, this appeal concerns an assessment to income tax under Sch D, Case I, of the taxpayer company for 1964-65, which the Special Commissioners, on appeal by the company, acting under s 127 (3) of the Income Tax Act 1952, reduced by £78,798.

The taxpayer company, which previously made up its accounts to 31st January in each year, after 31st January 1964 changed its accounting date to 30th April. e The first new period was thus from 31st January 1964 to 30th April 1965. This brought into play s 127 (2) (b) of the Income Tax Act 1952, and under it the Commissioners of Inland Revenue decided that, in respect of the year of assessment 1965-66, the company's basis period should be the 12 months ending on 30th April 1964. The commissioners were not bound to select this period, but there is no doubt that they were entitled to do so and that their decision was unappealable. The commissioners f then proceeded, under s 127 (3) of the Act, to deal with the last preceding year of assessment, i e 1964-65. They determined that the basis period for this year of assessment should be the 12 months ending 30th April 1963. This determination was, indisputably, valid, but, under the terms of s 127 (3), as amended, an appeal lay to the Special Commissioners who may, under the subsection, grant such relief, if any, as may be just.

g The relevant figures are as follows:

A. <i>Company's accounting periods</i>		£
1st February 1962 to 31st January 1963		104,867
1st February 1963 to 31st January 1964		141,203
1st February 1964 to 30th April 1965 (15 months)		95,654
h B. <i>Tax assessments</i>		
1963-64 (measured on year to 31st January 1963)		104,867
1964-65 (measured on year to 30th April 1963)		113,951
1965-66 (measured on year to 30th April 1964)		125,033

i The relevant law is contained in s 127 (2) and (3) of the Income Tax Act 1952, the latter as amended by s 17 of, and Sch 4 to, the Income Tax Management Act 1964. It is necessary, in addition, to have regard to the Finance Act 1965, in particular ss 46 (1), 49 (3), 80 (2) and 87. The effect of the latter Act was that the company became liable, in addition to income tax in respect of the sums mentioned, to corporation tax as from 1st May 1964. This fell to be assessed on the actual profits for that

period, and over a 12 month period amounted to tax on £76,523 (i.e. 12/15ths of £95,654 appearing above).

The Special Commissioners' decision: they noted, first, that the direction given as to the basis period for 1964-65 resulted in the basis periods for 1963-64 and 1964-65 overlapping by nine months, i.e. 1st May 1962 to 31st January 1963. (The apportioned profits for this period were some £78,000.) They then proceeded as follows:

'In the present case, looking at the overlap in the light of the circumstances of the Board's decision relative to 1965/66 and the consequential charge to Corporation Tax as from 1st May, 1964, we came to the conclusion that the profits of the nine months' overlap were being in a real sense charged to tax twice over, and this we considered was, in the particular circumstances, unjust. In all the circumstances it seemed to us that an appropriate way of relieving this injustice was to deduct £78,798 from the amount of the 1964/65 assessment.'

This decision was reversed by Pennycuik J¹ but restored by a majority of the Court of Appeal².

My Lords, I am unable to support the latter decision. Under s 127 (3) the commissioners, after they have decided, as they may or may not do, to fix a basis period different from the company's accounting period, have to make an assessment for the relevant year. The relevant year was 1964-65 and no other year. The appeal is formally against the decision to give the direction, but it is prescribed that if (as must be the case where a direction has been given) an assessment is made in accordance with the direction, the appeal against the decision is by way of an appeal against the assessment. Thus the appeal is against the assessment of £113,951. The reference to 'such relief, if any, as is just' shows that what the Special Commissioners have to consider is whether there is any injustice in the assessment and, if so, how it is to be relieved against.

Now, as appears from the figures given above, the assessment made by the Commissioners of Inland Revenue (£113,951) was in fact lower than that which would have been made if the company's original dates had stood (£141,203), but there can be no doubt that the Special Commissioners on appeal are not obliged to stop at this simple comparison. They may, indeed should, look at the assessments for other neighbouring periods (old and new) to see if there is any injustice, but the injustice, if any, must be in the assessment under enquiry. To illustrate: the Special Commissioners' practice is to take an average of the profits of several years (1) under the old system and (2) under the new, and if they find that the latter is significantly higher than the former (as it may be where there have been fluctuations in profits), they grant relief. The relief they grant is, and I would think almost necessarily must be, by way of reduction of the assessment in question; I cannot see how they can interfere with any other assessment not before them. I remark in passing that the result of the commissioners' decision is to take as the taxable profits for 1964-65 a sum of £35,000, which represents the profits for a period of three months.

I return to the Special Commissioners' decision and to the question whether they made any error in law.

It is clear, in the first place, that no injustice arises from the mere fact that there was a nine months' overlap, i.e. that some £78,000 of profits, those from 1st May 1962 to 31st January 1963, entered into two years' assessments. This double computation, or double use of profits for two years' assessments, is a phenomenon frequently found in income tax law: it may happen whenever there is a change of accounting period. Injustice can result if the doubly used profits are unusually high (not this case) but not from the double use itself. I need not elaborate on this because all four judges below agree that this fact alone cannot give rise to injustice.

¹ [1970] 1 All ER 1149, [1970] 1 WLR 294

² [1971] 2 All ER 447, [1971] 2 WLR 688

a The factor which does, it is said, have this effect arises from the introduction of corporation tax. This is because, for the year beginning 1st April 1964, the profits of a company come into charge as from the end of the basis period for the purposes of income tax for the assessment year 1965-66. Thus, the earlier in the financial year a company's accounting year ends, the more of its profits are charged, so that this company suffered, to the extent of nine months, by its basis period being brought
b back from 1st January 1965, to 1st May 1964. To this comparatively simple argument there was added another of more sophistication. The effect of the introduction of corporation tax was, it was said, to take away from the company the advantage it would otherwise have had at the end of its trading life—an advantage which would have caused the profits for a period to drop out of charge to income tax. Under the corporation tax system, this drop out does not occur. These two factors, taken
c together, amounted, it was claimed, to an injustice which the Special Commissioners could properly relieve against.

My Lords, I find this claim fallacious. In the first place, any supposed hardship arising from the overlap in the financial year 1964-65 of corporation tax and income tax is inherent in the nature of that tax and is common in some degree to all trading companies. The courts cannot regard as an injustice that which merely flows from
d the nature of a tax as devised by Parliament. Insofar as this company suffers from having its basis period end on 30th April 1964 (rather than later), it suffers in common with any other company with a similar basis date; there can hardly be injustice in denying it a relief which they cannot get. If, finally, the injustice lies not in the date itself, but in the change to that date, then it arises not from the determination of the commissioners under s 127 (3) (which related to the 12 months ending 30th April 1963, but from the decision of the commissioners under s 127 (2), fixing the terminal
e date of 30th April 1964), which decision was unappealable. Whichever way the matter is regarded, the impact of corporation tax and its remoter consequences have no bearing on the justice or injustice of the assessment under appeal.

In my opinion, the Special Commissioners' decision, whether based on the nine months' overlap, or the earlier incidence of corporation tax, or on a combination of
f these two, was wrong in law and there was no basis shown for reducing the assessment. I would allow the appeal.

VISCOUNT DILHORNE. My Lords, I have had the advantage of reading the speech of my noble and learned friend, Lord Wilberforce. I agree with it and there is nothing I wish to add.

g **LORD PEARSON.** My Lords, for the reasons given in the opinion of my noble and learned friend, Lord Wilberforce, I would allow the appeal.

LORD CROSS OF CHELSEA. My Lords, for the reasons given by my noble and learned friend, Lord Wilberforce, I agree that this appeal should be allowed.

h **LORD SALMON.** My Lords, for the reasons given in the opinion of my noble and learned friend, Lord Wilberforce, I would allow the appeal.

Appeal allowed.

j *Solicitors: Solicitor of Inland Revenue; Slaughter & May (for the taxpayer company).*

S A Hatteea Esq Barrister

Karak Rubber Co Ltd v Burden and others (No 2) ^a

CHANCERY DIVISION

BRIGHTMAN J

8th, 9th, 10th, 11th, 14th, 15th, 16th, 17th, 18th, 21st, 22nd, 23rd, 24th, 28th, 29th
30th JUNE, 8th, 9th, 12th, 13th, 14th, 15th, 16th, 19th, 20th, 21st, 22nd, 23rd, 26th, ^b
28th, 29th JULY, 4th, 5th, 6th, 7th, 8th, 11th, 12th, 13th, 14th, 15th, 18th, 19th, 20th,
21ST OCTOBER, 10th NOVEMBER 1971

*Bank – Duty of care – Contractual duty to exercise care and skill – Cheque – Payment –
Duty of bank to make enquiry before paying cheque in proper form – Company's cheque
signed by authorised signatories – Circumstances in which bank bound to make enquiry –
Reasonable ground for believing that authorised signatories misusing authority to defraud
principal – Company's assets being used for the purchase of company's shares.* ^c

*Trust and trustee – Constructive trustee – Participation in dishonest design – Dishonest
design on part of trustee – Agent of trustee participating in dishonest design – Liability of
agent as constructive trustee – Necessity of proving knowledge of design on part of agent –
Constructive knowledge sufficient – Bank – Company director – Take-over transaction in-
volving purchase by director of company's issued share capital – Director using company's
assets to finance purchase of shares – Director drawing cheque on company's account in
favour of third party to repay loan by third party for purchase of shares – Payment of cheque
by bank – Liability of bank to company as constructive trustee – Circumstances such as to
put reasonable banker on enquiry as to propriety of transaction.* ^d
^e

The plaintiff ('Karak'), a company with a stock exchange quotation, ceased to trade in 1958. Karak had assets consisting of a sum of £120,000 with its bank ('Chartered') and £5,000 in tax reserve certificates. The board of Karak invited offers for the issued capital. A banking company ('Contango') made an offer conditional on 75 per cent acceptance which was submitted by Karak's secretaries ('Williamsons') to the shareholders on 23rd January 1959. On 6th February the offer became unconditional, the sum payable to assenting shareholders being £89,768. Arrangements were made by Contango's bank ('National') for a letter to be prepared confirming that cheques were being despatched to assenting shareholders. The letter was to be handed to Karak at a meeting arranged for 17th February at Williamsons' offices. At this meeting the take-over transaction was to be completed and an extraordinary general meeting of Karak held for the appointment of Contango's nominees as directors in place of the existing board. On 10th February Contango asked Williamsons to arrange for a banker's draft to be issued in favour of National, for the credit of Karak's account, comprising the balance of Karak's cash so that this could be handed to a representative of National at the meeting. On 16th February Contango parted with the benefit of its contract to B in consideration of a sum of £7,000 and thereafter continued to act as undisclosed agents of B. B was informed by Contango that the sum payable by B to Contango on completion would be £98,954. In order to finance the transaction B had come to an arrangement with Minorities, a merchant bank in a small way of business which had overdraft facilities of about £6,000 with the Cannon Street branch of Barclays Bank ('Barclays'). Minorities was run by S who was a customer in good standing with Barclays. On 16th February S, acting on behalf of Minorities, telephoned C, the assistant manager of Barclays, and asked them to issue a draft for £98,954 to be exchanged for another bank draft acceptable to Barclays for £99,504. The Barclays draft was to be delivered to Williamsons' offices on the following day when the Karak take-over meeting was due to take place. This arrangement was quite out of keeping with the usual services provided by ^f
^g
^h
ⁱ

a Barclays to S, or to any other customer, although they had made a similar exchange of drafts at S's request some days earlier. C was given no further details about the transaction other than that Barclays might have the opportunity to open an account with a company having a stock exchange quotation, and that S's client was B, who was chairman of a public company, a chartered accountant and a man of importance and integrity. On 17th February C took Barclays' draft to Williamsons' offices where the
b Karak meeting was taking place. At the meeting a representative of Williamsons had the Chartered cheque, which was in fact a cheque drawn on the Midland Bank in favour of Karak for £115,890 representing the total cash balance of Karak with Chartered. Just before the meeting commenced C handed over the Barclays draft. On receipt of the draft National duly engaged to pay £89,768 to the assenting shareholders. The extraordinary meeting of Karak took place and B was elected to the Karak board.
c The Chartered cheque in favour of Karak then came into the possession of B who specially endorsed it in favour of Barclays. The cheque then came into the hands of C in place of the promised draft. C entertained no suspicion of any impropriety. He was not aware of the transaction underlying the intended exchange of drafts and did not appreciate that the function of the Barclays draft was to pay for Karak shares. He was merely concerned to carry out the instructions of Minorities and obtain acceptable counter-value for the Barclays draft. After the meeting B left with C and went to the Barclays office where B completed a form appointing Barclays bankers to Karak. C issued a cheque book and B then signed a cheque on behalf of Karak in favour of Barclays for the promised £99,504 which was duly credited to Minorities' account to cover the debit in respect of the earlier Barclays draft. In the result the assets of Karak were used for the purchase of its shares and Karak's cash balance was reduced from some £115,000 to just over £16,000. Karak commenced proceedings
e against, inter alios, Barclays claiming replacement of the amount of the Karak cheque, or a like sum by way of damages for negligence.

Held – (i) Barclays were liable to Karak for breach of their contractual duty of care for the following reasons—

f (a) although a bank was obliged to pay on demand a cheque which was in proper form and backed by adequate funds, it did not follow that a paying bank was under an absolute unqualified duty to pay without enquiry; it was, on the contrary, under a contractual duty to exercise such care and skill as would be exercised by a reasonable banker and that care and skill included, in appropriate circumstances, a duty to enquire before paying (see p 1231 c to e, post);

g (b) in exercising its duty of care the paying bank was bound to make such enquiries as might, in given circumstances, be appropriate and practical, where it had, or a reasonable banker would have, grounds for believing that the authorised signatories were misusing their authority for the purpose of defrauding their principal or otherwise defeating his true intentions (see p 1231 h and j, post);

h (c) the circumstances in which the Karak cheque came to be tendered to Barclays were so unusual and out of the ordinary course of banking business, the sum involved was so large, and the ground so solid for suspecting that someone was using Karak money to finance the take-over transaction, that a reasonable banker, in the interests of his customer, would have made further enquiries before inviting or allowing the customer's signatories to pay over £99,504 of the customer's money to Minorities (see p 1232 c and g and p 1233 c and d, post);

j (d) although it was open to Barclays to prove on a balance of probabilities that enquiries would have produced answers acceptable to a reasonable banker, so that failure to enquire had led to no loss to Karak, in the circumstances any answers which would have been given by B, had he been questioned, would have been unlikely to have satisfied a reasonable banker that the Karak cheque represented money about to be applied for the purposes of the company (see p 1233 g and p 1234 c and d, post).

Selangor United Rubber Estates Ltd v Cradock (a bankrupt) (No 3) [1968] 2 All ER 1073 followed. a

(ii) Barclays were also liable in equity as constructive trustees for the following reasons—

(a) although, in order to establish liability as a constructive trustee on the part of a third party who had assisted a trustee as his agent in a breach of trust, it was necessary to show that the third party had assisted with knowledge of a dishonest and fraudulent design on the part of the trustee, it was not necessary to show that the third party had actual knowledge; it was sufficient to show constructive knowledge, i.e. that the third party had knowledge of circumstances which would have indicated to an honest, reasonable man that such a design was being committed or would have put him on enquiry whether it was being committed (see p 1235 f, p 1236 d, and p 1241 f, post); b

(b) it was plain on the evidence that B, in deliberate and conscious fraud, had procured that £99,504 of Karak's money, i.e. the amount of the Karak cheque, should be misapplied in the purchase of the Karak shares so as to be lost to Karak; furthermore B was to be considered and treated as a trustee in relation to the sum of money comprised in the Chartered cheque and paid into Karak's account with Barclays and Barclays were to be considered as agents of B in his capacity as trustee; for the same reasons as those on which Barclays' breach of contractual duty was founded, a reasonable banker would have been put on enquiry as to the propriety of the Karak cheque and such enquiry would in all probability have revealed the impropriety (see p 1234 h, p 1235 d and p 1241 g, post). c

Barnes v Addy (1874) 9 Ch App 244 and *Selangor United Rubber Estates Ltd v Cradock (a bankrupt)* (No 3) [1968] 2 All ER 1073 applied. d

Williams v Williams (1881) 17 Ch D 437 and *Carl-Zeiss-Stiftung v Herbert Smith & Co (a firm)* (No 2) [1969] 2 All ER 367 distinguished. e

Notes

For a banker's position in regard to negligence in the payment of cheques and to cheques drawn in breach of trust, see 2 Halsbury's Laws (3rd Edn) 193-196, paras 361-364. f

For protection to bankers paying cheques, see *ibid* 197, 198, paras 367, 368; and for cases on the liability of bankers for paying cheques, see 3 Digest (Repl) 234-236, 601-610.

For liability as a constructive trustee arising from the receipt of money, see 38 Halsbury's Laws (3rd Edn) 860, para 1449, and for cases on the subject, see 47 Digest (Repl) 184-188, 1527-1565, 192, 1595-1609. g

Cases referred to in judgment

Bank of England v Vagliano Brothers [1891] AC 107, [1891-94] All ER Rep 93, 60 LJQB 145, 64 LT 353, 55 JP 676; *affg* sub nom *Vagliano Brothers v Bank of England* (1889) 23 QBD 243, 3 Digest (Repl) 273, 799. h

Bank of Baroda Ltd v Punjab National Bank Ltd [1944] 2 All ER 83, [1944] AC 176, 114 LJPC 1, 3 Digest (Repl) 247, 661.

Bank of New South Wales v Goulburn Valley Butter Co Proprietary Ltd [1902] AC 543, [1900-3] All ER Rep 935, 71 LJPC 112, 87 LT 88, 3 Digest (Repl) 205, 434.

Barnes v Addy (1874) 9 Ch App 244, 43 LJCh 513, 30 LT 4, 47 Digest (Repl) 191, 1593.

Bellamy v Marjoribanks (1852) 7 Exch 389, 21 LJEx 70, 18 LTOS 277, 3 Digest (Repl) 266, 762. i

Carl-Zeiss-Stiftung v Herbert Smith & Co (a firm) (No 2) [1969] 2 All ER 367, [1969] 2 Ch 276, [1969] 2 WLR 427, Digest (Cont Vol C) 899, 1224a.

Cummings (or McWilliams) v Sir William Arrol & Co Ltd [1962] 1 All ER 623, [1962] 1 WLR 295, 1962 SC (HL) 70, 1962 SLT 121, Digest (Cont Vol A) 592, 277c.

- a** *Curtice v London City & Midland Bank Ltd* [1908] 1 KB 293, 77 LJKB 341, 98 LT 190, 3 Digest (Repl) 246, 657.
Hill v Simpson (1802) 7 Ves 152, 32 ER 63, 24 Digest (Repl) 623, 6181.
Keane v Roberts (1819) 4 Madd 332, 56 ER 728, 3 Digest (Repl) 200, 409.
McLeod v Drummond (1807) 14 Ves 353, 33 ER 556; *on appeal* (1810) 17 Ves 152, 34 ER 59, 24 Digest (Repl) 624, 6195.
- b** *Marten v Rocke, Eytton & Co* (1885) 53 LT 946, 34 WR 253, 2 TLR 140, 3 Digest (Repl) 199, 407.
Marzetti v Williams (1830) 1 B & Ad 415, [1824-34] All ER Rep 150, 9 LJOSKB 42, 109 ER 842, 3 Digest (Repl) 237, 613.
Mead v Orrery (Lord) (1745) 3 Atk 235, 26 ER 937, 24 Digest (Repl) 623, 6179.
Metropolitan Police District Receiver v Croydon Corp'n [1956] 2 All ER 785, [1956] 1 WLR 113, 120 JP 399, Digest (Cont Vol A) 978, 751a.
- c** *Nelson v Larholt* [1947] 2 All ER 751, [1948] 1 KB 339, [1948] LJR 340, 64 TLR 1, 47 Digest (Repl) 187, 1554.
Nugent v Gifford (1738) 1 Atk 463, West temp Hard 494, 26 ER 294, 21 Digest (Repl) 596, 840.
Reckitt v Barnett, Pembroke & Slater Ltd [1929] AC 176, [1928] All ER Rep 1, 98 LJKB 136, 140 LT 208, 1 Digest (Repl) 361, 353.
- d** *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, [1918-19] All ER Rep 143, 87 LJKB 724, 118 LT 479, 9 Digest (Repl) 566, 3735.
Roberts v Tucker (1851) 16 QB 560, 20 LJQB 270, 15 Jur 987, 117 ER 994, 3 Digest (Repl) 257, 724.
Scott v Tyler (1788) 2 Bro CC 431, 2 Deck 712, 29 ER 241, 24 Digest (Repl) 620, 6157.
- e** *Selangor United Rubber Estates Ltd v Cradock (a bankrupt) (No 3)* [1968] 2 All ER 1073, [1968] 1 WLR 1555, [1968] 2 Lloyd's Rep 289, Digest (Cont Vol C) 98, 2580a.
Soar v Ashwell [1893] 2 QB 390, [1891-94] All ER Rep 991, 69 LT 585, 47 Digest (Repl) 185, 1545.
Westminster Bank Ltd v Hilton (1926) 136 LT 315, 43 TLR 124, 3 Digest (Repl) 246, 658.
Williams v Williams (1881) 17 Ch D 437, 44 LT 573, 47 Digest (Repl) 187, 1559.

f Action

- By a writ dated 29th January 1965 Karak Rubber Co Ltd ('Karak') claimed a declaration that the first defendant, John Leonard Burden, the second defendant, Douglas Alfred Cross, the third defendant, Minorities Trading & Securities Ltd, the fourth defendant, Barclays Bank Ltd ('Barclays Bank'), and the fifth defendant, Stanley Stewart & Co Ltd, were jointly and severally liable to replace moneys of Karak which
- g** had been misapplied. Karak also claimed an order that the first five defendants pay the Official Receiver as liquidator of Karak such sums as any one or more of them should be declared liable to pay. They also claimed against the first and second defendants damages for breach of duty and further or alternatively against Barclays Bank damages for negligence. The sixth defendant, the trustee in bankruptcy of the first defendant, who had been adjudicated bankrupt on 21st May 1968, took no part
- h** in the trial. The first defendant ceased to be a defendant by an order made on 15th June 1971. Proceedings against the third defendant were stayed by an order made on 15th January 1970 and the fifth defendant was struck off the register and no relief was sought against it. The facts are set out in the judgment.

I Edwards-Jones QC, J P Warner and R A Morritt for Karak.

- j** *Leonard Caplan QC, A P Leggatt and M K I Kennedy for Barclays Bank.*

The second, third, fifth and sixth defendants did not appear and were not represented.

Cur adv vult

10th November. **BRIGHTMAN J** read the following judgment. This action relates to the misfortunes of the Karak Rubber Co Ltd, which I shall call 'Karak', and concerns the liability of its directors and of its bank to make good most of its lost

assets. Karak was once a wealthy concern and became insolvent. It was, so it is said, the victim of a species of take-over fraud, whereby those seeking to buy a controlling interest in a company put their fingers in the company's till and steal the money in order to pay for their purchase. The bank was the unconscious tool which aided this process. The principal question in this action is whether it must bear the consequences. The fact that the theft involves a breach of s 54 of the Companies Act 1948 is purely incidental and of no fundamental importance, in my view.

Karak was incorporated under the Companies Acts 1862-1900 in the year 1907 for the purpose of cultivating rubber plantations in Asia. Its issued capital, at the relevant time, was £52,650 divided into £1 shares, which were quoted on the London Stock Exchange. In October 1958 Karak sold its estates and ceased to carry on active business. Thereafter, for practical purposes, its assets consisted only of a sum of the order of £120,000 with its bankers, the Chartered Bank, and £5,000 in tax reserve certificates.

In 1958 the secretaries of Karak were a firm of chartered accountants, Messrs George Williamson & Co (whom I shall call 'Williamsons') with an office at 21 Mincing Lane in the City of London. This was also Karak's registered office. The directors of Karak were Mr Roy (a partner in Williamsons), Mr Cheshire and Mr Clayton, all of whom have acted with complete propriety throughout. The board of Karak decided that the shareholding ought to be realised for the benefit of the members of the company. This could, of course, have been achieved by liquidation. There was, however, a more profitable alternative, which was to offer the shares for sale as a whole, since persons were willing to pay above asset value for shares conferring a controlling interest in a company in this situation. Accordingly, at the end of 1958, the Karak board invited offers for the issued capital. Six offers were received. That which the board resolved to recommend to the shareholders came from Contanglo Banking & Trading Co Ltd (which I shall call 'Contanglo'). Contanglo's offer was 44s per share, compared with an asset value of 41s per share.

Contanglo was a company in a small way of business by comparison with better known banking concerns. It had an office in Mayfair. It was controlled by Mr Levinson, a solicitor (now deceased), with the assistance of Mr Scott. Mr Levinson was interested in property development and Mr Scott was said to be an expert in that field. The directors of Contanglo, behind whom Mr Levinson and Mr Scott operated, were Mr Essex and Mr Meaden. The activities of Contanglo included the purchase either on its own behalf or for clients, of the control of inactive companies possessed of large cash balances. Contanglo's bankers were the National Bank Ltd of Whitehall, London. Contanglo's formal offer was submitted to the Karak directors by a letter dated 13th January 1959. The offer related to the whole of the issued share capital of Karak, and was in the following terms: (1) the purchase price was, as I have stated, 44s per share; (2) the offer was to remain open for acceptance for 14 days unless extended; (3) the offer was conditional on 75 per cent acceptance; (4) the offer was to be despatched by the board to the shareholders as soon as practicable; (5) after completion of the purchase, the existing board was to hold a board meeting at which Contanglo nominees were to be appointed additional directors, and the existing directors would immediately resign; (6) completion was to take place within seven days after the closing of the offer; (7) £3,500 was to be paid to the existing directors as compensation for loss of office.

Contanglo gave the name of its bankers, the National Bank Ltd, and of its solicitors, Mr Levinson's firm, as references to prove Contanglo's ability to implement the offer. The maximum purchase price that could be payable was £115,830. Williamsons, on behalf of Karak, took up Contanglo's references with the National Bank, the manager of which wrote to 'confirm that my customers would be in a position to implement the terms of the offer that is now being made'.

Williamsons, on behalf of Karak, submitted Contanglo's offer to the Karak shareholders in a circular letter dated 23rd January. There was sent with the circular a

a combined form of acceptance and transfer, which was to be lodged by each assenting shareholder with Williamsons by 6th February. The circular stated:

'Members accepting the offer will remain members of [Karak] until the 17th February 1959 when the Extraordinary General Meeting of which notice is sent herewith, will be held. On conclusion of that Meeting, and provided that there has been the requisite percentage of acceptances, payment of the purchase money will be made forthwith to the acceptors.'

b The extraordinary general meeting was for the purpose of ratifying the payment of the proposed compensation to the directors.

c On the same day, 23rd January, Contanglo wrote a letter to Karak intimating that it would be a matter of convenience to Contanglo if Karak would transfer its deposit account, then in fact £118,500, from the Chartered Bank to the National Bank in advance of the take-over. Mr Meaden, who wrote this letter on behalf of Contanglo, stated that he had consulted Mr Cheshire, who was agreeable. The board rejected this proposal.

d Correspondence ensued between Williamsons and the National Bank, as bankers to Contanglo, in regard to the payment to Karak shareholders of their purchase money. On 5th February the manager of the National Bank wrote to Williamsons as follows:

'As arranged on the telephone today, I am enclosing a draft letter confirming that cheques are being despatched to the shareholders who have accepted the offer made by the Contanglo Banking and Trading Company Limited. This would be handed to [Karak] at the Meeting at the conclusion of the take-over.'

e The draft was in the form of a letter from the manager of the National Bank, to Williamsons on behalf of Karak, and (in its finally agreed form) read as follows:

'I hereby confirm that cheques to the total value of £89,768. 16s. 0. are today being despatched by this Bank, to shareholders who have accepted the offer set out in your communication to them under date of the 23rd January, 1959.'

f On 6th February Contanglo declared the offer unconditional. The total acceptances on the final count amounted to 40,804, involving the payment to assenting shareholders of the sum of £89,768 16s which I have already mentioned. On 10th February Mr Meaden, on behalf of Contanglo, wrote to Williamsons a letter covering three matters. First, a suggested agenda was enclosed for the board meeting which, it was said, would be held at noon on Tuesday, 17th February. Williamsons were asked to have the agenda, if approved, prepared for that meeting. Secondly, Williamsons were asked to prepare forms showing the change in directors, secretary, registered office, etc. Thirdly, Williamsons were asked to arrange for a banker's draft to be issued in favour of the National Bank, for the credit of Karak's account, comprising the balance of Karak's cash, so that this could be handed to a representative of the National Bank at the meeting. The suggested agenda named the three new Karak directors as Mr Freeman (a Contanglo director), Mr Cacutt (the Contanglo bookkeeper) and Mr Mitchell. The agenda also provided for the transfer of the Karak banking account to the National Bank. In accordance with these proposals Williamsons wrote on 11th February to the Chartered Bank requesting the preparation of a banker's draft in the form required by the suggested agenda. Williamsons said that they would collect the draft at 10.30 a m on 17th February.

j It is clear that as between itself and the Karak shareholders, Contanglo was contracting as principal and not as agent. It would seem likely that, down to the stage in the story which I have reached, Contanglo was buying on its own account beneficially. However, on or shortly before 16th February, Contanglo parted with the benefit of its contract in consideration of a sum of £7,000 and it thereafter completed

the contract as undisclosed agent. Its principals were John Leonard Burden and Douglas Alfred Cross, or possibly Mr Burden alone. It is unnecessary to resolve that obscurity, and for convenience I will refer to Mr Burden as if he were the only buyer and the sole principal of Contango. To explain how this change occurred, it will be necessary to go back in time.

Barclays Bank Ltd maintained a branch at 103 Cannon Street, in the City of London, known as the Cannon Street Station branch. The customers of that branch included two concerns, described in the evidence in this action as merchant banks, Collingwoods Securities Ltd and Minorities Trading & Securities Ltd. They had been customers of Barclays Bank for a long time. Their principal business was the provision of finance by way of discounting bills and arranging credit for importers and exporters. The two companies were run by Mr I H Solomons and were owned by him or members of his family. Each of these companies had overdraft facilities with Barclays Bank of relatively modest proportions, about £6,000 in the case of Minorities Trading & Securities Ltd, which I will call 'Minorities'. Mr Solomons is dead, and I have not therefore had the advantage of his evidence.

The assistant manager of the branch was Mr Cooper. He had held that position since 1954. He was about 47 years of age at the time of the relevant events. His banking career had started in 1929 and his experience was considerable and varied. But he had no knowledge or experience of company take-over transactions. The manager of the branch was Mr Hockley. He had been manager throughout the whole of Mr Cooper's appointment. He also had no experience of take-overs.

Mr Solomons was a customer of the bank of long standing. He was highly regarded by both Mr Cooper and Mr Hockley. They found him meticulous in everything he did and said he would do, cautious, and particularly well versed in banking and other financial matters. He was said to be the main power in a firm of chartered accountants known as Sinclair De Mesquita & Co.

In December 1958 Mr Solomons asked Mr Cooper whether Barclays Bank would be willing to provide a certain service, in the form of a facility for exchanging drafts in connection with the take-over or acquisition of public companies intended to be developed as property companies. Mr Solomons stated that previously he had had the assistance of a well-known merchant bank, which he named, for this type of work, but had found the bank expensive, and in any event he would prefer to make use of the services of a clearing bank. Mr Solomons mentioned that Barclays Bank might acquire some valuable accounts in the process. This was an era in which there existed a number of dormant rubber companies with substantial cash balances, and apparently profits were to be made by financiers who possessed the expertise to purchase control and turn the companies to account in other directions. Nothing further was heard by Mr Cooper of this line of business until on, or shortly before, 11th February 1959, Mr Solomons, acting on behalf of Minorities, telephoned Mr Cooper. He asked Mr Cooper if he would be willing to arrange for Barclays Bank to issue a banker's draft for £74,645 2s, take it to the office of certain stockbrokers in Throgmorton Street at 11.30 a.m. on 11th February, and exchange such draft for what Mr Solomons described as 'a Bank draft acceptable to you for £75,100'. The charge for this service was to be a modest 5 gns. The intention of Mr Solomons, as well understood by Mr Cooper and by Mr Hockley (who was cognisant of the proposal), was that the counter-value for the Barclays Bank draft should be a banker's draft which Mr Cooper could regard as good as money, so that there would not in any real sense be any question of Barclays Bank having to grant a loan or extend credit to Minorities. Hence the very small charge. Mr Cooper thinks that Mr Solomons mentioned, during the telephone conversation, that a gentleman called Mr Stekel would be present and would instruct Mr Cooper in the procedure. The proposal was agreed by Mr Cooper and was confirmed by a letter from Minorities dated 11th February.

It was not disputed during the trial that the transaction proposed and agreed was unusual in character and, in relation to Mr Solomons and his companies, unusual in

a size. No similar transaction had been done for Collingwoods Securities or Minorities before, or indeed for any other customer of the branch. Be that as it may, when Mr Hockley saw Mr Solomons's letter, as he did, it did not cause him any concern or qualms or hesitation. I may mention that at this time, and during the relevant ensuing days, Minorities' account was overdrawn to the extent of £2,000 to £3,000. There was no question of Barclays Bank regarding Minorities as good for £75,000 or any sum approaching that figure.

b On 11th February Mr Cooper set out for Throgmorton Street with his banker's draft. His impression is that when he arrived at the stockbrokers' office, he was taken into the meeting by Mr Stekel, where he duly exchanged his bank draft for the draft of another bank drawn in favour of Barclays Bank. Mr Cooper may have been at the meeting for some 10 or 20 minutes and he then left on his own. He had not been c able to gather much of what was happening. He did, however, learn that the meeting was concerned with a take-over transaction and that the name of the company concerned was Kota Tinggi (Johore) Rubber Co Ltd. The matter to be noted, because it was repeated, was that Mr Cooper did not request, and Mr Solomons did not volunteer, any explanation why the bank should be asked to issue and hand over its own draft in exchange for another draft for a slightly greater amount; nor did Mr Cooper d ask any questions as to the capacity of Mr Stekel or the extent of his authority. That was the end of the bank's brief acquaintance with Kota Tinggi.

e On Monday 16th February Mr Solomons again telephoned Mr Cooper to arrange for an exchange of drafts. The telephone conversation is reflected in a letter dated 17th February, and probably sent round to the bank by hand on that day. It is signed by Mr Solomons as a director, and by the secretary, of Minorities. It is addressed to the manager of the Cannon Street Station branch of the bank, i e in effect to Mr Hockley, and is in the following terms:

'Confirming telephone conversation of yesterday, we shall be glad if you will arrange for your Draft, in favour of The National Bank Limited, in the sum of £98,954 10. 6d. to be delivered to the offices of Messrs. George Williamson & Co., 21, Mincing Lane, London, E.C.3., today at 12.15 p.m. in exchange for a Bank f Draft acceptable to you of not less than £99,504 10. 6d. [i e £550 more]. We are pleased to agree your fee of £7. 7s. for this service.'

Mr Cooper's impression is that Mr Solomons told him during the course of the prior telephone conversation that the bank might be required, or might have the opportunity, to open a public company account out of the transaction, by which he meant the account of a company with a stock exchange quotation; that Mr Stekel would be g there as previously and would give Mr Cooper his instructions; that Mr Solomons's client was a Mr Burden, who was chairman of ABC Coupler & Engineering Co Ltd, a publicly quoted company, and that Mr Burden was a chartered accountant and a man of importance and integrity.

h I must now interpose certain events which happened between 11th February and noon on 17th February, but bearing in mind that they were quite unknown to Barclays Bank at any relevant time.

j On 16th February, or possibly a day or two earlier but it matters not, Contanglo agreed, as I have mentioned, to sell the benefit of the take-over to Mr Burden for £7,000. On that day Contanglo wrote to Mr Burden enclosing what was called a completion statement, showing that the sum payable by Mr Burden to Contanglo on completion would be £98,954 10s 6d, made up of the sum of £89,768 16s due to the assenting shareholders, the purchase price of £7,000 to Contanglo, and sundry costs and expenses. Contanglo also told Mr Burden that a board meeting of Karak had been arranged for 12.15 p.m. on the following day at 21 Mincing Lane, enclosed a copy of the draft agenda and requested Mr Burden's instructions. Contanglo stated that it would require from Mr Burden a banker's draft made payable to the National Bank for £98,954 10s 6d in accordance with the completion statement. Other action

taken by Contanglo on this day was to write to its bankers, the National Bank, to confirm the place and time of the board meeting, stating that:

'At this meeting we shall hand to you a Banker's Draft amounting to £98,954 10. 6d which will adequately cover the cost of the shares . . . We look forward to meeting your representative who will be handing to the Company [i e Karak] a letter from your Bank stating that letters have been despatched to the assenting Shareholders.'

Contanglo also wrote to Williamsons confirming the place and time of the board meeting, but amending the agenda in two relevant respects; first, the new directors were to be Mr Burden, Mr Cross and Mr Stapley instead of the hitherto named Contanglo nominees; secondly, the new Karak bankers were 'to be resolved at the meeting'. The letter concluded:

'We confirm in the meantime that the Banker's Draft [i e for Karak's available cash balance with the Chartered Bank] should be made payable to the Company [i e Karak]. We shall not know until tomorrow the name of the Bankers to be appointed to the Company.'

Mr Burden, for his part, wrote to Minories:

'We shall be glad if you will arrange for a Bank Draft for £98,954. 10. 6. (Ninety eight thousand nine hundred and fifty four pounds ten shillings and six pence) to be issued in favour of the National Bank Limited and handed to Contanglo Banking and Trading Co. Ltd. tomorrow Tuesday 17th February at 12.15 p.m. in exchange for a Bank Draft for £99,504. 10. 6. (Ninety nine thousand five hundred and four pounds ten shillings and sixpence).'

The reason why Mr Burden instructed Minories that the draft to be received in exchange should be £550 in excess of that to be handed to Contanglo's bankers, was that there was a side arrangement (to put it shortly) between Minories, Mr Stekel and Mr Burden, that Minories should receive £150 for commission and bank charges, and that Mr Stekel or his nominees should receive £400 for (I infer) services rendered or to be rendered in connection with the take-over.

It was against that backcloth, invisible to Mr Cooper, that he came onto the stage to play his part. All that he knew was what was stated in Mr Solomons's letter of 16th February to Mr Hockley, and what had been mentioned by Mr Solomons in the preceding telephone conversation. He did not even know the name Karak Rubber Co Ltd.

Some time in the morning of 17th February, Mr Hockley and Mr Cooper signed on behalf of Barclays Bank, a banker's draft for £98,954 10s 6d in favour of the National Bank. I will refer to this as 'the Barclays draft'. The procedure in the case of a banker's draft issued by a branch on behalf of a customer (at least in the case of Barclays Bank's own procedure) is that the banker's draft, when issued, is debited to the account of the customer and credited to an internal suspense account known as 'branch drafts'. When the draft is returned to the bank for payment, which will normally be through the town or general clearing house, it is debited to the suspense account. Thus, as a matter of book-keeping, the draft is debited to the customer at the time when it is issued and not subsequently when the bank is called on to part with the money represented by the draft. The bank statement of Minories accordingly contains a debit on 17th February of £98,954 10s 6d against the entry 'Draft in favour of National Bank Ltd.' When the draft itself was returned through the clearing a day or two later, it was, no doubt, debited to the suspense account which I have mentioned.

So far as Karak was concerned, Tuesday, 17th February, opened with a first board meeting, attended by Mr Cheshire (in the chair), Mr Clayton and Karak's solicitor, Mr Brandt. The meeting was held in the boardroom at Williamsons' office in Mincing Lane. It dealt with formal matters and calls for no comment. It was

a followed at 12 noon, in the same room, by an extraordinary general meeting for the purpose only of considering a resolution approving the payment to the outgoing directors of £3,500 compensation for loss of office. Mr Cheshire (in the chair) and Mr Clayton were again present, together with three other shareholders and Mr Brandt. The resolution was not opposed. The completion of the business of that meeting cannot have occupied many minutes.

b The events of 17th February are now over 12 years stale, and not surprisingly the witnesses had some difficulty in recalling all the details. Mr Cooper gave his evidence over a period of three days, and his recollection was tested and retested intensively. Mr Cooper impressed me, and I am certain impressed all concerned in the case who heard him, as a witness of the utmost candour and honesty, and of complete intellectual integrity. His professional reputation was on trial, but he never shirked a question or answered evasively. His sole and manifest purpose was to assist the court to the utmost of his ability, withholding nothing. Inevitably many of his answers were the result of impression and reconstruction, rather than direct recollection.

c The boardroom at Williamsons was about eight paces by six in size, with an oblong table capable of accommodating about eight people in comfort, and occupying about half the space; some chairs were at the table, others against the wall. The persons present just before, or during the whole or some part of, the second board meeting, apart from Mr Cooper, can be identified with reasonable certainty as follows: (1) Mr Cheshire (in the chair at the commencement of the meeting) and Mr Clayton. Both gave evidence. (2) A representative of the National Bank, whose role was to receive a banker's draft for £98,954 10s 6d in accordance with Contango's letter of 16th February and to hand over a letter in the agreed form to Williamsons confirming the despatch that day of cheques to the assenting shareholders in accordance with the prior arrangement between the National Bank and Williamsons. The National Bank representative could not be traced. So no evidence was forthcoming from that quarter. Probably he did not stay until the end of the meeting. (3) Mr Cacutt, Contango's representative, whose job was to see that a banker's draft for £98,954 10s 6d, in favour of National Bank, duly reached the hands of that bank, serving the dual purpose of relieving Contango of its liability to the assenting shareholders and securing the £7,000 consideration due to Contango for the sale of the take-over to Mr Burden. Mr Cacutt gave evidence. He left the meeting at an early stage. (4) Mr Keen, not a partner in, but a highly responsible employee of Williamsons, who had been concerned throughout with the take-over arrangements. I had no evidence from him, owing to his death before the trial. He had a number of documents in his custody before the commencement of the meeting, including the acceptances and transfers by the assenting shareholders, a cheque for £115,890 18s drawn by the Chartered Bank on the Midland Bank in favour of Karak (which I will call 'the Chartered cheque'), the indicia of title to the only other assets of Karak, namely a £5,000 tax reserve certificate and a certificate for a few shares in a company irrelevant to this action, and the resignation of the three existing directors signed in anticipation of an item on the agenda to which I will come later. He placed these documents on the boardroom table, either in front of himself or in front of Mr Cheshire, as the chairman of the meeting. (5) Mr Brandt, Karak's solicitor. He gave evidence. He was present, as he says, merely in case any legal difficulties happened to arise. (6) Mr Simpson, an employee of Williamsons, who kept the list of Karak's shareholders. He was concerned to prepare the boardroom for the three meetings, to lay out the papers and to usher into the room those arriving at 21 Mincing Lane who did not know their way. He gave evidence. (7) Mr Burden and Mr Cross. Neither gave evidence during the trial. Mr Stapley was not present. He is recorded as resigning the next day. (8) Mr Stekel. He made a fleeting appearance on the stage during the trial, pursuant to a subpoena duces tecum. Neither side called him, although he must have known a lot. I am not going to speculate on the reason for his absence as a witness or to comment

on the matter. He was available to both sides, and presumably each side took the view that he would not assist its case. I shall leave it at that. (9) Mr Curtis, who was to be the new secretary. He was identified by Mr Cheshire, who happened to know him personally. He was not mentioned by any other witness. He did not give evidence. The total count, including Mr Cooper, was accordingly 12 persons.

I must say a word about the Chartered cheque. This, as I have mentioned, was in the custody of Mr Keen of Williamsons, having been fetched earlier that morning from the Chartered Bank by a representative of Williamsons in accordance with their letter to the bank of 11th February. It was dated 16th February and was drawn by the Chartered Bank on the Midland Bank Ltd in favour of Karak for £115,890 18s, representing the total cash balance of Karak with the Chartered Bank less the £3,500 compensation for directors, which I have mentioned. For some reason the Chartered Bank did not issue its own cheque in favour of Karak, but drew on an account which it maintained with the Midland Bank, so that, in strict banking terms, this instrument was not a banker's draft but a banker's cheque. It would for practical purposes have the same financial standing as a banker's draft. It was a cheque which qualified for the town clearing, of which the Cannon Street Station branch of Barclays Bank was also a member, so that Barclays Bank, if collecting it, would be able to obtain cash the same day without any difficulty. The cheque, as it now exists, contains two endorsements; first a special endorsement and beneath it a general endorsement. The special endorsement is in the handwriting of Mr Burden and reads:

'For and on behalf of Karak Rubber Co., Limited, J. Leonard Burden, director,
Pay Barclays Bank Ltd.'

The general endorsement I will deal with later in its chronological place. I am satisfied that the special endorsement was not on the Chartered cheque at the commencement of the meeting.

Mr Cooper had been asked to attend at Williamsons' office at 12.15 p.m. He probably turned up about ten minutes earlier. He had the Barclays draft with him. If he had carried out what the bank had agreed to do, he would have retained the Barclays draft firmly in his grip until someone at Williamsons' office handed to him in exchange a banker's draft equivalent in standing to hard cash, for £99,504 10s 6d. He would then have left Mincing Lane, returned to his branch and paid the exchanged draft into the account of Minorities. And that would probably have been the end of the matter so far as Barclays Bank was concerned. Alternatively, if no one had produced a banker's draft for the purposes of the exchange, Mr Cooper would have returned to his branch with the Barclays draft, cancelled the draft and reversed the entries in the bank's books in accordance with what I am told is normal banking procedure where a draft is issued but not used.

Mr Cooper did not part with the Barclays draft in exchange for another banker's draft. He parted with it in exchange for the Chartered cheque. One of the matters probed in evidence and debated in argument was the moment of time when Mr Cooper handed over the Barclays draft, and whether he received the Chartered cheque into his possession simultaneously or later during the course of the meeting. At the end of the day, I doubt whether this matters very much. Mr Cooper has no positive recollection of how and when he parted with the Barclays draft. I am, however, myself reasonably satisfied that Mr Cooper was imperturbed by a persuasive Mr Stekel into handing over the Barclays draft just before the meeting commenced, without receiving anything in exchange except assurances. I reach this conclusion not only from the general tenor of the evidence of Mr Cooper as he ultimately reconstructed the situation in his own mind, but also because it is in my view unlikely that the National Bank would have engaged itself to pay £89,768 16s to the assenting shareholders, as it did at an early stage of the meeting, without first being put in funds by the receipt of the Barclays draft; and it is unlikely for a number of reasons, including what I have heard from Mr Cheshire, that Mr Cheshire or Mr Keen would

a have allowed the Chartered cheque out of his possession until the new board had taken over responsibility for the company.

The evidence indicates that Mr Cooper parted with the Barclays draft, probably to Mr Stekel but conceivably direct to the National Bank representative, in the brief interval of time which elapsed between his arrival at Mincing Lane and the commencement of the second board meeting (which followed immediately after the extraordinary general meeting and not at 12.15 pm) on assurances by Mr Stekel (i) that there existed a banker's cheque in favour of Karak for £115,890 18s, and Mr Stekel may well have taken an opportunity to point to the Chartered cheque lying on the boardroom table; (ii) that Mr Burden and Mr Cross were about to be appointed directors of Karak in the place of the existing board; (iii) that the Chartered cheque would then come into the possession of Mr Burden and Mr Cross; (iv) that the new directors would then open an account for Karak with the Cannon Street Station branch so that the Chartered cheque could be paid into that account; and (v) that Mr Burden and Mr Cross would then draw a cheque on the new Karak account in favour of Barclays Bank, which could be paid into the Minorities account in place of the banker's draft envisaged by Minorities' letter to the bank of 17th February. As security for the due performance of these assurances, Mr Stekel or Mr Burden probably told Mr Cooper that Mr Burden would specially endorse the Chartered cheque in favour of Barclays Bank as soon as he got it. Thus, Mr Cooper would implement his instructions from Minorities in general effect although not in precise detail. Mr Cooper was not aware of the transaction underlying the intended exchange of drafts. He did not appreciate that the function of the Barclays draft was to pay for Karak shares. Mr Cooper was concerned to carry out the instructions of Minorities and to ensure that he received acceptable counter-value for the Barclays draft. I am completely satisfied that he entertained no suspicion whatever of any impropriety at any relevant time.

I also think, on considering the evidence as a whole, that there was a certain amount of hubbub and chatter at the meeting, owing to the number of people attending who had different interests and functions. This left a marked impression on the mind of, at least, Mr Cheshire as chairman of the meeting. The only significance of this is that it would tend to make it difficult for an unversed stranger to pick up the threads of what was occurring.

The course of the proceedings of the second board meeting followed the agenda, and are recounted in the minute book of Karak over the signature of Mr Burden, appended on 15th April. Having heard the evidence, I have no reason to doubt that the minute is correct. I will read the minute and comment later:

g '1. TRANSFERS. Submit 123 Forms of Acceptance and Transfer for a total of 40,804 shares for a consideration of forty-four shillings per share in accordance with the Circular to Shareholders dated 23rd January, 1959. Submitted.

h 2. NATIONAL BANK LTD. Submit letter from National Bank Limited stating that cheques were being despatched this day to assenting Shareholders. Submitted.

3. DIRECTORATE. Resolve to appoint Messrs. J. L. Burden, D. A. Cross and F. G. Stapley Directors of the Company. Carried unanimously. 4. Submit letters of resignation from the Board of Directors from Messrs. O. J. Roy, A. E. Cheshire and R. G. Clayton in which they also state that they waive remuneration under Article 82 of the Memorandum and Articles of Association, as from 17th of February, 1959. Submitted and accepted. Resolved to appoint Mr. J. L. Burden Chairman of The Company. 5. COMPENSATION TO DIRECTORS. Confirm the payments to the Directors Messrs. O. J. Roy, A. E. Cheshire and R. G. Clayton for the loss of office amounting to a total of £3,500. Confirmed. 6. SECRETARIES. Submit letter of resignation from the Secretaries, Geo. Williamson & Co., in which they also state that they waive remuneration under Article 82 of the Memorandum and Articles of Association, as from the 17th February, 1959. Resolve to appoint Mr. C. R. Curtis Secretary to the Company. 7. REGISTRARS. Resolve to appoint Messrs. C. R. Curtis & Co. Registrars to the Company.

8. SITUATION OF THE REGISTERED OFFICE. Resolve to change the Registered Office of the Company to 26 Caxton Street, Westminster, London, S.W.1. Resolved accordingly. 9. ASSETS OF THE COMPANY. Resolve that Geo. Williamson & Co., hand over to the newly appointed Secretaries the following—(1) Tax Reserve Certificate for £5,000 dated 29th March, 1957. (2) Certificate for 24 shares of £1 each in Malgro House Ltd. (3) Banker's Draft for £115,890 18. od. 10. BANKERS. Resolve to close the Company's Accounts with the Chartered Bank and to appoint Barclays Bank Ltd., of 103 Cannon Street, London, E.C.4. 11. RESOLUTIONS [and I think I need not read these; they deal with the honouring of cheques by the bank].^a

Mr Cooper does not recall being present when items 1 and 2 were taken, but I think he must have been there. However, it is not proved that he heard and absorbed these items, and I see no reason, on the evidence before me, for so inferring. In particular, as I have mentioned, he was not aware of the purpose of the Barclays draft and that it was being used for financing the consideration paid by the National Bank to the assenting shareholders. He was not provided with a copy of the agenda. It is likely that he heard and understood items 3, 4, 9 and 10, because he would have been on the look-out for them in view of the assurances which had been given to him by Mr Stekel. I infer that, at the conclusion of item 9, the Chartered cheque was handed to Mr Burden, and that he then and there endorsed it in favour of Barclays Bank and handed it to Mr Cooper. Certainly, it was in Mr Cooper's hands when he left the meeting. Barclays Bank (through Mr Cooper) received the Chartered cheque in its capacity as Karak's prospective banker.^c

Mr Cooper then departed in company with Mr Burden and Mr Cross. They made their way to the Cannon Street Station branch of the bank, where they arrived at or shortly before 1.00 p.m. At the bank, Mr Cooper filled in a copy of the bank's standard form of appointment of Barclays Bank as banker to a company. This form, when completed, recited that at a meeting of the Karak board, held on that day, it was resolved that Barclays Bank be appointed the banker of the company and that the bank was authorised, shortly stated, to honour all cheques signed by Mr Burden and Mr Cross as directors. The completed form was signed by Mr Burden as chairman of Karak. Karak takes no point that the resolution actually passed at Williamsons' office provided that a cheque should be countersigned by the secretary of Karak. At the same time Mr Cooper issued a cheque book for Karak, and wrote out in his own hand a cheque drawn on the Karak account, in favour of Barclays Bank, for the promised £99,504 10s 6d. This cheque was then signed by Mr Burden and Mr Cross on behalf of Karak and handed to Mr Cooper, or to Mr Hockley, who at some time had joined them. Mr Cross filled in a paying-in slip in respect of the Chartered cheque. The four of them then took some refreshment at a nearby place, and parted company. In due course the bank credited the Chartered cheque (endorsed by Mr Hockley on behalf of Barclays Bank) to Karak's new banking account debited to that account the cheque for £99,504 10s 6d, which I will call 'the Karak cheque', and credited the Karak cheque to the Minorities account, thus covering the debit for the Barclays draft made on the same day. No suspicion of any sort had been aroused in the mind either of Mr Hockley or Mr Cooper.^d

There are no other events which are directly material to the possible liability of Barclays Bank and I can therefore cover the ground quite briefly. Karak started 17th February with a cash balance, after allowing for the directors' compensation, of over £115,000. It ended the day with just over £16,000. Four months later, having cashed its tax reserve certificates but conducted no real business, its cash balance was down to £3 8s 8d. It lingered on, with never more than £850 in its coffers, and usually much less, until in June 1961 it was wound up compulsorily on the petition of the Commissioners of Inland Revenue based on an indebtedness of some £10,000. The shares of the assenting shareholders were registered first in the name of the National Bank (Branch Offices Nominees) Ltd, but were later transferred (less a few sold off)^e

a to Mr Burden and Mr Cross. Mr Cross ceased to be a director in August 1960. On 14th November 1960 the Board of Trade appointed inspectors to investigate the affairs of the company. The inspectors reported on 31st July 1961. On 29th January 1965 the writ in this action was issued.

b The action is brought by Karak with the authority of the Official Receiver, as liquidator. The action is also brought by the Board of Trade (now the Department of Trade and Industry) in the name of Karak, pursuant to s 169 (4) of the Companies Act 1948.

c The first defendant to the action is Mr Burden. He was adjudged bankrupt in 1968. He ceased to be a defendant by an order made on 15th June 1971. I have been told that in fact he has died. The second defendant is Mr Cross. He has served what is called a defence. It is couched in informal language, and says that he did what Mr Burden told him to do. He has taken no part during the trial. The third defendant is d Minorities, against whom proceedings have been stayed as a result, I believe, of some sort of compromise. The fourth defendant is Barclays Bank, which alone has fought the action. The fifth defendant is a company called Stanley Stewart & Co Ltd. It is said to have received some of the pickings in the form of a cheque for £1,750 on the Karak account paid on 18th February 1959, and alleged to have been a misapplication of Karak's moneys. This company has however been struck off the register, and no relief is sought against it. The sixth defendant is Mr Burden's trustee in bankruptcy. He has the benefit of the defence served by Mr Burden. He appeared before me to say that he had no funds to enable him to take any part in the trial.

e For practical purposes the relief claimed is as follows: (1) Against Mr Cross and Mr Burden's trustee in bankruptcy, replacement of the amount of the Karak cheque and of the £1,750 paid to Stanley Stewart Ltd, totalling £101,254 10s 6d with interest at 5 per cent from 17th February 1959. (2) Against Barclays Bank Ltd, replacement of the amount of the Karak cheque, or a like sum by way of damages for negligence with interest as aforesaid. (3) Against all three defendants, the cost of the Board of Trade investigation.

f I will deal first with the claim against Barclays Bank. It is pleaded that a sum equal to the amount of the Barclays draft was, by the process of honouring the Karak cheque, applied not for the purposes or benefit of Karak but for the benefit of Mr Burden, Mr Cross, Minorities and Barclays Bank. So far as the bank was concerned, (a) it discharged at Karak's expense the indebtedness of Minorities to Barclays Bank for the amount of the Barclays draft, or (b) it prevented such indebtedness arising, or (c) it recouped to Barclays Bank the amount for which Barclays Bank was liable on the Barclays draft, or (d) it enabled Barclays Bank, in substance, (although not in g form) to comply with the arrangement which it had made with Minorities as recorded in the letter of 17th February from the latter to the former. Karak also pleads that the amount of the Karak cheque was misapplied in giving financial assistance for the purpose of, or in connection with, the purchase of the assented shares and was ultra vires Karak.

h It is not now claimed against Barclays Bank that either Mr Hockley or Mr Cooper was consciously aware that the amount of the Karak cheque represented money being misapplied by Mr Burden and Mr Cross, either by giving financial assistance for the purpose of, or in connection with, the purchase of the assented shares, or in any other context. It is pleaded nevertheless that Barclays Bank ought to have known that such money was being misapplied because a reasonable banker and a reasonable businessman would have derived such knowledge from the facts of which Mr Hockley i and Mr Cooper were actually aware. Alternatively, it is said, the bank would have derived such knowledge if certain enquiries had been made which ought to have been made. The enquiries which ought to have been made, it is said, were (1) enquiries from persons present at the second board meeting, as to the nature of the transaction being carried out, the source of the Chartered cheque and the destination of the Barclays draft; the persons so identified as those of whom enquiries ought to have

been made were the outgoing Karak directors, the representatives of Williamsons, Contanglo and the National Bank, and Messrs Burden, Cross and Stelkel; and (2) enquiries from Mr Burden and Mr Cross as to the consideration for the Karak cheque. It is further pleaded that Barclays Bank was negligent in the performance of the duty which, as banker, it owed to Karak as its customer in honouring the Karak cheque without (a) making any enquiry as to the purpose for which the money was being applied, or (b) taking steps to ensure that the money would be applied only for the purposes and benefit of Karak, or (c) making the above-mentioned enquiries at the board meeting or of Mr Burden and Mr Cross.

The claim against Barclays Bank is based on the interpretation of the law laid down by Ungood-Thomas J in *Selangor United Rubber Estates Ltd v Cradock (a bankrupt)* (No 3)¹. That is to say, it is founded on the principles of constructive trusteeship as elucidated in that case, and also on the principles of contract which that case decided were applicable as between banker and customer where the banker is acting as paying banker. In the *Selangor* case¹ the learned judge considered constructive trusteeship before breach of contract, as also did the plaintiff's counsel in opening this case. However, in reply, the plaintiff's counsel put breach of contract in the forefront of his case, at least chronologically, and I propose likewise to deal with the two topics in that sequence.

The facts of the *Selangor* case¹, so far as material for present purposes, can be outlined as follows. Selangor was a dormant company with about £235,000 in liquid assets, including some £232,500 to its credit with Barclays Bank. On 31st March 1958 Contanglo, as agent for an unidentified principal, one Cradock, offered to buy the whole of the issued stock of Selangor for cash, conditional on a minimum percentage acceptance. On 17th April Contanglo declared the offer unconditional. Completion was due to take place on 25th April. The purchase price and certain expenses totalled about £188,000. On 21st April the outgoing Selangor board, at the request of Contanglo, transferred the company's cash from Barclays Bank to the National Bank. The National Bank was Contanglo's banker. Cradock had a personal banking account with the Oxford Street branch of the District Bank, where he had an insignificant credit. On 23rd April Cradock asked the District branch manager to prepare a banker's draft in favour of Contanglo for £195,322 and to attend at the National Bank on 25th April in order to exchange it for a banker's draft in favour of Cradock for £235,000. The branch manager agreed to do this. On 25th April a board meeting of Selangor was held at the National Bank premises. Reynolds attended as the representative of District Bank. He had with him the banker's draft which had been requested. At the meeting Reynolds was told by Cradock that Selangor's banking account with available cash totalling £232,764, was about to be transferred to the Oxford Street branch of the District Bank; that Selangor would then draw a cheque for £232,500 on its new banking account in favour of a company called Woodstock Trust Ltd; that Woodstock Trust would endorse such cheque in favour of Cradock, who would pay it into his account with the District Bank. Reynolds was asked, and agreed, to exchange his banker's draft, not for another banker's draft as previously arranged, but for an alleged equivalent, namely, Selangor's cheque for £232,500 drawn in favour of Woodstock Trust and endorsed to Cradock. Contanglo, having thus obtained the banker's draft for £195,322, paid into its account with the National Bank and thus covered on behalf of Cradock the £188,000 due on completion of the take-over offer. On these facts, which I have only briefly summarised, Selangor claimed, inter alia, against District Bank damages for negligence in performance of the duty which, it was claimed, District Bank owed to Selangor as its customer. The negligent act alleged was debiting the £232,500 cheque against Selangor's account without making any, or any sufficient, enquiry as to the purpose for which the £232,500 was being paid to Woodstock Trust for Cradock.

It is convenient to refer to the bank on which a cheque is drawn by its customer as

¹ [1968] 2 All ER 1073, [1968] 1 WLR 1555

a 'the paying bank', and to refer to the bank which receives the cheque for the purpose of collecting payment on behalf of its customer as 'the collecting bank'. The claim in contract against the District Bank in the *Selangor* case² was, and the claim against Barclays Bank in the case before me is, a claim against such bank in its capacity as paying bank.

b The question accordingly arose in the *Selangor* case² as to the nature and extent of the contractual duty of care owed by a paying bank to its customer when called on to honour a cheque drawn by the customer; and in particular, in the case of a corporate customer which has given the usual mandate to its bank, to what extent the bank is entitled to place exclusive reliance on the fact that the cheque is signed by the corporation's duly authorised signatories. The conclusion reached by Ungood-Thomas J was as follows³:

c '... a bank has a duty under its contract with its customer to exercise "reasonable care and skill" in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely. The relevant considerations include the
d prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard to a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business. An operation which is reasonably consonant with the normal conduct of business (such as payment by a stockbroker into his account of proceeds of sale of his
e client's shares) of necessity does not suggest that it is out of the ordinary course of business. If "reasonable care and skill" is brought to the consideration of such an operation, it clearly does not call for any intervention by the bank. What intervention is appropriate in that exercise of reasonable care and skill again depends on circumstances.'

f Then the learned judge continued⁴:

'As between the company and the bank, the mandate, in my view, operates within the normal contractual relationships of customer and banker and does not exclude them. These relationships include the normal obligation of using reasonable skill and care; and that duty, on the part of the bank, of using reasonable skill and care, is a duty owed to the other party to the contract, the customer,
g who in this case is the plaintiff company, and not to the authorised signatories. Moreover, it extends over the whole range of banking business within that contract. So the duty of skill and care applies to interpreting, ascertaining, and acting in accordance with the instructions of a customer; and that must mean his really intended instructions as contrasted with the instructions to act on signatures misused to defeat the customer's real intentions. Of course, omnia praesumuntur rite esse acta, and a bank should normally act in accordance with the
h mandate—but not if reasonable skill and care indicate a different course.'

In the result, the learned judge concluded that the circumstances were such as to put a reasonable banker on enquiry in accordance with its contractual duty of care.

i This conclusion was reached after considering certain cases dealing with the contract existing between a paying bank and its customer, including *Bellamy v Marjoribanks*⁵, decided in 1852, *Curtice v London City & Midland Bank Ltd*⁶, decided by the Court

2 [1968] 2 All ER 1073, [1968] 1 WLR 1555

3 [1968] 2 All ER at 1118, 1119, [1968] 1 WLR at 1608

4 [1968] 2 All ER at 1119, [1968] 1 WLR at 1609

5 (1852) 7 Exch 389

6 [1908] 1 KB 293

of Appeal in 1908, and *Westminster Bank Ltd v Hilton*⁷, decided by the House of Lords in 1926. It was also reached after considering a number of cases against collecting banks. Where a collecting bank is sued by the true owner of a cheque for wrongful payment thereof, the claim is for conversion or for money had and received, and not in contract. There is no contractual relationship between the person who draws the cheque and the bank to which the cheque is handed for collection (unless the collecting bank is also the paying bank). Negligence (although not an ingredient of a claim in conversion or for money had and received) is however a relevant topic because s 82 of the Bills of Exchange Act 1882 and its modern counterpart afford a statutory defence to a claim by the true owner where a banker has collected a crossed cheque in good faith and without negligence on behalf of a customer who has no title or a defective title. The collecting bank cases were cited to the learned judge and relied on by him for the purpose of providing illustrations of circumstances constituting carelessness in a banking context and as indications of the standard of care demanded of bankers.

I would be guilty of causing a quite unjustified waste of time and paper if I sought to restate and reanalyse the numerous cases on the duties of bankers which were so recently subjected to critical examination in the *Selangor* case⁸. I shall therefore turn at once to the nature of the attack which has been levied in this case on the correctness of the *Selangor*⁸ decision in contract.

The proposition advanced by counsel on behalf of Barclays Bank is short and simple, and in one sense commercially attractive because readily workable by junior banking staff. It is this. The primary obligation of a paying bank, in relation to a cheque which is presented for payment, and is clear and unambiguous on its face, and is authenticated by the proper signature or signatures, and is covered by available funds, is to pay the cheque on demand. Subject to two apparent exceptions so far as a corporate customer is concerned, the paying bank has no right or duty to exercise any care, skill or judgment in deciding whether it will or will not comply with the unambiguous, properly authenticated instructions of its customer. By virtue of issuing a cheque book to the customer, the bank has engaged itself to pay any such cheque on demand if funds be available. That is the intention of both bank and customer when the account is opened. The paying bank has a duty of care to its customer, but that duty is a limited one. It does not embrace the question whether the bank ought or ought not to do that which the customer has, in the agreed manner, told it to do. It only embraces (1) reasonable care in interpreting the instructions of its customer (for example, in interpreting a communication countermanding payment), and (2) reasonable care in making itself available to receive the instructions of the customer (for example, by opening its doors at reasonable hours and attending with reasonable expedition to its customer's postal communications). The two exceptions admitted in the case of a corporate customer to the basic and fundamental rule that the paying bank is to dispense cash automatically against an unambiguous and properly authenticated cheque are: (a) if the payment is to the actual, conscious knowledge of the bank a wrongful application of the company's money, or (b) if the payment is for a purpose known to the bank but such purpose (unknown to the bank) is precluded by the memorandum or articles of association. The first exception depends on the fact that it is an implied term of the contract between banker and customer that the banker shall act honestly and in good faith towards its customer. If a bank knowingly pays a cheque which is a wrongful application of its customer's money, it is acting dishonestly and therefore in breach of contract. The second exception depends on the fiction that persons have notice of the contents of a company's memorandum and articles of association.

Counsel attacked from four directions the wider duty of care which the *Selangor* case⁸ decided is owing by the paying banker to its customer.

7 (1926) 136 LT 315

8 [1968] 2 All ER 1073, [1968] 1 WLR 1555

a (1) Neither the *Bellamy*⁹ nor the *Curtice*¹⁰ nor the *Hilton*¹¹ case was a proper foundation for the learned judge's conclusion. The *Bellamy* case⁹ was concerned with the crossing of a cheque; such crossing was a device, he submitted, to protect the true owner by securing payment only through a banker; the case was not concerned with any duty of care owed by the paying bank to its own customer. The *Curtice* case¹⁰ was concerned with a paying bank's obligation when the customer
b seeks to communicate the countermanding of a cheque; it therefore lies within the area where admittedly the bank has a duty of care. So also the *Hilton* case¹¹, which was concerned with the interpretation of an ambiguous countermand.

(2) The learned judge could not properly rely on the collecting bank cases or on any analogy with the position or duties of a collecting bank. A collecting bank has no instant duty of action comparable with that which is incumbent on a paying bank.
c As between itself and its customer, a collecting bank merely has a duty to collect a cheque with reasonable expedition. The cases where, in a suit between a collecting bank and a third party, the collecting bank has sought to disprove negligence in order to secure the protection of s 82 of the Bills of Exchange Act 1882, are irrelevant to the existence, or non-existence, of a general duty of care on the part of a paying bank. The cases under s 82 relate to a duty of care which is different in origin, in
d character and in scope from the kind of duty with which the court was concerned in the *Selangor* case¹²; different in origin, because the duty arises by virtue of a statute and not by virtue of a contractual implication; different in character, because it is not a duty which the collecting banker owes to anyone save himself; the true owner of the cheque cannot sue the collecting banker for breach of a duty of care; the collecting banker exercises care solely in order to avoid liability to the true owner in conversion or for money had and received; different in scope, because no standard
e of care is laid down by s 82.

(3) As a cheque is by statutory definition and by its own inherent nature a bill of exchange payable on demand, the banker is by the essential nature of the contract between him and his customer *prima facie* required to pay his customer's cheque on demand. Apart from all else, to dishonour a cheque may defame the drawer or
f impair his credit. Any gloss on that contract which requires the banker to pay his customer's clear, unambiguous and properly authenticated cheque *not* on demand but (in certain circumstances) only after critical thought and the conduct of an inquisitorial exercise, can only arise by implication. A term which finds no expression in a contract is not to be implied unless necessary in a business sense to give efficacy to the contract; that is to say, if it is a term of which it can confidently be predicted that
g it is so obvious that it goes without saying: *Reigate v Union Manufacturing Co (Ramsbottom) Ltd*¹³. The *Reigate*¹³ test was not applied in the *Selangor* case¹², nor was the *Reigate* case¹³ mentioned in argument. The terms supposed, in any event, could not have been implied in the absence of evidence of banking practice and procedure, of which there was none. In the absence of such evidence the court would not know what was obvious to a banker in the context of a bill of exchange payable on demand.
h The *Reigate*¹³ test could only properly be posed within the framework of evidence of the time available to a paying bank when called on to pay over the counter, or under the town clearing rules or under the general clearing rules.

(4) It was said that important cases exemplifying the right of a customer of a bank to have his cheque paid on demand were not cited to the learned judge in *Selangor*¹². One of these cases was *Marzetti v Williams*¹⁴, which was decided in the Court of King's
j Bench in 1830. In that case the plaintiff had a credit of approximately £70 with his

9 (1852) 7 Exch 389

10 [1908] 1 KB 293

11 (1926) 136 LT 315

12 [1968] 2 All ER 1073, [1968] 1 WLR 1555

13 [1918] 1 KB 592, [1918-19] All ER Rep 143

14 (1830) 1 B & Ad 415, [1824-34] All ER Rep 150

bankers by the evening of 17th December 1828. At 11.00 a.m. on 19th December a further sum of £40 was paid into the account in cash. At 3.00 p.m. on that day a cheque, drawn by the plaintiff in favour of certain payees for £87, was presented for payment. The bank clerk, to whom the cheque was presented, said that there were insufficient funds in the account for payment. It was found as a fact that enough time had elapsed, between the payment in of the £40 and the presentation of the cheque, for the £40 to have been credited to the account. An action was brought by the customer against the bankers for damages. The action was in substance founded on a contract by the banker to pay the cheques of his customer when the latter had funds sufficient in his hands for that purpose¹⁵. The plaintiff succeeded in his claim because 'he had a right to have his cheque paid at the time when it was presented, and the defendants were guilty of a wrong for refusing to pay it'¹⁶. Another case, absent from the *Selangor*¹⁷ citations, on which counsel for Barclays Bank relied, was *Marten v Rocke, Eyton & Co*¹⁸ decided by North J in 1885. Morris was an auctioneer of cattle. He had a single banking account into which it was his custom to pay the gross proceeds of sale of livestock and out of which he would pay the sellers after deducting his commission. His current account was overdrawn by about £2,250 in December 1884 when he paid in the sum of £2,229 representing most of the proceeds of the last auction sales. The defendant bank withdrew Morris's credit facilities and applied this amount in part discharge of the overdraft. Morris became bankrupt, and the plaintiff Marten, and other sellers, were not paid. Marten claimed that the bank held the money, less commission, as trustee for the benefit of himself and other unpaid vendors. The action failed. Counsel for Barclays Bank relied on the following statement of North J as emphasising the basic obligation of a bank to honour a cheque save where the bank is privy to a wrong¹⁹:

'The defendants could not have refused to honour Morris's cheques against the fund paid in (assuming the account to have been in credit) unless [the bankers] were actually privy to an intended breach of trust by Morris...'

A third case on which counsel relied was *Bank of England v Vagliano Brothers*²⁰. The plaintiff Vagliano carried on business as a merchant and a banker, originally in partnership but from May 1887 alone, under the trade name of Vagliano Brothers. The Bank of England was his banker. The plaintiff employed a clerk called Glyka. Glyka had responsible duties and enjoyed the plaintiff's complete confidence. Between February and August 1887 Glyka, by a series of frauds, obtained the plaintiff's genuine acceptance of 43 forged bills of exchange and thereby secured for himself £71,500 which he utilised to cover losses incurred on the stock exchange. Glyka's procedure was to forge the name of a well-known customer of Vagliano Brothers as if such customer were the drawer of a bill of exchange on Vagliano Brothers, the bill being expressed to be payable to Petridi, who was well known to the plaintiff. Glyka then, by a deception, secured the genuine signature of the plaintiff as acceptor of the bill, the bill being marked as payable at the Bank of England. Glyka's next step was to forge the endorsement to Petridi in favour of a fictitious name. Glyka, or his agent, then presented the bill in due time at the Bank of England for payment in cash across the counter, an unusual but not improper course. The plaintiff claimed that the Bank of England had wrongly debited his account with the £71,500, on the basis that a bank which agrees to pay its customer's acceptances has a duty as between itself and its customer to identify the person to

15 See (1830) 1 B & Ad at 423

16 See (1830) 1 B & Ad at 425, 426

17 [1968] 2 All ER 1073, [1968] 1 WLR 1555

18 (1885) 53 LT 946

19 (1885) 53 LT at 948

20 [1891] AC 107, [1891-94] All ER Rep 93

a whom it makes payment as the person properly entitled to that payment. It was held by a majority in the House of Lords that the bank was not liable because (i) it had been misled by the plaintiff who, by his signatures, had given apparent authenticity to the forgeries and (ii) that the bank was entitled to treat the forgeries as bills payable to bearer because Petridi was a fictitious or non-existent person within the meaning of s 7 of the Bills of Exchange Act 1882. Counsel for Barclays Bank relied on a number of passages in the speeches to support his proposition that there is an obligation on a bank to pay without enquiry a cheque or other bill of exchange which is clear on its face and properly authenticated. The principal passages are these: Lord Halsbury LC said¹:

c 'Suppose they had been genuine signatures of Petridi and the bills had been dishonoured while the bankers were making inquiries, would not Mr. Vagliano have had grave ground for complaint against the bankers who had allowed his credit to be thus disturbed? I think each of the parties to the transaction must be taken to have known the ordinary course of mercantile affairs, and it is manifest that no banker could hesitate to pay such bills as came to him, so accredited as they were by Mr. Vagliano's acceptance, without throwing the whole mercantile world into confusion.'

d Lord Bramwell in a dissenting speech said²:

'I do not agree with the notion that a banker is entitled to make inquiries as to whether he should pay, as there suggested. [That was a reference to *Robarts v Tucker*³.] He must honour or dishonour the bill on presentment.'

Lord Macnaghten said⁴:

e 'Bankers who undertake the duty of paying their customer's acceptances cannot do otherwise than pay off-hand, and, as a matter of course, bills presented for payment which are duly accepted and regular and complete upon the face of them. It would be out of the question for a banker to adopt the suggestion made by one of the learned Judges in *Robarts v. Tucker*³, and defer payment until satisfied by inquiry and investigation that all the indorsements on the bill are genuine. That is hardly a practical suggestion. A banker so very careful to avoid risk would soon have no risk to avoid.'

In *Bank of Baroda Ltd v Punjab National Bank Ltd*⁵ the Punjab Bank sued the Baroda Bank on a cheque. The Punjab Bank claimed as holders for value of a cheque drawn by a customer of the Baroda Bank on that bank and endorsed generally by the payees. g The customer had no funds, but the cheque, which was post-dated, had been marked on its face by an officer of the Baroda Bank with a statement indicating that the account was good for the money. A question which arose was whether a cheque, being a bill drawn on a bank payable on demand, was capable of acceptance in the same way as other bills of exchange were accepted. In delivering the opinion of the Board, Lord Wright, after contrasting the acceptance of a cheque with the acceptance h of a bill of exchange, said⁶:

'Other things being equal, in particular, if the customer has sufficient funds or credit available with the bank, the bank is bound either to pay the cheque or dishonour it at once.'

Barclays Bank has led evidence of banking practice. This was given by a Mr Avis. j He had been in the employment of the Midland Bank for 35 years and was now the

¹ [1891] AC at 116, 117, [1891-94] All ER Rep at 99

² [1891] AC at 141, [1891-94] All ER Rep at 112

³ (1851) 16 QB 560

⁴ [1891] AC at 157, [1891-94] All ER Rep at 120

⁵ [1944] 2 All ER 83, [1944] AC 176

⁶ [1944] 2 All ER at 87, [1944] AC at 184

manager of the High Holborn branch of that bank. Counsel for Barclays Bank referred to the strait-jacket of time within which a paying bank operated, and which in his submission precluded the sort of enquiry which the *Selangor* case⁷ held to be incumbent on a paying bank in certain circumstances. There are three situations to be considered. (1) A case where an open cheque is presented to the paying bank over the counter for payment in cash. In such a case the payee obviously expects payment at once and there are practical difficulties in the way of any appreciable delay. (2) A crossed cheque where both the drawer and the payee of the cheque are customers of the same branch of the bank. In that case the bank is acting both as collecting bank and as paying bank and the debit to the account of the drawer of the cheque and the credit to the account of the payee of the cheque is an internal matter of the branch concerned. In this case the bank has the whole of the day in which to make the decision whether to debit the cheque to the one account and credit it to the other account. Mr Avis believed that he was right in saying that as a matter of practice the bank had the power to hold the cheque over until the following day if necessary. (3) Cheques which fall to be paid through the clearing arrangements. A large part of the evidence of Mr Avis was directed to banking practice in regard to clearing arrangements.

The principal clearing arrangement is the general clearing house. About 2½ million cheques pass through the general clearing house each day. The system works in this way. Assume that a customer of a country branch of the C bank (the collecting bank) is the payee of a cheque drawn on a country branch of the P bank (the paying bank). I use the expression 'country branch' merely to exclude a branch which is a member of the town clearing to which I will refer later. Assume that the payee hands the cheque to the branch of the C bank on Monday for collection. The branch posts the cheque on that day to its own head office in London, where it will arrive in due course of post on Tuesday. On Tuesday the head office of the C bank bundles together, according to banks, all cheques which are to be collected. All cheques drawn on the P bank will therefore comprise one bundle. A representative of the C bank takes these bundles to the general clearing house, and receives in exchange from a representative of the P bank a corresponding bundle of cheques drawn on the C bank. The total of one bundle of cheques is set off against the total of the other bundle of cheques and a balance struck, but I need not deal with that aspect. On Tuesday the head office of the P bank posts to the relevant branches of the P bank all cheques drawn on such branches which the head office has received through the general clearing house. The cheque with which I am dealing accordingly arrives back in the normal course of post at the country branch of the P bank on Wednesday. This will be the first that this branch knows of this cheque. The branch must then decide whether to pay the cheque or not to pay. If the branch decides not to pay the cheque, it must send the cheque back to the relevant branch of the C bank by the last post on Wednesday, so that in due course of post it will arrive at such collecting bank on Thursday morning. If the collecting bank has not received the cheque back by that time, it is entitled in all normal circumstances to treat the cheque as having been duly paid by the paying bank and to treat the amount of the cheque as a cleared amount in the account maintained with its customer. In the result, the paying bank has a period of time extending from the incoming post in the morning until the outgoing post in the evening to decide whether or not to pay the cheque. So much for the general clearing. The town clearing gives the paying banker much less time. The town clearing applies only to certain branches of the clearing banks within a limited area of London, and it applies only to cheques of £5,000 and upwards. A cheque is cleared through the town clearing when both the paying branch and the collecting branch are members of the town clearing. Cheques for the town clearing are taken to the town clearing house at intervals during the day, the last delivery being 3.45 p.m.

⁷ [1968] 2 All ER 1073, [1968] 1 WLR 1555

a If the paying banker, having collected cheques drawn on him from the town clearing house, decides not to pay a cheque, he must return that cheque to the town clearing house not later than 4.30 pm on the same day. Otherwise the collecting branch is entitled to treat the cheque as cleared. Allowing for the time which would be taken by the messenger in bringing the last batch of cheques back from the town clearing house to the branch in question, it is plain that the paying bank may not have many minutes in which to make up its mind whether to honour the cheque. The minimum sum of money and the clock times which I have mentioned are those now applicable, and different sums and times have applied in other eras. The changes are however of no significance in this case. There are also local clearances. Mr Avis had no experience of them and they play no part in this case.

b In my view the Achilles heel of the bank's argument, both in the *Selangor* case⁸ and in the case before me, is that it is not, and never reasonably could be, asserted that a paying bank with certain knowledge that the authorised signatories are misapplying the company's funds may nonetheless rely on their signatures. If that is axiomatic, and it was conceded so to be in the case before me, it seems utterly irrational to suppose that a bank has an absolute unqualified duty to pay and no duty to enquire despite a deep suspicion, approaching but falling short of a certainty, that the funds are being misapplied. Once a bank disclaims the untenable position of being in all cases an automatic cash dispenser, whatever the circumstances, there is no rational stopping-place short of a contractual duty to exercise such care and skill as would be exercised by a reasonable banker in similar circumstances. And that care and skill must rationally include, in appropriate circumstances, a duty to enquire before paying. I appreciate the simplicity and convenience of counsel's able submission, particularly in an age when banking transactions are reckoned in their daily millions and a rapid turnover of staff may present practical difficulties. But on the broader view expediency is not a persuasive argument for excusing a banker from enquiring in all circumstances short of certainty, when of course enquiry would be needless. Without, therefore, reference to authority I would myself be disposed in principle to adopt, without any qualification, that contractual duty of care which has been propounded by the learned judge in the *Selangor* case⁸, because it seems to me rational. I discern nothing in the cases which have been read to me which is inconsistent with that conclusion. None of the cases relied on by the bank, in support of its defence, was directed towards the type of problem which I have to decide; that is to say, whether, despite a primary obligation to pay a cheque on demand, a bank owes to its customer a duty of care which may, in an extreme case, oblige it to question the authority of an authorised signatory. Nor do I think it is right to assume that the learned judge in the *Selangor* case⁸ suffered from an absence of evidence of the practice of bankers. He was not dealing, any more than I am dealing, with a case where a cheque is presented over the counter or is subject to the exigencies of the town or general clearing timetables, nor with anything remotely approaching a normal cheque transaction. I have not overlooked the *Reigate*⁹ test, which was much pressed on me with persuasive illustrations of hypothetical question and answer. In my judgment the implied duty of care formulated in the *Selangor* case⁸ passes that test without trouble. The proper question, in my view, which should supposedly be put to paying banker and customer, in a case such as the present, is whether the banker is to exercise reasonable care and skill in transacting the customer's banking business, including the making of such enquiries as may, in given circumstances, be appropriate and practical if the banker has, or a reasonable banker would have, grounds for believing that the authorised signatories are misusing their authority for the purpose of defrauding their principal or otherwise defeating his true intentions. The answer to that question is so obvious that I forbear to give it.

8 [1968] 2 All ER 1073, [1968] 1 WLR 1555

9 [1918] 1 KB 592, [1918-19] All ER Rep 143

A shorter course for me to have taken would have been to adopt the decision in the *Selangor* case¹⁰ without expressing my own opinion. Counsel on both sides accepted that that decision must have high persuasive authority so far as I am concerned, and that it would be correct for me to follow it unless I were convinced that it was wrong: *Metropolitan Police District Receiver v Croydon Corpn*¹¹. I did not take that easy line out of deference to the elaborate and partially new submissions developed before me.

The question accordingly arises whether Barclays Bank, in the performance of its contractual duty of care as a paying bank, should have made enquiry as to the propriety of the Karak cheque before honouring it. Matters to be considered include (1) first and foremost whether the operation was unusual and out of the ordinary course of banking business, (2) the magnitude of the transaction, (3) the time and opportunity available to the bank for making an enquiry, and (4) the degree of suspicion which the known facts would have provoked in the mind of a reasonable banker. In my opinion the operation proposed to the bank in Minories' letter of 17th February was without question unusual and remote from the ordinary course of banking business. It involved the exchange of one banker's draft for another banker's draft of slightly greater amount in unrevealed circumstances. Not the least astonishing feature, to my mind, is that no explanation was sought by Mr Hockley or Mr Cooper. It was not the type of transaction customarily carried out by Barclays Bank or, so far as the evidence went, by any other bank. It became no less unusual or out of the ordinary course of banking business in the altered form it assumed at the second board meeting. The Karak cheque, as I have already indicated, by no stretch of imagination represented an ordinary cheque transaction. As to the magnitude of the transaction, it was large in relation to the normal business of Minories, in relation to the creditworthiness of Minories and in relation to the known assets of Karak. There was ample time and opportunity for the bank to make enquiries. The effective incoming directors of Karak were in the company of Mr Cooper for at least an hour after the end of the second board meeting. As to the degree of suspicion which would have been aroused in the mind of a reasonable banker, the bank, through Mr Hockley and/or Mr Cooper, knew by the end of the board meeting (a) that the meeting had been concerned with the take-over of a company called Karak, (b) that the effective control of that company had passed to Mr Burden and Mr Cross at that meeting, (c) that the delivery of the Barclays draft was a step taken in the course of that take-over, (d) that the Karak cheque was intended to cover the Barclays draft, and (e) that the Karak cheque represented money which was the property of Karak. A reasonable banker who was neither obtuse, as Mr Cooper was not, nor distracted by other cares, as Mr Cooper was, would have reasoned that the Barclays draft probably represented the price of the take-over and that Karak money was probably being used to pay that price. Mr Hockley and Mr Cooper were both honest and reasonable bankers. Mr Cooper, however, was completely thrown off his guard by his well-founded anxiety to secure the promised funds to off-set the Barclays draft. He thought, rightly, that in the absence of such funds the bank might not be entitled to debit Minories with the cost of a draft, or recover such cost even if rightly debited. Mr Hockley was less versed in the facts and no doubt was content to rely on Mr Cooper.

Mr Cooper's frame of mind is illustrated by the following passages in his evidence which were reflected several times during the course of his cross-examination:

'Q Was the real position that it (the Chartered cheque) was fulfilling more than one role, that it was the promise about to be fulfilled of a new account of a company? A Yes.

'Q That it was the lifeline by which the bank account at risk for £98,000 was to be pulled safely to shore? A Yes to both counts.

¹⁰ [1968] 2 All ER 1073, [1968] 1 WLR 1555

¹¹ [1956] 2 All ER 785, [1956] 1 WLR 113

a 'Q So really the opening of [Karak's] account when you got back, whilst desirable in itself, was also serving the paramount concern of yourself to obtain the countervalue you had gone out to seek? A Yes.

'Q And your mind when you got back to the bank was primarily concerned with getting that counter-value with a sense of relief that you had got that far? A Yes.

b 'Q And you were not really directing your mind to anything else? A This was my prime concern.'

In my judgment the circumstances were so unusual and out of the ordinary course of banking business, the sum involved so large, and the ground so solid for suspecting that someone was using Karak money to finance the take-over transaction, that a reasonable banker would in the interests of his customer have made further enquiries before inviting or allowing the customer's signatories to pay over £99,504 of the customer's money to the account of Minorities. I do not take the view that a reasonable banker would necessarily have made such enquiries at the board meeting itself. At that stage Barclays Bank had not become Karak's banker, Karak had no assets with Barclays Bank and the Karak cheque, although envisaged, had not been drawn. A reasonable banker, possessed of the knowledge of Mr Cooper but, unlike Mr Cooper, **d** approaching the situation in a detached and uncommitted frame of mind, would have put his questions to the signatories when the Karak cheque was actually tendered.

There remains the question what damage, if any, was suffered by Karak in consequence of the bank's failure to perform its duty to enquire. This must depend on what one supposes would have been the answers to questions never in fact put.

e In the *Selangor* case¹² the learned judge said:

'If enquiry ought to be made, and no enquiry is made, then the weight of authority establishes, in my view, that it is to be assumed that a true answer would be given; and, if no enquiry is made, that negligence is established.'

f I do not think that this is to be read as meaning that there is an irrebuttable presumption that truthful answers would have been given to the questions put, and counsel for [Karak] expressly disclaimed such a proposition. I have seen a copy of the transcript of part of the argument in the *Selangor* case¹³ and it is clear that counsel for the District Bank and the Bank of Nova Scotia conceded, without argument, that it was to be assumed for the purposes of that case that if an enquiry had been made, an honest answer would have been given. In my view it is clearly open to Barclays

g Bank to prove if it can that, on a balance of probabilities, enquiries would have produced answers acceptable to a reasonable banker, so that the failure to enquire led to no loss to Karak: see *Cummings (or McWilliams) v Sir William Arrol & Co Ltd*¹⁴. That was an appeal from the Court of Session in an action by the widow of an employee killed in circumstances in which it was claimed that there was a breach of a statutory duty on the employer to provide safety equipment for the employee's use. It was **h** held that the onus was on the pursuer to establish not only the breach of duty but also the causal connection between the breach and the injury. It is sufficient for me to read a short passage from the speech of Lord Reid¹⁵:

j 'If I prove that my breach of duty in no way caused or contributed to the accident I cannot be liable in damages. And if the accident would have happened in just the same way whether or not I fulfilled my duty, it is obvious that my failure to fulfil my duty cannot have caused or contributed to it. No reason has

¹² [1968] 2 All ER at 1118, [1968] 1 WLR at 1607

¹³ [1968] 2 All ER 1073, [1968] 1 WLR 1555

¹⁴ [1962] 1 All ER 623, [1962] 1 WLR 295

¹⁵ [1962] 1 All ER at 631, [1962] 1 WLR at 305

ever been suggested why a defender should be barred from proving that his fault, whether common law negligence or breach of statutory duty, had nothing to do with the accident.' a

It seems to me that this principle must equally apply to the law of contract. The onus of proving the causal connection lies on Karak. The emphasis is put the other way in the passage I have quoted because, if a statute requires a safety device, one would start with the assumption that it is of some use, that a reasonable employee would use it, and that the employee in question was a reasonable man. So the onus of proof will soon shift in a case such as that. b

In my judgment the answers which would probably have been given by Mr Burden and Mr Cross, had they been questioned, are unlikely to have satisfied a reasonable banker that the Karak cheque represented money about to be applied for the purposes of the company. A few simple questions would merely have served to confirm the reasonable banker's suspicion that the money was not being so applied. On a balance of probabilities I am of the opinion that a reasonable banker of reasonable intelligence, undistracted by any anxiety for his own personal position, would have soon learned that the function of the Barclays draft was to cover payment for shares, and that the function of the Karak cheque was to cover payment for the Barclays draft. And so the fraud would have been exposed. The inevitable result would have been that a reasonable banker performing his contractual duty of care towards Karak, would have declined to write out the Karak cheque in favour of Barclays Bank and to tender it for the signatures of Mr Burden and Mr Cross, or to debit such a cheque to the account of Karak. c

In my judgment the case against Barclays Bank in negligence is proved. The quantum of damages is the loss suffered by Karak. This may not be the full amount of the Karak cheque insofar as those who have suffered are confined to creditors and non-assenting shareholders. This may have to be the subject-matter of further argument. d

My decision on the claim in contract is sufficient to dispose of the case so far as this court is concerned. I have, however, heard a full argument on the question of constructive trusteeship, and I must deal with that topic as well. e

I must first touch on Karak's claim against the trustee in bankruptcy of Mr Burden and Mr Cross. These claims have not been actively fought. I deal with them at this stage because the quality of the conduct of Mr Burden and Mr Cross is decisive of the question whether the claim against Barclays Bank in constructive trusteeship is capable of succeeding; that claim is based on the existence of their fraud and dishonesty. Karak pleads that Mr Burden and Mr Cross procured that the amount of the Karak cheque should be misapplied in bad faith in providing out of Karak's money the purchase price of the 40,804 shares and the expenses incidental to that purchase. In my judgment, on the evidence I have heard, and quite apart from admissions by Mr Burden and Mr Cross to which I will refer later, it is plain beyond the possibility of argument to the contrary that Mr Burden, in deliberate and conscious fraud, procured that £99,504 10s 6d of Karak's money, that is to say, the amount of the Karak cheque, should be misapplied in financing the purchase of the Karak shares so as to be lost to Karak, and that Mr Cross, either knowingly or recklessly, was implicated in that fraudulent and dishonest design. I did not understand counsel on behalf of Barclays Bank, to seek to argue otherwise. f

It is convenient to make an initial distinction between (i) a person who is a constructive trustee because (although not nominated as a trustee) he has received trust property with actual or constructive notice that it is trust property transferred in breach of trust, or because (not being a bona fide purchaser for value without notice) he acquires notice subsequent to such receipt and then deals with the property in a manner inconsistent with the trust, and (ii) a person who has not received and become chargeable with trust property in that manner but whom equity nevertheless g

h

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a fixes with liability as a constructive trustee on account of assistance which he has rendered to a breach of trust. This is not intended to be an exhaustive definition of constructive trusteeship, but to distinguish two categories thereof. There is included in the second category of constructive trusteeship the duly appointed agent of the trustees who is in receipt of trust property solely by virtue of the existence of such agency but who, by assisting in a breach of trust at the direction of trustees, is fixed with liability as a constructive trustee. The two categories are conveniently labelled in b Snell's Principles of Equity¹⁶ with the catch-phrases 'knowing receipt or dealing' and 'knowing assistance', which seem to me an admirable shorthand description of their different natures.

c The question of law which arises is: in what circumstances will a court of equity treat the second category of person as a trustee in order to provide an equitable remedy against that person on account of conduct which a court of equity considers unconscionable?

d It is common ground that directors of a company, although not trustees in the strictest sense of that expression, are to be considered and treated as trustees of money which comes to their hands or is under their control. The fact that they are to be considered and treated as trustees bears on the question whether the imposition of the equitable remedy of constructive trusteeship is available against those who have dealings with them. It is also common ground that a bank is not a trustee for its customer of the amount to his credit in his account. In the result, Mr Burden and Mr Cross are to be considered and treated as trustees in relation to the sum of money comprised in the Chartered cheque and paid into Karak's account with Barclays Bank, and Barclays Bank is to be considered and treated as the agent of such trustees.

e The conclusion of law reached by the learned judge in the *Selangor* case¹⁷, in relation to the second category of constructive trustees, was as follows: (1) strangers who act as the agents of trustees are liable as constructive trustees if they 'assist with knowledge in a dishonest and fraudulent design on the part of the trustees'; (2)¹⁸

f 'The knowledge required to hold a stranger liable as constructive trustee in a dishonest and fraudulent design, is knowledge of circumstances which would indicate to an honest, reasonable man that such a design was being committed or would put him on enquiry, which the stranger failed to make, whether it was being committed.'

(3) What is 'a dishonest and fraudulent design' is to be judged¹⁹:

g '... according to "the plain principles of a court of equity" ... The governing consideration is to give effect to equitable rights, where it is not inequitable to do so, and when knowledge of the existence of those rights is material to granting equitable relief. In general, at any rate, it is equitable that a person with actual notice or constructive notice of those rights should be fixed with knowledge of them. This is in a context of producing equitable results in a civil action and not in the context of criminal liability.'

h These conclusions were reached after consideration of a large number of authorities, ranging in time from the decision of Leach V-C in 1819 in *Keane v Roberts*²⁰ down to the decision of the Privy Council in *Bank of New South Wales v Goulburn Valley Butter Co Proprietary Ltd*¹.

The formulation in the *Selangor* case² of the law applicable to the second category

j 16 26th Edn, pp 202, 203

17 [1968] 2 All ER at 1096, [1968] 1 WLR at 1580

18 [1968] 2 All ER at 1104, [1968] 1 WLR at 1590

19 [1968] 2 All ER at 1098, [1968] 1 WLR at 1582, 1583

20 (1819) 4 Madd 332

1 [1902] AC 543, [1900-3] All ER Rep 935

2 [1968] 2 All ER 1073, [1968] 1 WLR 1555

of constructive trusteeship is based on the judgment of Lord Selborne LC in 1874 in *Barnes v Addy*³ with which James and Mellish LJJ concurred. This was a case in which beneficiaries unsuccessfully sued solicitors who had been associated with the fraud of the trustee; it was found that the solicitors had no knowledge or suspicion of the fraud and that there was nothing to lead them to suppose that a fraud was intended. The test of liability (which it may be convenient to call the *Barnes v Addy*³ formula), in the words of Lord Selborne LC, was that⁴:

'they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.'

This was paraphrased with approval by Lord Esher MR in *Soar v Ashwell*⁵ (a first category case) as:

'... he has knowingly assisted a nominated trustee in a fraudulent and dishonest disposition of the trust property.'

The point on which the authorities were obscure, until the *Selangor* case⁶, was what degree of 'knowledge' was required to satisfy that test. A person may have knowledge of an existing fact because in a subjective sense he is actually aware of that fact. In an appropriate context a court of law may attribute knowledge of an existing fact to that person because in a subjective sense he has knowledge of circumstances which would lead a postulated man to the conclusion that the fact exists or which would put a postulated man on enquiry whether the fact exists.

The claim against the District Bank was that it knew, or as a reasonable banker ought to have known, that Selangor's money was being applied for the purpose of giving financial assistance in connection with the purchase by Cradock of Selangor stock. It was not pleaded that the District Bank ought to have made enquiries. The decision, which went against the District Bank on constructive trusteeship as it did in negligence, was based on proof of facts which would have brought home the knowledge of such misapplication to the mind of a reasonable banker.

Counsel for Barclays Bank attacked the statement of law in the *Selangor* case⁶ principally on two grounds: (1) that it was inconsistent with the ratio decidendi of and was impliedly overruled by the decision of the Court of Appeal in *Carl-Zeiss-Stiftung v Herbert Smith & Co*⁷, and (2) because important and decisive cases were not brought to the attention of the learned judge.

It will be observed that, according to the *Selangor* case⁶, an objective test is to be applied both in assessing the defendant's 'knowledge' and in assessing the character of the 'design'. Counsel for Barclays Bank, in an argument of great penetration, accepted the objective test in relation to the 'design' but not in relation to 'knowledge'. There is no such thing, he submitted, as constructive trusteeship of the category with which this case is concerned, based on the defendant's constructive knowledge of facts as distinct from his actual knowledge of facts or knowledge which has to be imputed to him because he has closed his eyes with the deliberate intention of avoiding actual knowledge; counsel bracketed actual knowledge with imputed knowledge in that special sense. He said that a defendant is not to be fixed with liability as a constructive trustee of the second category unless he has been guilty of a lack of probity, which he likened to moral obliquity or dishonesty or bad faith or fraud. The test is subjective to this extent, that the court must first assess the acts, the knowledge and the intention of the defendant, and by knowledge is meant actual or imputed knowledge but not constructive knowledge. These subjective matters are then to be submitted

3 (1874) 9 Ch App 244

4 (1874) 9 Ch App at 252

5 [1893] 2 QB 390 at 394, 395, [1891-94] All ER Rep 991 at 994

6 [1968] 2 All ER 1073, [1968] 1 WLR 1555

7 [1969] 2 All ER 367, [1969] 2 Ch 276

a to the objective test of the accepted moral standard of the community and adjudged accordingly. In other words, the defendant is not liable as a constructive trustee if he had no actual or imputed knowledge of the design and did not intend to participate in it; on the other hand, he cannot successfully defend a claim by saying that he knew of the design but did not regard it as dishonest. Unless, it is submitted, a subjective test is applied to the acts, knowledge and intention of the defendant, it is not possible to charge him with that lack of probity which is the foundation of a stranger's liability as a constructive trustee. It is important to an understanding of this argument to appreciate the special sense given to the expression 'imputed knowledge', which in counsel's formulation is brought about by the deliberate shutting of eyes so as to avoid actual knowledge.

c The *Carl-Zeiss* case⁸ was a dispute between the Carl-Zeiss company of Jena ('the East German foundation') and the Carl-Zeiss company of Württemberg ('the West German foundation'). In the main action the East German foundation claimed, inter alia, that the assets of the West German foundation, including its property in England, were held by that foundation in trust for the East German foundation. The East German foundation later issued a writ against the current and former solicitors of the West German foundation claiming that when they were put in funds by their client, they had notice, via the East German foundation's pleadings in the main action and from other material, that such money belonged to the East German foundation, and it was said that the solicitors were accountable accordingly. The matter came on for trial as a preliminary issue.

e The East German foundation based its claim on a submission that a man who receives trust property which he knows or ought to know is trust property and applies that property in a manner which he knows or ought to know is inconsistent with the terms of the trust, is accountable at the suit of the beneficiaries under that trust. The submission failed, on the ground that the solicitors only had knowledge of a disputed claim that the assets of the West German foundation were trust property; they did not have knowledge that such assets were *in fact* trust property. Danckwerts LJ expressed his conclusion as follows⁹:

f '... claims are not the same thing as facts. . . . What we have to deal with is the state of the defendants' knowledge (actual or imputed) at the date when they received payments of their costs and disbursements. At that date they cannot have had more than knowledge of the claims above mentioned. It was not possible for them to know whether they were well founded or not . . . Consequently, it seems to me that the plaintiff's claim against the defendant solicitors must fail on the requisite condition of knowledge or notice.'

g Sachs LJ said¹⁰:

h 'First, and to my mind decisively, whatever be the nature of the knowledge or notice required, cognisance of what has been termed a "doubtful equity" is not enough.'

Later, after discussing the relevance of constructive notice in the sense of s 199 of the Law of Property Act 1925, he added¹¹:

i 'As at present advised, I am inclined to the view that a further element has to be proved, at any rate in a case such as the present one. That element is one of dishonesty or of consciously acting improperly, as opposed to an innocent failure to make what a court may later decide to have been proper enquiry. That would entail both actual knowledge of the trust's existence and actual

8 [1969] 2 All ER 367, [1969] 2 Ch 276

9 [1969] 2 All ER at 375, [1969] 2 Ch at 293

10 [1969] 2 All ER at 378, [1969] 2 Ch at 296

11 [1969] 2 All ER at 379, [1969] 2 Ch at 298

knowledge that what is being done is improperly in breach of that trust—though, of course, in both cases a person wilfully shutting his eyes to the obvious is in no different position than if he had kept them open.’

Then, after referring to the *Selangor* case¹² and certain other authorities, he added¹³:

‘Out of deference to the conclusions reached by UNGOED-THOMAS, J., and to the fact that the *Selangor* case¹² is under appeal, it now seems best, however, for me not to state a final view in this matter, especially when the instant case concerns agents who may thus be in a different position from other strangers.’

It is plain that he was not expressing any decided opinion on this point. Lastly, I quote from the judgment of Edmund Davies LJ¹⁴:

‘The concept of “want of probity” appears to provide a useful touchstone in considering circumstances said to give rise to constructive trusts, and I have not found it misleading when applying it to the many authorities cited to this court. It is because of such a concept that evidence as to “good faith”, “knowledge” and “notice” plays so important a part in the reported decisions. It is true that not every situation where probity is lacking gives rise to a constructive trust. Nevertheless, the authorities appear to show that nothing short of it will do.’

Then, after having cited two cases, he said that they were¹⁵—

‘but two illustrations among many to be found in the reports of that want of probity which, to my way of thinking, is the hallmark of constructive trusts, however created.’

The *Selangor* case¹² was certainly not expressly overruled by the *Carl-Zeiss* case¹⁶. It was not even referred to in the judgments of Danckwerts and Edmund Davies LJ. Nor do I think that it was overruled by necessary implication. Counsel for Barclays Bank submitted that Danckwerts LJ used the expression ‘imputed knowledge’ in his own sense of wilful shutting of eyes as distinct from knowledge which is to be attributed to the defendant because a reasonable person would have drawn the inference or would have been put on enquiry. I do not read his words in that sense, nor does it seem consistent with his later reference to ‘the requisite condition of knowledge or notice’.

I agree with counsel that the judgment of Edmund Davies LJ might be read as supporting his proposition. But in the end the ratio decidendi of that judgment appears to be the same as that of the other judgments, namely¹⁷:

‘... mere notice of a claim asserted by a third party is insufficient to render the agent guilty of a wrongful act in dealing with property derived from his principal in accordance with the latter’s instructions unless the agent knows that the third party’s claim is well founded and that the principal accordingly had no authority to give such instructions.’

Accordingly I reject the submission that the *Selangor*¹² judgment on constructive trusteeship is inconsistent with the ratio decidendi of the *Carl-Zeiss* case¹⁶.

In support of his proposition that lack of probity is an essential ingredient of the second category of constructive trusteeship, counsel for Barclays Bank also referred

¹² [1968] 2 All ER 1073, [1968] 1 WLR 1555

¹³ [1969] 2 All ER at 380, [1969] 2 Ch at 299

¹⁴ [1969] 2 All ER at 381, 382, [1969] 2 Ch at 301

¹⁵ [1969] 2 All ER at 382, [1969] 2 Ch at 302

¹⁶ [1969] 2 All ER 367, [1969] 2 Ch 276

¹⁷ [1969] 2 All ER at 384, [1969] 2 Ch at 304

a me to five pre-Keane v Roberts¹⁸ cases. These were Nugent v Gifford¹⁹, Mead v Lord Orrery²⁰, Scott v Tyler¹, Hill v Simpson² and McLeod v Drummond³. It may well be that these cases are consistent with the proposition that fraud or what is tantamount to fraud must be found before an agent who has not intermeddled is rendered accountable as a constructive trustee. They are not, in my view, decisive against the relevance of an objective test, that is to say, whether the circumstances would have indicated a dishonest and fraudulent design to a reasonable man or have put him on enquiry. It must, I think, be remembered that equitable doctrines have developed over the passage of time and it would not be right to assume that principles expressed two centuries ago were being fully and exhaustively enunciated for all ages to come.

b Counsel for Barclays Bank took me with great care and patience through most of the authorities cited by the learned judge on constructive trusteeship, in order to convince me that they were consistent with his proposition of law. I do not think that any useful purpose would be served by my subjecting these authorities to a critical analysis of my own. That, in my view, is an exercise to be performed elsewhere if it is to be performed at all. I shall however refer to one of counsel's new authorities, Williams v Williams⁴, in detail. This was a case which was referred to by all the learned Lords Justices in the Carl-Zeiss case⁵, but was not read to the learned judge in the Selangor case⁶. It is described in the reports of the Carl-Zeiss case⁷ as 'a case cited in the Selangor⁶ judgment' but this is clearly a misprint for 'a case not cited in the Selangor⁶ judgment'. It was much stressed in argument on behalf of Barclays Bank. The facts in Williams v Williams⁴ were these. Edward Williams married in 1863 in India. He made a marriage settlement, which was executed by him and his wife. By the settlement he conveyed his undivided share in certain land to trustees in trust for himself for life, with remainder to his wife for life, with remainder to the children of the marriage. The settlement was handed over to the wife. The parties returned to England. The husband had occasion to consult a solicitor, Mr Cheese, about his will. Mr Cheese asked the husband if there were a marriage settlement, and the husband assured him there was none. Something, the husband said, had been prepared but it arrived too late for execution. In 1868 the land was partitioned, and some 700 acres were conveyed to the husband. In 1869 the husband sold part of the land. Mr Cheese acted as his solicitor. The purchase money was about £8,000 and was used to pay the husband's debts. Six years later the husband asked his wife for the settlement. He gave her some excuse, and she handed it to him. The settlement was never seen again. In 1877 the husband made another will. He appointed the wife his sole executrix and gave her a life interest, with remainder to the children. In 1879 he died. The wife, as his executrix, sold the remainder of the land in lots, Mr Cheese acting as her solicitor. The land realised about £3,500. In 1880, in the course of dealing with a requisition which had been raised by a purchaser, Mr Wood, a clerk in Mr Cheese's office, wrote to the wife and enquired if there was a settlement. The wife replied that there was, and enclosed a note made by the solicitors who had prepared it. Mr Wood reported this to Mr Cheese, but did not show him the wife's letter or the note enclosed with it. Mr Cheese answered that 'it was all nonsense, that she was referring to a promise only,

18 (1819) 4 Madd 332

19 (1738) 1 Atk 463

20 (1745) 3 Atk 235

1 (1788) 2 Bro CC 431

2 (1802) 7 Ves 152

3 (1807) 14 Ves 353

4 (1881) 17 Ch D 437

5 [1969] 2 All ER 367, [1969] 2 Ch 276

6 [1968] 2 All ER 1073, [1968] 1 WLR 1555

7 [1969] 2 All ER at 379, [1969] 2 Ch at 298

and that there had been no settlement'. Later, a copy or draft of the settlement was found. Mr Cheese had used half the proceeds of sale to pay the husband's debts including some money due to himself. The remainder of the money remained intact. The children of the marriage sued the wife, the trustees of the marriage settlement and Mr Cheese. The claim against Mr Cheese was that he might be declared liable to account for and make good 'the purchase-money arising from the sale of the hereditaments comprised in the indenture of settlement received and disposed of by him with notice of the trusts of the said indenture'. Two matters were conceded. First, it was admitted that Mr Cheese had no wrong motive in anything which he did. Secondly, it was admitted that notice to Mr Wood of the wife's claim that a settlement existed would not of itself be notice to Mr Cheese. It was held that Mr Cheese did not have such notice of the settlement as to be treated constructively as a trustee, so as to be liable for money which had passed through his hands.

Counsel for Barclays Bank argued that this case was an authority, not cited to the learned judge in the *Selangor* case⁸, that an agent or other stranger to the trust is not liable as constructive trustee unless he has actual knowledge of the facts or has shut his eyes against acquiring knowledge of the truth. He relied particularly on a passage which I will read⁹:

'I am not now dealing with the question whether Mr. Cheese was negligent in his duty as solicitor. That I take to be a perfectly separate and distinct question. Whether he did his duty as solicitor to Mrs. Williams, or was negligent in that duty, is, I think, a very different question from the question whether he had such notice as to make his concurring as her solicitor in the sales of the property and allowing the money to pass through his hands sufficient to affect him personally so as to make him liable to repay the money. The case, again, would have been different if I had been satisfied that Mr. Cheese had wilfully shut his eyes—if there had been any motive whatever fairly suggested for supposing that Mr. Cheese was desirous of thinking that there was no settlement. If it were proved to me upon the evidence that he had wilfully shut his eyes, and was determined not to inquire, then the case would have been very different.'

In my opinion, *Williams v Williams*¹⁰ has no relevance at all to the case before me. In the case with which I am dealing, the plaintiff is relying exclusively on the *Barnes v Addy*¹¹ formula as interpreted in the *Selangor* case⁸. It is fundamental to that species of constructive trusteeship that the stranger who is sued has knowingly assisted a trustee in a fraudulent and dishonest disposition of the trust property. The wife in *Williams v Williams*¹⁰ was not a trustee of the settlement, and even if she were to be treated as such by virtue of some extension of the *Barnes v Addy*¹¹ principle, she certainly was not engaged in a dishonest and fraudulent design or in a dishonest and fraudulent disposition of the trust property. Furthermore, it is to my mind reasonably clear that the type of notice, the existence of which Kay J was concerned to decide about, was not confined to actual notice, but extended to constructive notice to be ascertained by reference to an objective test. After considering the husband's assertion of no settlement, and the long course of dealing with the property on the basis of no settlement, Kay J said¹²:

'Mr. Cheese, therefore, had a right, I think, under these circumstances, to be very strongly of opinion that there was no settlement at all . . . If he had, as

⁸ [1968] 2 All ER 1073, [1968] 1 WLR 1555

⁹ (1881) 17 Ch D at 445

¹⁰ (1881) 17 Ch D 437

¹¹ (1874) 9 Ch App 244

¹² (1881) 17 Ch D at 445, 446

a I believe he had, a *bonâ fide* conviction that there was no settlement whatever... if that was the impression on his mind—I think it was reasonable under the circumstances that that impression should continue, and that he should give to Mr. Wood the answer he gave, and I cannot hold that he is affected with such notice as to make him personally liable for the purchase-moneys which passed through his hands as solicitor.’

b Whatever *Williams v Williams*¹³ may be authority for, it is certainly not authority that in the context of a claim based on the *Barnes v Addy*¹⁴ formula, knowledge means actual knowledge as distinct from constructive knowledge.

In my view, *Williams v Williams*¹³ on a proper analysis was a case concerned with the first rather than the second category of constructive trusteeship. The claim against Mr Cheese was that trust money was wrongfully in his hands by the direction of one c who had no title thereto and that he proceeded to dispose of it in defiance of the beneficiaries’ title of which he had been given due notice. That is not the type of case with which the second category of constructive trusteeship is concerned. The same observation applies to the *Carl-Zeiss* case¹⁵.

I take this opportunity to record that I asked counsel for Karak whether he based his claim to any extent on the first category of constructive trusteeship, having regard d to the fact that the Karak cheque was made payable to Barclays Bank and was endorsed by Barclays Bank and credited to Minorities, so that in that sense the trust money passed through the hands of Barclays Bank. Counsel told me that the claim against Barclays Bank in the context of constructive trusteeship was based exclusively on the second category of constructive trusteeship, that is to say, on the *Barnes v Addy*¹⁴ formula, where it is fundamental to find the existence of a dishonest and e fraudulent design on the part of the trustees.

I respectfully agree with the explanation of the *Barnes v Addy*¹⁴ formula which I find in the *Selangor*¹⁶ judgment. If, as seems to be established by the cases, an objective test of ‘knowledge’ is rightly applied in the context of the first category of constructive trusteeship (see, for example, *Reckitt v Barnett*¹⁷ and *Nelson v Larholt*¹⁸), I do not myself f see any particular logic in denying it a similar role in the context of the second category of constructive trusteeship. To borrow the words of Lord Cranworth, spoken admittedly in a different context, ‘Constructive notice is as good as any notice, if it does amount to notice’¹⁹.

Applying the *Barnes v Addy*¹⁴ formula, as explained in the *Selangor* case¹⁶, I reach the conclusion, for reasons already indicated in dealing with the claim in negligence, that a reasonable banker would have been put on enquiry as to the propriety of the g Karak cheque and that such enquiry would in all probability have revealed the impropriety. So I find the claim against Barclays Bank made good in equity as in contract. I do not consider, because it is unnecessary, whether the circumstances known to Mr Cooper or Mr Hockley would have brought the dishonest and fraudulent design home to the mind of a reasonable man, as distinct from putting him on enquiry.

h I turn to the relief sought against the trustee in bankruptcy of Mr Burden and against Mr Cross. Replacement is sought not only of the amount of the Karak cheque but also of the sum of £1,750 paid to Stanley Stewart & Co Ltd by cheque dated 17th February 1959, and cleared on 19th February. Mr Burden admitted in a statement made before an examiner on 5th July 1961 that the £99,504 10s 6d was

j 13. (1881) 17 Ch D 437

14. (1874) 9 Ch App 244

15. [1969] 2 All ER 367, [1969] 2 Ch 276

16. [1968] 2 All ER 1073, [1968] 1 WLR 1555

17. [1929] AC 176, [1928] All ER Rep 1

18. [1947] 2 All ER 751, [1948] 1 KB 339

19. In *Cookson v Lee* (1853) 23 LJCh 473 at 478

transferred to Minorities to enable the assenting shareholders to be paid, and that the £1,750 represented a fee paid by Karak for the introduction to Contanglo. No other explanation has been forthcoming from Mr Cross, nor is there any evidence that those moneys were used for Karak's benefit. In these circumstances, Karak has a claim against both parties for the replacement of such sums with interest. I will hear counsel for Karak on the exact terms of the order which ought to be made against the trustee in bankruptcy and against Mr Cross.

Order accordingly.

Solicitors: Solicitor, Department of Trade and Industry; Durrant Cooper & Hambling (for Barclays Bank).

Richard J Soper Esq Barrister.

Coptic Ltd v Bailey and another

CHANCERY DIVISION

WHITFORD J

2nd, 3rd NOVEMBER 1971

Sale of land – Vendor's lien – Subrogation – Mortgage – Provision of purchase money by mortgagee – Execution of valid charge in favour of mortgagee – Remortgage of property to second mortgagee – Sum advanced by second mortgagee used to discharge debt to first mortgagee – Second mortgage invalid and unenforceable – Whether vendor's lien extinguished on execution of valid charge in favour of first mortgagee – Whether second mortgagee entitled by subrogation to vendor's lien.

The defendants agreed to purchase certain property for £2,750 and for this purpose negotiated a loan of £1,500 from T I Ltd. It was agreed that the loan would be repayable by instalments and secured by a charge on the property which was being purchased. In June 1964 the defendants' solicitors received the £1,500 from T I Ltd. On 19th June the purchase was completed, the charge executed in favour of T I Ltd and the sum of £1,500 was handed over by the solicitors to the vendor in part payment of the purchase price. The defendants subsequently fell into arrears with their repayments and in consequence their solicitors negotiated a remortgage of the property with the plaintiffs who were registered moneylenders. In due course the solicitors received £1,600 from the plaintiffs which they held pending the completion of the remortgage. In June 1966 the defendants executed a second legal charge in favour of the plaintiffs. Three days later, at the request of the defendants, the solicitors paid the sum of £1,521 to the account of T I Ltd in discharge of the 1964 charge. This sum was paid out of the £1,600 which the solicitors had been given to hold on behalf of the plaintiffs. The defendants again fell into arrears. The plaintiffs brought proceedings for the recovery of the outstanding balance of the sum advanced. It was common ground that the loan agreement of 1966 and the legal charge thereunder were illegal and unenforceable under the provisions of the Moneylenders Act 1927.

Held – The plaintiffs were entitled to recover the moneys advanced to the defendants for the following reasons—

(i) when T I Ltd paid to the vendor £1,500 in part satisfaction of the purchase money, they secured thereby a lien to the sum by subrogation to the vendor; that lien was not automatically extinguished when they secured a charge on the property purchased; it followed that, when the plaintiffs discharged the defendants' debt to T I Ltd, they in turn acquired by subrogation such protection, including the lien, as T I Ltd would have had (see p 1247 h and p 1248 b, post); *Nottingham Permanent Benefit*

- a** *Building Society v Thurstan* [1900-3] All ER Rep 830 and *Congresbury Motors Ltd v Anglo-Belge Finance Co Ltd* [1970] 3 All ER 385 applied; *Capital Finance Co Ltd v Stokes* [1968] 3 All ER 625 distinguished;

- (ii) alternatively, since on the facts the money had been advanced by the plaintiffs in order to pay off the money lent by T I Ltd as mortgagees, the plaintiffs became equitable assignees of the mortgagee and therefore were entitled to have the mortgage kept alive for their benefit and to enforce the mortgagee's rights thereunder (see p 1248 c and g, post).
- b**

Notes

For subrogation, see 24 Halsbury's Laws (3rd Edn) 163, para 305, and for cases on transfer of lien, see 32 Digest (Repl) 336, 337, 658-660.

c Cases referred to in judgment

Capital Finance Co Ltd v Stokes, Re Cityfield Properties Ltd [1968] 3 All ER 625, [1969] 1 Ch 261, [1968] 3 WLR 899, Digest (Cont Vol C) 110, 5287f.

Congresbury Motors Ltd v Anglo-Belge Finance Co Ltd [1970] 3 All ER 385, [1971] Ch 81, [1970] 3 WLR 683, affg [1969] 3 All ER 545, [1970] Ch 294, [1969] 3 WLR 502, Digest (Cont Vol C) 636, 660a.

- d** *Nottingham Permanent Benefit Building Society v Thurstan* [1903] AC 6, [1900-3] All ER Rep 830, 72 LJCh 134, 87 LT 529, 67 JP 129, 32 Digest (Repl) 337, 660.

Adjourned summons

By an originating summons dated 15th December 1969, the plaintiffs, Coptic Ltd, claimed against the defendants, Stanford Washington Bailey and Gloria Iona Bailey, inter alia, payment of all moneys due to the plaintiffs under a legal charge dated 19th June 1966 made between the defendants and the plaintiffs, foreclosure or sale of the property comprised in the legal charge, and delivery by the defendants to the plaintiffs of possession of the property. The defendants counterclaimed for delivery up by the plaintiffs of the legal charge and all documents of title to the property in question held by the plaintiffs. The facts are set out in the judgment.

- f** *J R McDonald* for the plaintiffs.
E C Evans-Lombe for the defendants.

WHITFORD J. The facts in this matter are really not in issue, but must be recited. In April 1964 the first defendant in these proceedings entered into a contract to buy certain property at Littlebury Road, London, from a person who has been referred to as the vendor, for a sum of £2,750, and the first defendant paid the usual deposit to a firm of estate agents who were acting as agents. Davies, Arnold & Cooper were acting as solicitors for the defendants in this purchase, and to enable the purchase to take place they negotiated a loan of £1,500 for the defendants from a company of the name of Thulium Investments Ltd. There was an agreement that this loan should be repaid over a period of years by certain monthly instalments and that the loan should be secured by a charge on the property being purchased.

g

h

On 29th May 1964 the solicitors received the sum of £1,500 from Thulium and the defendants executed the legal charge, on 19th June, in favour of Thulium. On the same day the contract was completed. On completion, the solicitors for the defendants handed to the vendor's solicitors a draft for the purchase moneys outstanding, which included the whole of the £1,500 which the solicitors had received from Thulium, and it is said that this sum was paid by the solicitors as agents for Thulium.

j

The sale having been completed, the position then arose that the defendants should have repaid, by monthly instalments, the sum which they had borrowed, but they fell into arrears. As a result of this, it was agreed that the solicitors should negotiate a remortgage of the property with the plaintiffs in these proceedings.

In June 1966 the solicitors received £1,600 from the plaintiffs, which they held pending the completion of the remortgage. On 19th June 1966 the defendants executed the second legal charge ('the 1966 charge') in favour of the plaintiffs. This charge was executed pursuant to an agreement of loan contained in a memorandum dated 19th June 1966, made between the plaintiffs and the defendants.

On 22nd June 1966 the solicitors paid the sum of £1,521 15s to the account of Thulium, at the request of the defendants, in discharge of the 1964 charge, and the remortgage was completed. It is accepted that this sum paid into Thulium's account, was paid out of the £1,600 which the solicitors had been given to hold on behalf of the plaintiffs. The 1966 arrangement provided for the repayment of the moneys lent by the plaintiffs at a rather higher rate, and the defendants again fell into arrears. They have altogether, under the 1964 and 1966 charges, repaid a total of £288 5s.

Now the plaintiffs in these proceedings are registered moneylenders, and it arose at an early stage and was asserted by the defendants that the loan agreement of 1966 and the legal charge given thereunder were illegal and unenforceable under the provisions of the Moneylenders Act 1927. The defendants counterclaim for delivery up by the plaintiffs of the legal charge and all documents of title to the property in question held by the plaintiffs.

The reasons why it was asserted that the loan agreement and the legal charge were illegal and unenforceable were set out in an affidavit filed on behalf of the defendants, which I have not been taken through in detail because it was accepted, on behalf of the plaintiffs, that the defendants' contentions on this point were good. They turn on certain points which, having regard to the fact that the plaintiffs are moneylenders, make it impossible for them to enforce the agreement and the charge. Perhaps the most relevant contention and the only one which was accepted by the plaintiffs was the defendants' contention that the memorandum of agreement did not contain all the terms of the agreement. Faced with this situation, the plaintiffs sought to secure leave to amend their pleadings and they now seek to recover the sum which was paid to secure the release of the charge in favour of Thulium, on the basis of a lien. They put the case in two ways. In the end, I think that whichever way it is put, they rely on the decision of the Court of Appeal in *Congresbury Motors Ltd v Anglo-Belge Finance Co Ltd*¹. Now that was a case where the defendant moneylenders advanced moneys for the purchase of certain premises, and on completion took a mortgage which was held unenforceable by the provisions of s 6 of the Moneylenders Act 1927. It was, however, held at first instance and confirmed on appeal that the defendants were entitled, by subrogation, to the vendor's lien and that such subrogation was neither in conflict with the Moneylenders Acts nor the policy behind them.

In the judgment in the Court of Appeal it was pointed out that the court is not concerned with the ethical merits on the one hand of a party who hopes to be able to establish a clear title secured with somebody else's money, or on the other hand of a person who advances money without securing the basis for repayment. The court pointed out that it was concerned with the position in law. No doubt, if the plaintiffs fail to establish a lien in this case, the defendants will have got their property, in some measure at least, at the plaintiffs' expense, and persons who operate a business of the type operated by the plaintiffs and no doubt are able to secure, but do not in fact secure, advice as to how they should conduct their business, are, having regard to the impact of statutory provisions on their business, put at some risk.

The *Congresbury* case¹ was one in which the court was concerned with a single transaction between the moneylenders and the company to whom the property was conveyed. As I have said, it was a case in which the defendants were the moneylenders. The plaintiffs initiated their proceedings for the purpose of securing certain declarations. The Court of Appeal followed, by analogy, a decision of the House of Lords in a

¹ [1970] 3 All ER 385, [1971] Ch 81 affg [1969] 3 All ER 545, [1970] Ch 294

a case of *Nottingham Permanent Benefit Building Society v Thurstan*². The facts of the case are summarised in the Court of Appeal judgment in the *Congresbury* case³, in the following terms:

b 'That case involved the Infants Relief Act 1874. A married female member of a building society wanted a loan to acquire a property on which her builder husband proposed to erect houses for sale at profit. She was, unknown to the building society, an infant. She arranged for a loan to enable her to acquire the land, which cost £250, from the building society. The transaction was put through by payment by the lenders direct to the vendors of the purchase price, a mortgage being granted by the borrower. Subsequently further moneys were advanced on the mortgage to enable buildings to be erected. The building society later discovered that she was an infant, discontinued advances, took possession of the property and completed houses on it. On attaining 21, the borrower asserted that the mortgage was void against her under s 1 of the Infants Relief Act 1874, and claimed delivery up of the mortgage deed and title deeds and possession of the land. It was held that the mortgage was void and must be delivered up; that the building society had no lien on the title deeds for money expended by it on building on the land or for money advanced for such building to the borrower; but that it had such a lien for the £250 paid, on her behalf, to the vendor for the purchase price because, but for that payment, the vendor would have had an unpaid vendor's lien, and the building society was entitled by subrogation to the same lien together with all the remedies inherent in it.'

e Now, that again was a case where in substance there was a single transaction to be considered. The present case, so far as the plaintiffs' position is concerned, is really removed one stage from the *Congresbury* case⁴. They say that Thulium enjoyed a vendor's lien by subrogation and when they, at the defendants' request, paid out Thulium, there was a subrogation to the lien which Thulium themselves, by subrogation, enjoyed.

f The defendants say that there is a vital distinction in the present case because *Congresbury*⁴ was decided on the basis that there never was an effective mortgage—indeed, there could not have been an effective mortgage—because of the provisions in the Monelenders Act 1927 and the nature of the agreement which had been entered into. In the present case, the defendants, by contrast, say that there was never anything ineffective about the security which Thulium got and that because, at the time when the charge in favour of Thulium was executed, the vendor's lien was extinguished, Thulium never got a vendor's lien by subrogation, and if that be right then it is impossible that any such lien should pass to the plaintiffs. The defendants rely on *Capital Finance Co Ltd v Stokes*⁵ referred to at the end of the *Congresbury*⁴ judgment and distinguished on the basis that the *Capital Finance* case⁵ was a case in which there was an effective charge which only became ineffective when, after the expiry of 21 days, it had not been registered as required by certain relevant provisions of the Companies Act 1948.

h It is necessary to consider the way in which the Court of Appeal dealt with the facts of the *Congresbury* case⁴ and I would turn first to the passage where, having considered the *Thurstan* case², the Court of Appeal considered the impact of the case on the matters then before them. They said⁶:

i 'It was submitted to us in argument that a distinction existed in that in *Thurstan's* case² the lender was ignorant of the fact of infancy, whereas the moneylender

2 [1903] AC 6, [1900-3] All ER Rep 830

3 [1970] 3 All ER at 387, [1971] Ch at 90, 91

4 [1970] 3 All ER 385, [1971] Ch 81

5 [1968] 3 All ER 625, [1969] 1 Ch 261

6 [1970] 3 All ER at 390, [1971] Ch at 93

in the present case must be assumed to know that a condition precedent to the enforceability of the obligation to repay (and the security) had not been fulfilled. It was, it was said, the moneylender's fault that it failed in its attempt to secure a contract for repayment of the loan and a valid security therefor. We observe the difference but do not accept that it is a relevant distinction; and if we observe that an accusation of fault comes ill from a litigant avowedly devoid of ethical merit it must not be thought that this has blinded us to a genuine distinction. An alternative submission was made to us—although we believe it was not made below, and it is not to be found in the grounds of appeal. This was that, assuming that for a moment of time that theoretically elapsed between the completion of the purchase and the completion of the mortgage there was a subrogation to the vendor's lien, the acceptance of the legal mortgage waived or abandoned or superseded or caused a merger of the lien. The short answer in our view is that the same point, if valid, was applicable in *Thurstan's* case⁷. To this it was replied that in that case the security was by statute expressed to be void, while here it is expressed to be unenforceable. We see no relevant distinction, particularly when it is for the court to take the point on the pleadings which must show, as could not here be done, that the relevant condition precedent to enforceability was not fulfilled. In each case the security is ineffective, and in our view ineffective for all purposes, including any question of nullifying the lien by subrogation. If indeed it is justly said that the moneylender is deemed to know of the defect in the mortgage, it may equally be said to be deemed not to waive or abandon the lien. Move into the world of deeming and the results may be unforeseen.

It is perhaps also relevant at this stage to consider what was said in the *Capital Finance* case⁸, where the same question arose, but in slightly different circumstances, because there it was not a question of some third party having a lien by subrogation, but whether the vendor did or did not have an unpaid vendor's lien and having, in the circumstances of that case, at one stage, taken moneys and subsequently a charge to secure his interest. Harman LJ said⁹:

'The remaining and most serious question is whether the first defendant did not have an unpaid vendor's lien. Such a lien arises in the ordinary course in favour of a vendor who has not received the purchase money and it is the creature of the law and does not depend on contract or possession. It depends on the fact that the vendor has a right to specific performance of his contract. The existence of the lien, however, depends on the terms of the bargain between the parties and on the surrounding circumstances and may be excluded, as is pointed out in SNELL'S PRINCIPLES OF EQUITY¹⁰: "As soon as a binding contract of sale is made, the vendor has a lien on the property for the purchase-money and a right to retain the property until the money is paid . . . Occasionally, however, the vendor will have no lien. If he receives all that he bargained for, e.g., if he sells the property in consideration of the purchaser giving him a promissory note or a bond to pay him an annuity, and a promissory note or bond is duly given, there will be no lien on the property sold, even though the note is not met at maturity or the annuity is not paid. Moreover, the nature of the contract may exclude the vendor's lien, as where the existence of a lien would prevent the purchaser from selling the property, or where the intention of the parties is that the purchaser shall resell or mortgage the property and pay off the vendor out of the proceeds . . ." It was held by PENNYCUICK, J., here that the terms of the contract did exclude a lien in this case. The circumstances relied on were first, that the first defendant contracted for a legal charge for the balance of the purchase

⁷ [1903] AC 6, [1900-3] All ER Rep 830

⁸ [1968] 3 All ER 625, [1969] 1 Ch 261

⁹ [1968] 3 All ER at 629, [1969] 1 Ch at 278

¹⁰ (1966) 26th Edn, pp 490, 491, paras 2 and 3

a money and that he got; secondly, that the existence of the equitable charge arising as above described left "no room" (in the judge's words) for a vendor's lien; and thirdly, that the terms of cl. 14 of the contract showed that it was intended to pay off the first defendant out of the proceeds of the sale of lots and that this process would be inconsistent with the existence of a vendor's lien. The learned judge accepted the view that the existence of the equitable mortgage
b up to the date of completion left "no room" for a vendor's lien. I do not feel able to accept this view. At the date of the contract only a part of the deposit was paid (see cl. 14 (1)) and thereafter until completion, the equitable mortgage only covered three-quarters of the purchase money and left room for a lien at least on the balance. It does seem to me, however, that this lien must be taken to have been abandoned when the contract was completed, for on the happening of that
c event the first defendant got all that he bargained for, namely one-quarter of the purchase money in cash and the balance by way of the stipulated legal charge. It seems to me that the provision for paying off the legal charge by instalments on sale of plots within two years is irrelevant and has no bearing either way because the first defendant, as legal chargee, must join in any conveyance and could refuse to concur unless paid his £600.

d It is to be observed that the Court of Appeal in *Congresbury*¹¹ said, in relation to the *Capital Finance* case¹²:

'We need not analyse that case too closely; it concerned (inter alia) the overriding of either a vendor's lien, or an equitable charge created by the contract for sale and purchase of land, by a legal charge which turned out to be unenforceable against the liquidator and creditors of the purchaser company for lack of registration within 21 days under s 95 of the Companies Act 1948. But there the legal
e charge was an effective charge in every respect until failure to comply with a condition subsequent, and, as against the company as a going concern, was always an effective charge. We were referred on this general point by counsel for the defendant company in rejoinder to a number of cases, but, being satisfied that the alternative way of putting the plaintiff company's case is not sustainable,
f we need not discuss them.'

Now there is no doubt that in the *Congresbury* case¹³ the vendor got all that he bargained for. He was paid his money and his lien was no doubt extinguished on completion and never came into existence, because, at the moment of completion, he was fully paid off. But there still remains the question of a lien by subrogation
g and one looks not only at the vendor, who had to be considered in the *Capital Finance* case¹², but at the third party who provided the money for the purchase, as the House of Lords did in the *Thurstan* case¹⁴ and as the Court of Appeal did in the *Congresbury* case¹³. When Thulium paid to the vendor £1,500 in part satisfaction of the purchase money, they secured, without any other action on their part, a lien to the sum by subrogation. At the same time, they secured a charge, which, as far as anybody could
h tell at that stage, might or might not be effective to protect their interest, but which, certainly on its face—and I read the document—does not purport expressly to exclude any right they might have by way of lien. I find myself unable to come to the conclusion that it must be a necessary implication that any lien that they might otherwise have, should be extinguished.

Now counsel for the defendants in this case did not suggest that in terms the contract excluded a lien. His whole case was really based on this, that any lien there might otherwise have been, was necessarily extinguished at the moment the charge was entered. Now whatever the position may have been in the *Capital Finance* case¹²,

11 [1970] 3 All ER at 390, [1971] Ch at 94

12 [1968] 3 All ER 625, [1969] 1 Ch 261

13 [1970] 3 All ER 385, [1971] Ch 81

14 [1903] AC 6, [1900-3] All ER Rep 830

where, when the charge was taken by the vendor he was deemed by the Court of Appeal to have abandoned his lien, I see no reason, on the facts of the case before me, to consider that there was never at any time a lien by subrogation, and, if there was, that that lien was abandoned by Thulium by reason of the taking of the charge. a

Now if this is right, the defendants accept that when the plaintiffs discharged the defendants' debt to Thulium, they acquired, by subrogation, such protection as Thulium would have had, for the defendants did not suggest, in argument before me, that the plaintiffs' case could fail for any other reason than that there was never a lien by subrogation to Thulium. b

I think that the plaintiffs succeed in this way of putting their case. But they do also put it on an alternative basis in this way. They say that where a person advances money for a person who obtains a mortgage, and acquired money for this purpose, the person advancing the money becomes an equitable assignee of the mortgage and is entitled to have it kept alive for his benefit, and, so they say, when the plaintiffs in fact paid off Thulium as mortgagee they were entitled at least to this same interest, and on this basis should be entitled to recover the moneys which they had advanced to pay off Thulium. c

Now whilst the defendants in this case do not dispute the general proposition stated as to the equitable rights of persons paying off mortgage debts, they do say that, before a proposition of this nature can be given effect to, it is necessary that one should be able to come to the conclusion that there was in existence an agreement to provide money for the person to pay off the mortgage. They say that there is no evidence in this case that any such agreement was in existence at all and they point to the fact that the first memorandum of agreement relating to the provision by the plaintiffs of the moneys that they have paid was in 1966 and it can be read from end to end without finding any reference to the facts that the money to be advanced was to be used for the particular purpose of paying off the mortgage or indeed for any other purpose. Counsel for the plaintiffs says that it is rather strange that the defendants at one time suggest you must find spelt out in the document such rights as the plaintiffs might have had under the 1966 agreement and charge, and on another basis argue that the agreement is bad because it does not contain all the terms agreed between the parties and that the defendants should not be heard to say, at this stage of the proceedings, that if in fact there was in existence an agreement that this money should be advanced for the purpose of paying off Thulium, then this must be found in the agreement, which it is part of the defendants' case does not set out all the terms agreed. d
e

There is no disagreement between the parties to the action that if money was advanced to pay off the mortgage the plaintiffs are entitled to judgment. On these facts I find the money was provided by the plaintiffs for paying off the charges in favour of Thulium, and I think that the plaintiffs are also entitled to succeed on the second way that they have put their case. In the result, the plaintiffs succeed and the defendants' counterclaim must be dismissed. f
g

Judgment for the plaintiffs. Counterclaim dismissed. h

Solicitors: *Davies, Arnold & Cooper* (for the plaintiffs); *Rayner & Co* (for the defendants).

Gillian Whitear Barrister.